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16 MARCH 2022

LEGAL OPINION

ON THE

EFET GENERAL AGREEMENT

CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

CONTENTS

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EFET
European Federation of Energy Traders
Amstelveenseweg 998
1081 JS Amsterdam

16 March 2022

Dear Sirs,

Legal Opinion on the EFET General Agreement Concerning the Delivery and Acceptance of Electricity

1. SCOPE OF ROLE/DOCUMENTS EXAMINED

1.1 Introduction

We have been requested, as legal advisers to the European Federation of Energy Traders **("EFET")** in their instruction letter (the "**Instruction Letter**") sent to us by mail during September 2021 to render an opinion in respect of the laws of The Netherlands **("this jurisdiction")** on certain specific issues relating to the validity of the EFET Power Contract and the relevant Annexes and Appendices (all as defined below) pertaining thereto.

1.2 Documents examined

1.2.1 This opinion letter (the "**Opinion Letter**") is given only in respect of the EFET Power Contract in the form described below and the documents mentioned in paragraph 1.2.2 below. Our Opinion Letter is further limited to each of the following scenarios:

(a) either the EFET Power Contract (including the Annexes and the Appendices) and each Individual Contract are governed by the Governing Law or Clause 22.1 of the EFET Power Contract is adjusted to provide for the law of this jurisdiction to govern the EFET Power Contract (including the Annexes and the Appendices) and each Individual Contract;

(b) with respect only to the Insolvency Proceedings as defined and described in section (A) (*Enforceability of Close-Out Netting*) of this Opinion Letter, assuming that the EFET Power Contract is governed by a law (including English or German law) other than the laws of this jurisdiction;

(c) the enforceability by the courts in this jurisdiction of the EFET Power Contract if it is subject to the laws of a jurisdiction other than this jurisdiction (including English or German law and including specific Insolvency related issues).

1.2.2 In arriving at the opinions expressed in paragraph 4 below, we have examined and relied upon the following documents:

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

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

The agreement mentioned under (a) or (b), whichever applicable, for the purpose of this Opinion Letter being the "**EFET Power Contract**".

(c) EFET Credit Support Annex to the General Agreement (Version 5 April 2002) (the "**CSA**");

(d) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2, published 20 July 2005);

(e) Annex 2(A) to Enclosure 4, the EFET Confirmation of Allowance Transactions (Including EUA, CER and ERU Transactions);

(f) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 3.0, published June 20, 2008);

The appendix mentioned under (d) or (f), whichever applicable, for the purpose of this Opinion Letter being the "**Allowances Appendix**".

(g) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005) (the "**VAT Annex**" and together with the CSA, the "**Annexes**"); and

(h) EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version

2.1, published 20 December 2000) (the "**Italian Appendix**" and together with the Allowance Appendix, the "**Appendices**").[1]

For purposes of paragraphs 4.39 and 4.40 only:

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

(j) EECS Certificate & National Scheme Certificate Appendix (published Version 2.0/16 April 2021);

(k) E-Notice Agreement as published by EFET on 13th October 2021;

For purposes of paragraphs 4.41, 4.42 and 4.43 only:

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

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

1.3 **Interpretation**

In this Opinion Letter, unless otherwise specified:

1.3.1 capitalised terms without definition shall, unless the context otherwise requires, have the same meanings ascribed to them in the EFET Power Contract, the Appendices or the CSA;

1.3.2 headings in this Opinion Letter are for ease of reference only and shall not affect the interpretation hereof;

1.3.3 "**AFM**" means the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*);

1.3.4 "**BA**" means the Dutch Bankruptcy Act (*Faillissementswet*);

1.3.5 "**BRRD**" means the EU Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;

1 Please note that the Italian Electricity Appendix is generally not in use anymore. However, EFET members may have executed the Appendix in the past and/or may have legacy trades governed by the Appendix.

1.3.6 "**BRRD2**" means EU Directive 2019/879 of the European Parliament and the Council of 20 May 2019 amending the BRRD;

1.3.7 "**BRRD Act**" means the provisions incorporated into the FMSA and the BA that implemented the BRRD into Dutch law (as amended by the Law of 29 September 2021 (*Stb,* 463) implementing the IFD and as amended by the implementing legislation for BRRD2 which took effect on 21 December 2021);

1.3.8 "**BRRD Entity**" means a type of entity that is within the scope of the resolution regime under the BRRD Act and/or the SRMR and includes (provided they qualify as a Counterparty under paragraph 2.1.1 below):

(i) a Dutch Credit Institution (not being an "opt-in" bank as referred to in article 3:4 FMSA; i.e. an undertaking that does not meet the requirements for a bank but has voluntarily applied for a licence as a Dutch Credit Institution);

(ii) a Dutch Investment Firm that is (a) covered by article 4 paragraph (1) sub (1) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("**MiFID2**"; as amended) and (b) subject to the initial capital requirements of article 9 paragraph (1) of Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms (the "**IFD**")[2] (a "**BRRD Investment Firm**");

(iii) a financial institution (*financiële instelling*), as defined in article 1:1 FMSA (cf. article 4(1)(26) CRR), that is established in this jurisdiction, when such financial institution is a subsidiary of a Dutch Credit Institution (not being an opt-in bank) or a BRRD Investment Firm, or of a company referred to in (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with articles 6 to 17 CRR;

(iv) financial holding companies (*financiële holdings*), mixed financial holding companies (*gemengde financiële holdings*) and mixed-activity holding companies (*gemengde holdings*), each as defined in article 1:1 FMSA (cf. articles 4(1)(20), (21) and (22 CRR), respectively) that are established in this jurisdiction;

(v) a Third Country Credit Institution or Third Country Investment Firm where DNB has refused to recognise the actions of a third country resolution authority in accordance with article 96 BRRD in which

[2] Applies only to proprietary trading firms and certain types of securities underwriting firms (i.e. the investment activities listed in points (3) and (6) of Section A of Annex I to MiFID2).

case the Dutch branch of that Third Country Credit Institution or Third Country Investment Firm is subject to the BRRD Act.

1.3.9 a "**Clause**" means a clause of the EFET Power Contract, an Appendix or an Annex (including the CSA);

1.3.10 "**COMI**" means the centre of main interests, as defined in article 3(1) of the EU Insolvency Regulation;[3]

1.3.11 "**Commencement Time**" means in respect of Insolvency Proceedings, 00.00 hours of the day of the judgment of bankruptcy or moratorium;

1.3.12 "**Credit Institution**" means a bank (*bank*) as defined in article 1:1 FMSA;

1.3.13 "**CRR**" means the EU Regulation 575/2013 of the European Parliament and the Council of 26 June 2013, on prudential requirements for credit institutions and investment firms and amending EMIR;

1.3.14 "**Custodian**" means a legal owner entity (*bewaarentiteit*)[4] represented by the Manager where both are acting for the account of an FGR Investment Fund;

1.3.15 "**DCC**" means the Dutch Civil Code (*Burgerlijk Wetboek*);

1.3.16 "**Delivery Agreement**" has the meaning set out in paragraph 4.2.2 below;

1.3.17 "**DNB**" means the Dutch Central Bank (*De Nederlandsche Bank N.V.*);

1.3.18 "**Dutch Company**" means a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or an SE and which have their COMI in The Netherlands at all relevant times (not being a Dutch Credit Institution, DNB, a Dutch Insurance Company (or an entity that is a parent company of or affiliated with a Dutch Insurance Company), a Dutch Investment Firm, a Dutch Investment Fund (or its Custodian or Manager), or a BRRD Entity) or any of the entities dealt with in the Schedules to this Opinion Letter) and not otherwise subject to any type of regulation that might affect our Opinion Letter);

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[3] In the case of a company or other legal person (in the absence of proof to the contrary), there is a rebuttable presumption that such centre is where the registered office of the company is located. This place must, of course, be within a Regulation State.

[4] Under the FMSA, it is required for all FGR Investment Funds that legal ownership of their assets is held by a single purpose entity whose sole object is holding legal title to the assets (including receivables) of one or more FGR Investment Funds. This is not the same entity as the "depositary" referred to in the AIFMD or the UCITS Directive.

1.3.19 "**Dutch Credit Institution**" means a company that is (i) validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap),* a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or a cooperative (*cooperatie)* and (ii) has a license to engage in the business of a Credit Institution pursuant to article 2:12 of the FMSA;

1.3.20 "**Dutch Insurance Company**" means a company that (i) is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) and (ii) has a license to engage in the business of an insurance company pursuant to article 2:27 of the FMSA and (iii) is not a BRRD Entity;

1.3.21 "**Dutch Investment Firm**" means a company that (i) is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and (ii) is licensed as an investment firm (*beleggingsonderneming*) under article 2:99 FMSA; a Dutch Investment Firm may include a securities broker/dealer and a BRRD Investment Firm;

1.3.22 "**Dutch Investment Fund**" means either: ((i) a legal owner entity (*bewaar entiteit*; hereinafter, a "**Custodian**")[5] represented by the manager (*beheerder*; hereinafter, a "**Manager**") where both are acting for the account of a single mutual investment fund (*fonds voor gemene rekening*; an "**FGR Investment Fund**"), or (ii) an investment company (*beleggingsmaatschappij*) represented by a manager (*beheerder*) (hereinafter an "**Investment Company**"), where:

(a) each such Custodian, Manager or Investment Company as the case may be is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap, or N.V.;* which will always be the case for Investment Companies), a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid, or B.V.*) or a foundation (*stichting,* which will normally be the case for Custodians) and has a license to engage in such business under the FMSA (or is exempt from the requirement to have such a licence) or otherwise meets the

[5] Under the FMSA, it is required for all FGR Investment Funds that legal ownership of their assets is held by a single purpose entity whose sole object is holding legal title to the assets (including receivables) of one or more FGR Investment Funds, This is not the same entity as the "depositary" referred to in the AIFMD or the UCITS Directive.

requirements imposed by the FMSA (or is exempt from such requirements); or

(b) the Custodian meets the aforementioned requirements, but the Manager is an entity incorporated in another EU Member State which has a license as referred to under (a) or has passported its home Member State license to The Netherlands (or a combination of both).

These Investment Companies and FGR Investment Funds may qualify as a UCITS (under Directive 2009/65/EC on the Coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended) or an Alternative Investment Fund (under Directive 2011/61/EC on Alternative Investment Fund Managers, as amended; hereinafter an "**AIF**" and together with a UCITS "**Regulated Funds**"), but may also be unregulated ("**Unregulated Funds**").

1.3.23 "**Dutch Partnership**" means either a general partnership (*vennootschap onder firma; VOF*) or a limited partnership (*commanditaire vennootschap; CV*) in each case formed under Dutch law and having its COMI in this jurisdiction provided each Managing or General Partner of such Dutch Partnership also has its COMI in this jurisdiction (and neither the Dutch Partnership nor any of its General or Managing Partners being subject to the exercise of Resolution Powers or to any type of regulation that might affect our Opinion Letter);

1.3.24 "**EEA**" means the European Economic Area;

1.3.25 "**EEA Credit Institution"** means an EEA undertaking duly incorporated or organised under the laws of another EEA Member State and which qualifies as a credit institution under EU Banking Co-ordination Directive (2013/36/EU), but which is not a Dutch Credit Institution and which has obtained a banking license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

1.3.26 "**EEA Insurance Company**" means an undertaking duly incorporated or organised under the laws of another EEA Member State, not being a Dutch Insurance Company and which has obtained an insurance license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) located in this jurisdiction that meets all the requirements of the FMSA in order for that branch to be lawfully engaged in business in this jurisdiction;

1.3.27 "**EEA Investment Firm**" means an undertaking duly incorporated or organised under the laws of another EEA Member State, not being a Dutch Investment Firm and which qualifies as an investment firm under MiFID2 and which has obtained an investment firm license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

1.3.28 "**Electricity Act**" means the Dutch 1998 Electricity Act (*Elektriciteitswet 1998*):

1.3.29 "**Electricity Company**" means an electricity provider (*leverancier*) as defined in article 1(f) of the Electricity Act or an electricity producer (*producent*) as defined in article 1(g) of the Electricity Act, in each case duly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and which has its COMI in The Netherlands at all relevant times;

1.3.30 "**EMIR**" means Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (as amended);

1.3.31 "**EU Insolvency Regulation**" means the EU Council Regulation No. 2015/848 on insolvency proceedings, an EU Council Regulation which applies to all Regulation States;

1.3.32 "**FCA Law**" means the provisions of articles 7:51 through 7:56 DCC and the various provisions in the BA that implemented the FCD into Netherlands law;

1.3.33 "**FCD**" means Directive nr. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 (as amended) on financial collateral arrangements;

1.3.34 "**financial collateral arrangement**" means an arrangement defined as such in the FCD or, in case Dutch law applies, the FCA Law where the parties thereto are qualifying parties for the purposes of the FCD or the FCA Law and the charged or transferred assets are "financial collateral" as defined by the FCD or such FCA Law;

1.3.35 "**FMSA**" means the Dutch Financial Markets Supervision Act (*Wet op het financieel toezicht*), together with all its implementing and subordinate decrees and regulations;

1.3.36 "**Foreign Company**" means a company (not being an SE, an EEA Credit Institution, an EEA Insurance Company, an EEA Investment Firm, a Third Country Credit Institution, a Third Country Insurance Company or a Third Country Investment Firm) incorporated with legal entity status under the laws of another jurisdiction and having a branch or branches established or located in this jurisdiction and if such a company has its COMI in a Regulation State that such Dutch branch will qualify as an "establishment" within the meaning of article 2(10) of the EU Insolvency Regulation (each, a "**Dutch Branch**");

1.3.37 "**Fund Contract**" means the contractual relationship between an FGR Investment Fund's Manager, Custodian and participants;

1.3.38 "**General Partner(s)**" has the meaning set out in paragraph 4.16.2;

1.3.39 "**Governing Law**" shall mean English law, German law or the laws of another EU Member State other than the Netherlands;

1.3.40 "**Insolvency**" and "**Insolvency Proceedings**" will be understood to refer to the procedures listed in paragraph 4.1(i)-(iii). A Party which is insolvent for the purposes of any insolvency law or otherwise subject to Insolvency Proceedings is referred to as the "**Insolvent Party**" and the other Party is referred to as the "**Solvent Party**";

1.3.41 "**Insolvency Representative**" means a liquidator (*curator*) during a bankruptcy (*faillissement*) or an administrator (*bewindvoerder*) during a moratorium of payments (*surseance van betaling*) in the sense of the BA;

1.3.42 "**Limited Partner(s)**" has the meaning set out in paragraph 4.16.2

1.3.43 "**Local Government Entities**" means associations of local governments with legal entity status pursuant the *Wet gemeenschappelijke regelingen*;

1.3.44 "**Manager**" means the manager (*beheerder*) of an FGR Investment Fund or an Investment Company which may be licensed as a fund manager under the FMSA or under the laws of another EU jurisdiction;

1.3.45 "**Managing Partner(s)**" has the meaning set out in paragraph 4.16.2;

1.3.46 "**Member State(s)**" means member state(s) of the European Union or the EEA as the context may require;

1.3.47 "**Municipality**" means a municipality (*gemeente*) in this jurisdiction that is duly established under the Dutch Constitution (*Grondwet*) and the *Gemeentewet* as a legal entity under public law (*publiekrechtelijke rechtspersoon*);

1.3.48 "**Nationalisation Measures**" means measures within the meaning of Chapter 6 of the FMSA (*bijzondere maatregelen*) in respect of a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, a Dutch Investment Fund (or its Custodian or Manager) and certain other regulated entities not covered by this Opinion Letter;

1.3.49 "**Netting Clause**" means the netting provisions of Clause 11 of the EFET Power Contract;

1.3.50 "**Party**" means a party to the EFET Power Contract;

1.3.51 "**Purchase Agreement**" has the meaning set out in paragraph 4.2.2 below;

1.3.52 **"Recovery and Resolution (Insurers) Act**" means the law of 28 November 2018 amending the BA and the FMSA to introduce powers for the recovery and resolution of Dutch Insurance Companies;

1.3.53 "**Regulation State**" means The Netherlands and the other Member States of the European Union (save for Denmark);

1.3.54 "**Resolution Measures**" means the procedures listed in paragraph 4.1 (iii) and (iv) below;

1.3.55 "**Resolution Powers**" means:

(a) In relation to BRRD Entities: (a) the sale of business powers (article 3a:28 FMSA/article 24 SRMR); (b) the bail-in powers (article 3a:44 FMSA/article 26 SRMR) by means of which liabilities owed by a BRRD Entity may be wholly or partially written down, cancelled or modified; (c) the bridge institution powers (article 3a:37 FMSA/article 25 SRMR): (d) the asset separation powers (article 3a:41 FMSA/article 25 SRMR); (e) the pre-resolution mandatory write-down or conversion powers (article 3a:17 FMSA/article 21(1) SRMR) pursuant to which DNB may write down or convert certain of the BRRD Entity's Tier 1 and Tier 2 capital instruments prior to or at the same time as exercising any other Resolution Power;

(b) in relation to Dutch Insurance Companies: similar powers introduced under the Recovery and Resolution (Insurers) Act.

1.3.56 "**Resolution Safeguards**" means:

- in relation to BRRD Entities: those provisions from the BRRD Act that provide that the exercise of certain Resolution Powers or ancillary powers (specifically: a partial property transfer to a transferee or the use of the power to cancel or modify contractual terms or to replace the entity under resolution by another entity as party to an agreement), shall not adversely affect security arrangements[6], set-off arrangements[7], netting arrangements[8] or title transfer financial collateral arrangements;[9]

- in relation to Dutch Insurance Companies: the functionally identical safeguards introduced under the Recovery and Resolution (Insurers) Act;

1.3.57 "**Retroactive Effect Rule**" means the rule that any dispositions of property made or agreements entered into by the Party subject to Insolvency Proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) are void;

1.3.58 "**Rome I**" means Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations;

1.3.59 "**SE**" means a "*Societas Europaea*" established pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 on the European Company Statute and which has its statutory seat and its COMI in The Netherlands at all relevant times;

1.3.60 "**Solvency II**" means Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance;

1.3.61 "**SRB**" means the single resolution board established under the SRMR which will be responsible for determining whether an entity within the scope of the SRMR meets the conditions for it to be placed under resolution;

1.3.62 "**SRMR**" means Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform

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6 Defined as arrangements under which a person has by way of security an actual or contingent interest in the assets or rights (that are subject to partial property transfer), irrespective of whether that interest is secured by specific assets or rights or by way of a security right on a totality of assets or similar arrangement (i.e. a floating charge; article 3a:1 FMSA), It is highly likely that the Deed of Charge will be regarded as a security arrangement

7 Defined as an arrangement under which two or more claims or obligations owed between the affected institution and a counterparty can be set off against each other (article 3a:1 FMSA).

8 As defined in article 2(1)(98) BRRD, which includes "close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim".

9 These safeguards originate in articles 68(4), 69-71 and 76-80 BRRD (article 3a:60 FMSA).

procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/20.

1.3.63 "**SSM Regulation**" means Regulation (EU) No. 1024/2013 of the European Parliament and of the Council of 15 October 2013;

1.3.64 "**Termination Clause**" means the close out provisions of Clauses 10.3 through 10.5 of the EFET Power Contract;

1.3.65 "**Third Country Credit Institution**" means a Dutch branch of a credit institution incorporated with limited liability status from a country that is not a Mmber State of the EEA, which branch meets all the requirements of the FMSA in order for it to be lawfully engaged in such banking business in this jurisdiction;

1.3.66 "**Third Country Insurance Company**" means a Dutch branch of an insurance company incorporated with limited liability status in a country that is not a Member State of the EEA, which branch meets all the requirements of the FMSA in order for it to be lawfully engaged in such insurance business in this jurisdiction;

1.3.67 "**Third Country Investment Firm**" means a Dutch branch of an investment firm incorporated with legal entity status from a country that is not a Member State of the EEA which branch provides investment services and/or engages in investment activities and is licensed pursuant to Section 2:99 FMSA in order to be lawfully engaged in such investment business in this jurisdiction;

1.3.68 "**this jurisdiction**" and "**The Netherlands**" means the part of the Kingdom of The Netherlands located in Continental Europe (excluding, for the avoidance of doubt, any overseas nations forming part of the Kingdom of The Netherlands such as Aruba, Curacao, and St Maarten and any overseas special municipalities such as Saba, St. Eustatius and Bonaire);

1.3.69 "**WHOA**" means the Act on Court Approved Pre-Insolvency Restructuring Schemes (*Wet Homologatie Onderhands Akkoord*) which has entered into effect on 1st January 2021 and "**WHOA Proceedings**" means composition proceedings as regulated under the WHOA;

1.3.70 "**WHOA Memorandum of Reply**" means the *Memorie van Antwoord* pertaining to the Dutch Senate's proceedings on the Bill introducing the WHOA (*wetsontwerp* 35.249) which includes an official analysis of the impact of the WHOA on financial master agreements and netting arrangements contained therein;

1.3.71 "**WUDCI**" means EU Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions (as amended).

1.4 Individual Contracts

We opine only on the following types of individual contracts:

1.4.1 Commodity Transaction:

meaning a transaction in which one Party agrees to buy from or sell to the other Party a specified quantity of Commodity in exchange for payment of a specified price, which becomes due on the same day (a "**Spot Commodity Transaction**"), two days later or on another agreed future date. The transaction will be settled by physical delivery of the quantity of Commodity or by payment of the cash equivalent of the relevant quantity of Commodity in exchange for payment of the specified price and the parties may agree that the specified price is based or dependent, at least partially, on the price for a specified security, different commodity or an interest rate.

1.4.2 Commodity Option:

meaning 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 will be settled by physically delivering the quantity of the Commodity in exchange for payment of the strike price.

1.4.3 Commodity Swap:

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

whereby "**Commodity**" means electricity or emission allowances (see also paragraph 4.41.4 for the legal classification of the latter).

A Commodity Transaction, a Commodity Option and a Commodity Swap shall be together referred to as the "**Individual Contracts**" and each as an "**Individual Contract**". Individual Contracts provide for the physical delivery of Cmmodities in exchange for cash, however, some of them may also provide for cash settlement or, in the event that offsetting physical delivery obligations are entered at different times, may be settled by agreement through the combination of, as applicable, a partial or total cancellation of otherwise offsetting physical delivery obligations, coupled with a net financial payment.

1.5 **Spot Commodity Transactions**

There is no specific definition under the laws of this jurisdiction of a Spot Commodity Transaction. However, there are certain rules with regard to the treatment of certain commodity contracts in the event of Insolvency as set out in paragraph 4.2 below. Also, paragraph 4.42 elaborates on certain financial regulatory requirements in relation to certain (Commodity) Transactions. Our opinion on close-out netting in this Opinion Letter includes an opinion on close out netting with regard to Spot Commodity Transactions.

1.6 **Scope**

Where individual Parties choose to move away from the documents, scenarios and product coverage described in this paragraph 1 in any way, they must satisfy themselves that their agreement is still valid and enforceable and this Opinion Letter does not apply.

2. **ASSUMPTIONS**

2.1 **Assumptions set out in the Instruction Letter**

We have been requested to make the following assumptions for our opinion:

Assumptions as to Counterparties and Governing Law

2.1.1 For purposes of this Opinion Letter we have only considered the following parties under an EFET Power Contract:

(a) a Dutch Company;

(b) a Dutch Partnership;

(c) a Dutch Credit Institution;

(d) a Dutch Insurance Company;

(e) a Dutch Investment Firm;

(f) an Electricity Company;

(g) an Dutch Investment Fund;

(h) a Municipality;

(i) a Local Government Entity; and

(j) any of the parties referred to in (a) - (g) above to the extent that they are publicly-owned entities;

such parties hereafter together referred to as the "**Counterparties**" and each a "**Counterparty**".

For the purpose solely of the multi-branch analysis in Part (B) and Appendix A, we also consider:

(i) a Foreign Company acting through one or more of its Dutch Branches;

(ii) EEA and Third Country Credit Institutions;

(iii) EEA and Third Country Investment Firms;

(iv) EEA and Third Country Insurance Companies.

For the avoidance of doubt, this Opinion Letter does not extend to entities that are not Counterparties, including without limitation:

(i) any individuals (whether or not acting in the course of a business), associations or foundations;

(ii) any international or supranational organisations;

(iii) any collective investment schemes, companies or funds (regardless of their location or their governing law) other than Dutch Investment Funds;

(iv) any pension funds;

(v) any public law entities (such as the Dutch State, provinces, DNB etc) other than Municipalities and Local Government Entities;

(vi) any limited liability partnerships (as such concept does not exist under Dutch law);

(vii) any religious associations (*kerkgenootschappen*); and

(viii) any regulatory authorities or central counterparties; and

(ix) any trusts.

2.1.2 Two Parties enter into the EFET Power Contract and one of them is a Counterparty.

2.1.3 For the purpose of any opinions regarding the EFET Power Contract (including the Annexes and Appendices) and Individual Contracts thereunder where the chosen law is a Governing Law: that such EFET Power Contract (including the Annexes and Appendices) and such Individual Contracts create valid, legally binding and enforceable obligations for both Parties under all relevant laws and that they, as a matter of their Governing Law, are valid and legally binding between the Parties thereto under all relevant laws.

2.1.4 On the basis of the terms and conditions of the EFET Power Contract and other relevant factors and acting in a manner consistent with the intentions stated in the EFET Power Contract, the Parties over time enter into a number of Individual Contracts (which include all of the Individual Contracts described in paragraph 1.4 above).

Enforceability of Close-out Netting

2.1.5 For the purposes of addressing the close-out netting issues in Part A below, whenever a Counterparty becomes the subject of Insolvency Proceedings under the laws of this jurisdiction and it has entered into Individual Contracts which are not yet matured, either the Counterparty or an Insolvency Representative seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the Insolvent Party, and to reject confirmations representing unprofitable Individual Contracts.

Multibranch Parties

2.1.6 For the purposes of addressing certain of the multi-branch issues in Part B, a Counterparty is incorporated in this jurisdiction, but may have one or more EFET Power Contracts (including the Appendices and Annexes) or Individual Contracts that have been entered into by branches or other duly registered offices in other jurisdictions.

2.1.7 For the purposes of addressing certain of the multi-branch issues in Part B, a Counterparty is a Foreign Company, but may have one or more EFET Power Contracts or Individual Contracts that have been entered into by its Dutch Branches. After entering into these Individual Contracts and prior to the maturity thereof, the Counterparty becomes the subject of voluntary or involuntary proceedings under the insolvency laws of its jurisdiction of incorporation.

Collateral

2.1.8 For the purposes of addressing certain of the collateral issues in Part C below, eligible credit support provided under the CSA ("**Eligible Credit**

Support") will only take the form of either cash (as defined in article 2(d) of the FCD (hereafter referred to as "**Cash Collateral**"; which we assume to mean a bank transfer between the account of one Party as the Transferor and the other Party as the Transferee, whereby the latter account is under the latter Party's control) or letters of credit ("**Letters of Credit**"). A Transferor trying to retrieve collateral from an insolvent entity which is a Counterparty to the EFET Power Contract and the CSA and is a legal entity as referred to in paragraph 2.1.1 above incorporated under the laws of this jurisdiction. A Transferee holding collateral and applying and using that collateral in a close-out netting event, is a Party to the same EFET Power Contract and the CSA and is an entity incorporated or organized under the laws of a jurisdiction other than this jurisdiction. Any Cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Transferee.

Confirmation Practices

2.1.9 For the purposes of addressing certain of the issues in Part E below concerning confirmation practices, when entering into an Individual Contract, the Counterparties in each case (i) make oral reference to the EFET Power Contract when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET Power Contract when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission).

For the purposes of addressing certain of the issues in Part E below concerning confirmation practices, Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement.

2.2 General Assumptions Necessary for Opinion

Furthermore, we have with your permission assumed:

2.2.1 that each Party has the capacity, power (corporate, regulatory and otherwise) and authority under all applicable laws to enter into the EFET Power Contract (including the Appendices and Annexes) and each Individual Contract thereunder and to perform its obligations thereunder and each Party has taken all necessary steps validly and lawfully to enter into, execute, deliver and perform the EFET Power Contract (including the

Appendices and Annexes) and each Individual Contract and has duly authorized, executed and delivered the same.

2.2.2 that each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required under the laws of any applicable jurisdiction (including The Netherlands) to enable it lawfully to enter into and perform its obligations under the EFET Power Contract (including the Annexes and the Appendices) and each Individual Contract and to ensure the legality, validity, admissibility in evidence or enforceability thereof;

2.2.3 that each Party (except for any FGR Investment Fund and any Dutch Partnership but including each partner of a Dutch Partnership and each Custodian and Manager of an FGR Investment Fund) is duly incorporated (or in the case of Municipalities and Local Govvernment Entities: duly established by law) as a legal entity (or, in case of an FGR Investment Fund or a Dutch Partnership, duly formed as an FGR Investment Fund or a Dutch Partnership) and validly existing and in good standing (where such concept is legally relevant to its capacity) under the laws of its jurisdiction of incorporation and of the jurisdiction of its place of business;

2.2.4 the due compliance with all matters (including, without limitation, the obtaining of the necessary consents, licenses, approvals and authorisations, the making of the necessary filings, lodgments, registrations and notifications and the payment of stamp duties and other taxes) under any law as may relate to or be required in respect of: (a) the EFET Power Contract (including the Annexes and Appendices) and any Individual Contracts thereunder, (b) their lawful execution, (c) the Parties thereto or other persons affected thereby, (d) the performance or enforcement by or against the Parties or such other persons, or (e) the creation of valid and legally binding obligations of all Parties to the EFET Power Contract (including the Annexes and Appendices) and any Individual Contracts, enforceable against such Parties in accordance with their respective terms;

2.2.5 that the execution and performance of the EFET Power Contract (including the Annexes and Appendices) and of the Individual Contracts contemplated thereby are in each Party's corporate interest (*vennootschappelijk belang*) and not prejudicial to its (present and future) creditors;;

2.2.6 that, save as expressly stated otherwise in this Opinion Letter, the EFET Power Contract (including the Annexes and the Appendices) and each Individual Contract are governed by the Governing Law;

2.2.7 that the EFET Power Contract (including the Annexes and the Appendices) and each Individual Contract have been entered into (or will be entered into) for *bona fide* commercial reasons and on arms' length terms by each of the Parties;

2.2.8 that the obligations to pay the Settlement Amounts are legally binding and enforceable and - under all relevant laws other than those of this jurisdiction - capable of being included in the Termination Amount as determined under Clause 11.1 of the EFET Power Contract and mutual between the Parties in the sense that in the sense that (a) they are the only two parties involved, (b) claim and counterclaim arise between the Parties acting in the same capacity and as principals and not as agents and each is personally liable as regards obligations owing by it and is personally entitled to the rights corresponding with the other Party's obligations (c) are not assigned to one of the Parties by a third party and (d) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

2.2.9 that the EFET Power Contract (including the Annexes and the Appendices) and any Individual Contracts are not capable of being voided or otherwise held invalid, null, void, unenforceable or ineffective (in whole or in part) by reason of fraud, error, misrepresentation, coercion, undue influence, illegality, financial assistance, voidable preference or transaction at an undervalue, illegality or otherwise whether or not on the insolvency of either of the Parties (except as specifically dealt with in this Opinion Letter);

2.2.10 that the EFET Power Contract (including the Annexes and the Appendices) and any Individual Contract are entered into prior to the formal commencement of any Insolvency Proceedings in respect of either Party and, at the time at which the same are entered into, neither Party was aware that an Insolvency petition in respect of the other Party had been filed;

2.2.11 that no further Individual Contracts will be entered into between the Parties on or after (i) the date of the Insolvency judgement of either Party (it being noted that under the laws of this jurisdiction a judgment by which Insolvency Proceedings are declared has retro-active effect from the Commencement Time), or (ii) the date one Party was aware that an Insolvency petition in respect of the other Party had been filed;

2.2.12 that, without prejudice to paragraph 4.42, none of the terms of the EFET Power Contract (including the Annexes and Appendices) will be altered, varied, waived, discharged or superseded by virtue of any agreement between the Parties and that no supplemental terms and conditions are or will be agreed between the Parties that could affect or qualify our Opinion Letter as set out herein;

2.2.13 that, save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the Termination Clause and the Netting Clause of the EFET Power Contract, each Party duly performs its obligations undertaken under the EFET Power Contract (including the Appendices and the Annexes) and each Individual Contract in accordance with their respective terms;

2.2.14 that, under the Governing Law and under all other relevant laws (other than those of this jurisdiction):

(a) the EFET Power Contract (including the Appendices and the Annexes) and any Individual Contract thereunder constitutes and will at all times constitute valid and legally binding obligations of the Parties thereto, enforceable in accordance with their terms;

(b) the choice of the Governing Law as the governing law of the EFET Power Contract (including the Appendices and the Annexes) and any Individual Contract thereunder is a valid and binding selection; and

(c) the submission by the Parties to the jurisdiction of the German Institute of Arbitration, a local German court or any other arbitritation institute or court, as the case may be with regard to the EFET Power Contract (including the Appendices and the Annexes) is legal, valid and binding upon the Parties;

(d) the collateral provisions as set out in the CSA will constitute a financial collateral arrangement (in the form of a title transfer financial collateral arrangement), or an arrangement of which such a financial collateral arrangement forms part;

(e) the Individual Contracts are capable of being terminated and liquidated in accordance with the Termination Clause and the Netting Clause;

and, without prejudice to our opinion under paragraphs 4.3.3(a) and 4.44 (*Choice of Law*) below, that the courts of this jurisdiction will, in giving effect to the choice of law provisions in the EFET Power Contract (including the Appendices and the Annexes) apply the chosen law correctly.

2.3 Specific Assumptions for Dutch Investment Funds

We also make the following additional assumptions specifically with regard to Dutch Investment Funds:

2.3.1 where a Counterparty is a Dutch Investment Fund, each Transaction will be within such Dutch Investment Fund's investment policies and any other requirements pursuant to applicable law, the relevant prospectus and/or applicable terms and conditions;

2.3.2 with regard to any agreements entered into with the Custodian for the account of an FGR Investment Fund, that in accordance with Dutch market practice the FGR Investment Fund's Manager enters into an EFET Power Contract and any Individual Contracts thereunder not in its own name as principal, but in the name and on behalf of the Custodian as principal acting for the account of the relevant FGR Investment Fund;

2.3.3 the power, capacity (corporate, regulatory and other), and authority of each Custodian and the Manager acting for the account of the relevant FGR Investment Fund to enter into the EFET Power Contract and any Individual Contracts contemplated thereby and to perform its obligations thereunder;

2.3.4 that the Manager and the Custodian acting for the account of an FGR Investment Fund have been duly incorporated and organised, and are validly existing under the laws of this jurisdiction and that neither of them has been dissolved (*ontbonden*) or ceased to exist pursuant to a merger (*fusie*) or de-merger (*splitsing*) and that the Fund Contract is legal, valid, binding and enforceable under all applicable laws (including Netherlands law);

2.3.5 that the Dutch Investment Fund (including in the case of an FGR Investment Fund, its Manager and its Custodian) has:

(a) taken all necessary action required by its corporate or constitutive documents and any applicable law, including Netherlands law;

(b) obtained all relevant internal and external authorisations, consents, approvals, licenses or orders from or notices to or filings with any regulatory or other authority or governmental body; and

(c) complied with all relevant internal and external requirements,

validly to execute, deliver and perform the EFET Power Contract and each Individual Contract entered into thereunder;

2.3.6 that pursuant to the Fund Contract:

(a) the participants shall have no proprietary rights (*goederenrechtelijke rechten*) with respect to the fund assets; and

(b) the FGR Investment Fund may only act through its Custodian, in its capacity as Custodian of the Fund, in conjunction with the Manager of the Fund.

2.3.7 that each FGR Investment Fund will have its seat (*zetel*) in The Netherlands and that each Investment Company or Custodian will have its COMI in The Netherlands and will not have any "establishment" (as defined in article 2(10) of the EU Insolvency Regulation) in any other Regulation State;

2.4 Specific Assumptions for Dutch Partnerships

We also make the following additional assumptions specifically with regard to Dutch Partnerships:

2.4.1 that each Dutch Partnership is duly formed either as a *commanditaire vennootschap* or as a *vennootschap onder firma* under Dutch law, that the partnership agreement between the General/Managing Partner(s) and any Limited Partners is legal, valid, binding and enforceable under Netherlands law and that no event causing automatic dissolution of such Dutch Partnership as described in article 7A:1683 of the Dutch Civil Code has occurred;[10]

2.4.2 that where the Counterparty is a Dutch Partnership, the EFET Power Contract, any Individual Contract and any other documents relating thereto have been validly entered into by a General Partner on behalf of a Dutch Partnership that is a general partnership *(vennootschap onder firma)* or by a Managing Partner on behalf of a Dutch Partnership that is a limited partnership *(commanditaire vennootschap)* for the account of the General or Limited Partnership;

2.4.3 that the obligations of each Dutch Partnership to pay the Settlement Amounts are mutual between the Dutch Partnership and the other Party in the sense that they (a) arise between the Dutch Partnership and the other Party acting in the same capacity and as principals and not as agents, (b) are not assigned to one of the Parties by a third party and (c) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

2.4.4 the power, capacity (corporate, regulatory and other), and authority of each Dutch Partnership and the General Partner(s) or Managing Partner(s)

[10] In translation article 7A:1683 reads as follows: A partnership shall be dissolved: 1. by the expiration of the time for which it was contracted; 2. by the destruction of an asset, or the completion of the transaction, which constitutes the object of the partnership; 3. by notice of termination given by a partner to the other partners; 4. by the death of or guardianship over one of the partners, or if he has been declared bankrupt or is the subject of the declaration of a personal debt relief arrangement.

thereof to enter into the EFET Power Contract and any Individual Contracts contemplated thereby and to perform the relevant obligations thereunder;

2.4.5 that the General/Managing Partners of a Dutch Partnership have been duly incorporated and organised, and are validly existing with legal personality (*rechtspersoonlijkheid*) under the laws of the Netherlands, have not been dissolved (*ontbonden*) or ceased to exist pursuant to a merger (*splitsing*);

2.4.6 that the Dutch Partnership, its General/Managing Partners and to the extent required any Limited Partners have:

(a) taken all necessary action required by the partnership agreement and their respective corporate or constitutive documents and any applicable law, including Netherlands law;

(b) obtained all relevant internal and external authorisations, consents, approvals, licenses or orders from or notices to or filings with any regulatory or other authority or governmental body; and

(c) complied with all relevant internal and external requirements,

to enable the General/Managing Partner(s) validly to execute, deliver and perform the EFET Power Contract and any Individual Contracts contemplated thereby and to ensure the legality, validity, enforceability or admissibility in evidence of the EFET Power Contract and any Individual Contracts contemplated thereby in this jurisdiction;

2.4.7 that neither the Dutch Partnership nor any of its General or Managing Partners is an entity that may be subject to the exercise of crisis prevention powers or Resolution Powers;

2.4.8 that each Dutch Partnership will have its seat (*zetel*) and centre of external dealings (*centrum van optreden naar buiten*), each within the meaning of article 10:118 DCC, in The Netherlands and that each Dutch Partnership and each General or Managing Partner will have its COMI in The Netherlands and will not have any "establishment" (as defined in article 2(h) of the EU Insolvency Regulation) in any other Regulation State.

3. SCOPE OF OUR REVIEW / MATTERS EXCLUDED

3.1 Scope of our review

As Dutch lawyers we are not qualified to assess the meaning and consequences of the terms of the EFET Power Contract (including the Appendices and the Annexes) under any law other than Dutch law and, in particular, we have made no investigation into any Governing Law as a basis for the Opinion Letter expressed hereinafter and do not express or imply an opinion thereon. Accordingly, our review of the EFET Power Contract has been limited to the terms as they appear on the face thereof, without reference to the general body of law incorporated into or made applicable to such document by the choice of law clause contained therein.

3.2 **No investigation into assumptions**

Where an assumption is stated to be made in this Opinion Letter, we have not made any investigation or enquiry with respect to the matters that are the subject of such assumption and we express no views as to such matters.

3.3 **No opinion on Individual Contracts**

For this Opinion Letter we have not reviewed the specific terms of any Individual Contract and consequently no opinion is expressed in relation to the binding nature and enforceability of any specific Individual Contract.

3.4 **Scope of Opinion**

We opine only as to the validity and effectiveness of certain specific provisions of the EFET Power Contract (excluding the Election Sheet thereto), in particular the Termination Clause and the Netting Clause. With regard to the CSA our Opinion Letter is limited to the issues discussed in Part (C) below. With regard to the Appendices, our Opinion Letter is limited to the issues discussed in paragraph 4.41 below.

We express no opinion and no opinion is given (or may be inferred or implied):

3.4.1 as to any law other than to the laws of The Netherlands in force as at the date hereof as applied and interpreted according to present published case-law of The Netherlands courts, administrative rulings and authoritative literature;

3.4.2 that the future or continued performance of any of the obligations of the Parties contemplated by the EFET Power Contract, the Appendices and the CSA will not contravene such laws application or interpretation, if such laws, application or interpretation are altered in the future;

3.4.3 with regard to the effect of any foreign law even in cases where, under Dutch law, any foreign law falls to be applied and we assume that no such foreign law would affect or qualify our opinion as set out below;

3.4.4 on the tax laws of The Netherlands or, except as stated otherwise, on international law, including (without limitation) the rules of or promulgated under or by any bi- or multilateral treaty or treaty organisation (unless implemented into the laws of The Netherlands) or on any anti-trust, competition, public procurement, state aid, market abuse, data protection, privacy, or cybersecurity laws;

3.4.5 on any commercial, accounting, capital adequacy or other non-legal matter or on the ability of any Party to meet its financial or other obligations under the EFET Power Contract;

3.4.6 on any property law aspects relating to transfers of Commodity or of Eligible Credit Support as envisaged under the EFET Power Contract or any CSA;

3.4.7 as to any matters of fact;

3.4.8 as to any person or entity other than the Counterparties mentioned in paragraph 2.1.1 above;

3.4.9 on the effects of any recognition of third country resolution measures in this jurisdiction based upon articles 93/94 BRRD;

3.4.10 as to any Individual Contracts that are accepted, directly or indirectly, for clearing through a central counterparty;

3.4.11 because a letter of credit is issued by a third party issuer in favour of the Party seeking credit support, we shall not address the "transfer" of Letters of Credit. Generally speaking, the characterisation of the provision of Letter of Credit shall be subject to the laws applicable to such Letter of Credit; or

3.4.12 any regulatory matters, in particular, but without limitation, (i) the applicability of and regulatory compliance of the EFET Power Contract or any Transaction carried out thereunder with any applicable provisions of

EMIR,[11] CSDR,[12] MiFID2[13]/MiFIR[14], SFTR[15] or GDPR,[16] and any technical standards made thereunder or any obligations arising for the parties pursuant to EMIR, CSDR, MiFID2/MiFIR, SFTR or GDPR, or the impact thereof (or a breach thereof) on the matters discussed in this Opinion Letter, (ii) the eligibility, or individual criteria required for the eligibility, of the EFET Power Contract for the purpose of credit risk mitigation or counterparty credit risk pursuant to the CRR or (iii) any other supranational or national law, directive or regulation on capital requirements in the financial sector, and none is implied or may be inferred herein.

3.5 Further limitations of scope

3.5.1 Once an amount has been determined under the Netting Clause, the party to whom such amount is payable must seek to enforce that amount, whether by lodgement of a claim against the other Party or otherwise; the ability to actually enforce payment of that amount will be dependent on the facts of the case. Our opinion in paragraph 4 below is confined to the enforceability of the Netting Clause, and accordingly, we do not opine on the enforceability of any net amount payable under the EFET Power Contract *after giving effect to* the Netting Clause or any right of set off.

3.5.2 There is no case law dealing with the EFET Power Contract's Termination Clause or the Netting Clause, but there is case law on these types of clauses and confirming that these can be validly invoked against an Insolvency Representative in Insolvency Proceedings. We understand, however, that your fundamental requirement is for the validity of those provisions of the

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11 Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (as amended) and its delegated or implementing regulations. However, article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the EFET Power Contract or any Individual Contract thereunder invalid or unenforceable.

12 Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) 236/2012 (as amended) together with any delegated or implementing regulations.

13 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (as amended) together with any delegated or implementing regulations.

14 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (as amended) together with any delegated or implementing regulations

15 Regulation No. 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

16 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (as amended).

EFET Power Contract, including its Appendices and the CSA, to be substantiated by a written and reasoned opinion.

4. OPINION

Based upon and subject to the foregoing and to the further qualifications set out below and subject to any factual matters, documents or events not disclosed to us, having regard to such legal considerations as we deem relevant, we are on the date hereof of the following opinion.

PART A

ENFORCEABILITY OF CLOSE-OUT NETTING

I. WINDING UP / INSOLVENCY

4.1 Dutch Insolvency Proceedings & Resolution Measures

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency procedures to which a Counterparty (not being an EEA Credit Institution or an EEA Insurance Company), could become subject in The Netherlands are the following:

(i) bankruptcy (*faillissement*), as referred to in and governed by title I of the BA;

(ii) except for Dutch Credit Institutions and Dutch Insurance Companies: moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA;

In addition, certain Counterparties can be subject to the following resolution and reorganisation measures:

(iii) solely in respect of Dutch Companies, Dutch Investment Firms, Dutch Investment Funds and Dutch Partnerships: WHOA Proceedings;

(iv) solely in respect of Dutch Credit Institutions and BRRD Investment Firms: the exercise of any Resolution Power by DNB as the national resolution authority for The Netherlands acting either (i) independently or (ii) upon the instructions of the SRB in respect of those BRRD Entities which fall within the scope of the SRMR;[17]

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[17] The SRMR applies to:

a. Credit institutions (i.e. banks and certain other deposit-takers), as defined in CRR, in participating member states of the European Union;

(v) solely in respect of Dutch Insurance Companies: the exercise of Resolution Powers under the Recovery and Resolution (Insurers) Act.

Together the procedures referred to under paragraphs (i) to (ii) shall be referred to as "**Insolvency Proceedings**" and those under paragraphs (iv) and (v) shall be referred to as "**Resolution Measures**". As WHOA Proceedings referred to under paragraph (iii) are privately negotiated pre-insolvency debt restructuring proceedings, they shall be referred to simply as WHOA Proceedings. A short overview of these proceedings is provided in Appendix A.

In Insolvency Proceedings, a judgment of bankruptcy or moratorium has retroactive effect as from the Commencement Time and the Retroactive Effect Rule makes any dispositions of property made or agreements entered into by the Insolvent Party subject to such proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) void.

It has been debated in legal literature whether a legal entity under public law (*publiekrechtelijke rechtspersoon*) such as a Municipality or a Local Government Entity can be declared Insolvent. Although this is not settled, it follows implicitly from case law that this should be the case and there are convincing arguments in favour of this. For the purpose of the analysis in this Opinion Letter we will take the view that, even though it is only a theoretical possibility, a Municipality and a Local Government Entity can become subject to Insolvency Proceedings.

4.2 Commodity Transactions in Insolvency Proceedings

4.2.1 Commodity Forwards in Insolvency Proceedings

There are two provisions in the BA, articles 38 and 237 BA, which may cause the mandatory *automatic* termination of all outstanding Commodity Transactions (which is not a Spot Commodity Transaction) as of the date of the Insolvency judgment in respect of an insolvent Party. Articles 38 and 237 deal with forward contracts for the future delivery of commodities (which should include securities), which commodities (or securities) are traded on a public exchange (*i.e.* the forward contract itself could be OTC)

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b. Parent undertakings, including financial holding companies and mixed financial holding companies, established in one of the participating member states of the European Union, when subject to consolidated supervision carried out by the European Central Bank in accordance with the SSM Regulation establishing the single supervisory mechanism; and

c. Investment firms and financial institutions (each as defined in the CRR) established in participating member states when they are covered by the consolidated supervision of the parent undertaking carried out by the European Central Bank in accordance with the SSM Regulation.

where such contracts have a settlement date falling after the Insolvency judgment. With effect from the Commencement Time *all* outstanding forward transactions that are within the scope of articles 38 or 237 BA are terminated by operation of law. The Parties' mutual and unperformed settlement and delivery obligations are extinguished automatically with effect from the Commencement Time. The rationale of these articles is to create certainty with respect to executory contracts containing speculative elements but relating to commodities or securities having a readily ascertainable market price. Therefore, it may not be required that the commodities or securities having such a market price are actually traded on an exchange.

If a Dutch court were to apply articles 38 and 237 BA to any Commodity Transactions (which are not Spot Commodity Transactions) (with maturity dates after the Insolvency judgment), the only practical consequence would be that the non-defaulting party would have no freedom to terminate such Commodity Transactions *after* the Insolvency judgment, because the Commodity Transactions will have already been automatically terminated with effect from the Commencement Time by operation of Dutch Insolvency law. The main risk constituted by articles 38 and 237 BA is that the date of the Insolvency judgment will be imposed by the court for Commodity Transactions for which under the terms of the EFET Power Contract a valuation date would apply which is after the date of the Insolvency judgment.

Otherwise, the legal consequences when applying either articles 38 and 237 BA or the Termination and the Netting Clauses are essentially the same: the relevant Commodity Transactions will be terminated and the mutual obligations converted into an obligation for one of the Parties to pay damages. Articles 38 and 237 BA do not provide for the manner in which such damages should be calculated, but, on the basis of the legislative history of these articles, it seems likely that the Parties can validly agree on a method of calculating damages when entering into the EFET Power Contract.

It should be noted that:

(i) only those Transactions which are actually outstanding as of the Commencement Time and have unperformed obligations for both Parties could be affected by articles 38/237 BA;

(ii) articles 38/237 BA do not apply to Transactions carried out on an EU financial market (art. 12 EU Insolvency Regulation) or through an EU payment or settlement system (which includes an EU central counterparty); this Opinion Letter does not deal with such exchange traded derivatives or cleared otc-derivatives.

4.2.2 Certain Physically Settled Commodity Transactions in Insolvency Proceedings

For certain physically settled Commodity Transactions automatic early-termination clauses may not be enforceable in Insolvency Proceedings:

(a) Electricity Companies are subject to certain restrictions in relation to purchase agreements (*inkoopcontracten*) where they act as buyer and that relate to their delivery of electricity to low-volume users (*i.e.*: consumers) (such agreements: "**Purchase Agreements**"). Such Electricity Companies are not permitted to include in such Purchase Agreements any clauses providing for automatic or optional termination or for the deferral of the supplier's obligations if their Insolvency is petitioned or Insolvency Proceedings are opened against them. Therefore, with regard to such Electricity Companies and insofar as an Individual Contract regarding the *physical delivery of electricity* would qualify as a Purchase Agreement, the early termination provisions of Clause 10 will not be enforceable. The risk this poses is not significant - in our view - because if an Electricity Company becomes subject to Insolvency Procedures, its license will typically be withdrawn within a period of approximately 10 days (the "**freeze period**") after which the early termination under the EFET Power Contract will be permitted and in any event all unpaid amounts owing by the Electricity Company in respect of electricity deliveries during the freeze period are automatically guaranteed by the transmission system operator (presently 'TenneT N.V.') as programme responsible party (*programma verantwoordelijkheid*) under the relevant legislation. After early termination becomes effective the netting may also include amounts due during the freeze period;

(b) furthermore, article 37b (for bankruptcy) and article 237b (for moratorium of payments) BA stipulate that in agreements for the continuous physical delivery of gas, water, electricity or heating needed for a customer's primary living needs or for the continuity of its business (each a "**Delivery Agreement**"), early termination clauses triggered by (a petition being filed for) Insolvency Proceedings or the levying of an attachment may only be invoked against customers who or which are subject to Insolvency Proceedings with the consent of the Insolvency Representative. Therefore, insofar as any Commodity Transactions can be treated as Delivery Agreements, early termination clauses triggered by (a request petitioning) Insolvency Proceedings or attachment may only be invoked with the consent of the Insolvency Representative[18].

4.3 Effectiveness of Termination Clause and Netting Clause during Insolvency Proceedings

4.3.1 Early Termination by notice

Dutch contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. Under Dutch law the main principle is that, unless provided otherwise, the commencement of Insolvency Proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms thereof. Dutch Insolvency rules in principle do not affect these termination clauses.

Subject to the considerations with regard to article 38/237 BA (set out in the previous paragraph) and - assuming the Commodity Transactions do not qualify as Delivery Agreements as referred to in articles 37b/237b BA as also explained above - we are of the opinion that the Termination Clause permitting the Terminating Party to terminate the EFET Power Contract and all the Individual Contracts entered into thereunder upon the Insolvency of a Counterparty is enforceable under the laws of this jurisdiction.

4.3.2 Automatic early termination

As set out above, under Dutch law the main principle is that, unless provided otherwise in the contract, the commencement of Insolvency Proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms thereof. Automatic 3close out clauses as referred to in Clause 10.4 of the EFET Power Contract therefore remain intact.

There is case-law confirming the effectiveness of automatic close out clauses, which operate immediately prior to or upon the Insolvency of one of the Parties. We are also not aware of any basis upon which such automatic close out clauses could violate any mandatory statutory provisions of Dutch law (except in the case of very specific Delivery Agreements and Purchase Agreements as mentioned in 4.2 above) or

[18] There is no guidance from case law or otherwise as to what constitutes a Delivery Agreement. Although it appears to be unlikely that such Delivery Agreements would be documented between a German energy or heating supplier and its Dutch customer(s) in the form of the EFET Power Contract, it cannot be ruled out and EFET members are advised to seek separate advice when in doubt.

Dutch public policy. Furthermore, Dutch contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. In addition thereto, with respect to certain futures contracts, Dutch insolvency law itself provides for automatic termination in the event of bankruptcy (see *inter alia* article 38/237 BA) of one of the Parties (see paragraph 4.2 above).

On the basis of the arguments set out above, it is our opinion that the Termination Clause as referred in Clause 10.4 of the EFET Power Contract automatically terminating the EFET Power Contract, including all Individual Contracts entered into thereunder, upon the Insolvency of a Counterparty should be upheld by the Dutch courts, and that the Insolvency Representative will not have the opportunity to disclaim or accept Individual Contracts depending on their profitability, since no Individual Contracts will be outstanding at the time he is appointed.[19]

It is not required for the enforceability in this jurisdiction of the Termination Clause of the EFET Power Contract to include the "single agreement" principle of Clause 1.1 of the EFET Power Contract. Also, all or some Individual Contracts may be terminated if a Material Reason occurs.

4.3.3 Calculation and payment of a Termination Amount

(a) ***Recognition of choice of law***

As regards the contractual obligations arising under as pursuant to the EFET Power Contract (including the Appendices and Annexes) the choice of law provision of Clause 22.1 of the EFET Power Contract will be recognised in this jurisdiction and the Governing Law would accordingly be applied by the Dutch courts if such contracts or any claim thereunder comes under their jurisdiction upon proper proof of the substantive rules of the Governing Law.

When applying the Governing Law, the competent courts of The Netherlands may or shall act as follows as a result of Rome I:

[19] As noted in paragraphs 4.3.4/4.12 and qualification 5.2.3 below, if Automatic Termination applies to a Counterparty which is a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm or a Dutch Investment Fund, the appointment of a silent administrator (*stille curator*) pursuant to article 1:76 FMSA may trigger close-out netting under the Termination and Netting Clauses (depending on their scope according to the Governing Law). As such appointments by their nature may not be publicly known, the Solvent Party may be faced with automatically terminated Transactions without being aware of such fact. Therefore, it is suggested to exclude the appointment of such silent administrator from the scope of the automatic termination in relation to such regulated entities.

(i) they may give effect to the overriding mandatory provisions (i.e. provisions the respect for which is regarded as crucial for a country for safeguarding its public interests, such as its political, social or economic organisation), to such an extent that they are applicable to any situation falling within their scope, irrespective of the Governing Law, of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (article 9(3) Rome I);[20]

(ii) they will apply the overriding mandatory provisions of the law of The Netherlands (article 9(2) Rome I);[21]

(iii) they may refuse to apply the Governing Law if such application is manifestly incompatible with the public policy of the Netherlands (article 21 Rome I);[22] and

(iv) they shall regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (article 12 (2) Rome I).

(b) ***Scope of chosen law***

Pursuant to article 12 of Rome I, the law determined to be applicable to a contract on the basis of Rome I will govern the interpretation and performance of the contract as well as the consequences of nullity or a breach of contract (including the assessment of damages and termination) and the statutory limitations on bringing suit for a breach. With respect to the EFET Power Contract (including the Appendices and Annexes) this entails that in principle the Governing Law governs the remedies provided to the Parties pursuant thereto. Therefore, if these remedies are enforceable in accordance with the terms of the EFET Power Contract under the

20 Where the dispute is solely over the contractual aspects of a transaction of a commercial or financial nature, Dutch courts have so far refused to give such overriding effect to certain mandatory rules, even in cases where there seemed to be every opportunity to do so. For this reason we consider the risk of mandatory rules of foreign jurisdictions be applied by Dutch courts to be remote.

21 The prevailing attitude in Dutch case law is that only Dutch rules which are of a "public law nature" (e.g. exchange control regulations, banking regulations, competition rules) are mandatory rules which are capable of overriding the chosen law.

22 From case law it appears that the test for manifest incompatibility with public policy will only be met in extraordinary circumstances, such as where the application of foreign law would violate fundamental principles of Dutch law or contravene international law.

Governing Law, this will in principle be recognised by the courts of The Netherlands.

However, the Governing Law will not govern every aspect of the EFET Power Contract and the relations of the Parties thereunder. For example, the EU Insolvency Regulation or Dutch insolvency law (including the rules implementing Solvency II and the WUDCI), as the case may be, will govern the question whether the Netting Clause and the Termination Clause (assuming their validity and effectiveness under the Governing Law) will be enforceable against the Insolvency Representative in the event of Insolvency Proceedings being declared in this jurisdiction. Also, in such Insolvency Proceedings, the contractual calculation of damages arrangements under the EFET Power Contract may only be recognised within the limits of Dutch Insolvency set-off. Please see section (c) below in this respect.

If both Parties to the EFET Power Contract would be established in The Netherlands, the validity of the choice for a Governing Law (not being Dutch law) is uncertain as in these circumstances, an "international connection" appears to be missing. In view of the type of transactions contemplated under the EFET Power Contract, however, a persuasive argument could be made that there is a sufficient international connection, but the matter is as yet undecided.[23]

(c) ***Analysis under Dutch Insolvency law***

The determination of the Termination Amount could, depending on the characterisation under the Governing Law, be treated by the Dutch courts either:

(i) as an agreed procedure – not involving the legal device of set-off – for arriving at a single net amount representing a Party’s damages

[23] In our view, the question whether or not a contract has an international character cannot always be answered exclusively on the basis of the factual (geographical) connecting factors which the contract has with one or more countries. In particular, contracts that concern a certain sector of international economic activity (so-called "international market" contracts) may have to be qualified as truly international contracts, so as to enable the parties to designate themselves the law governing their contract. This may also be the case where the choice of a certain Governing Law (e.g. German law) is, to a significant extent, international market practice or where the contract is embedded in a larger transaction. This view is in accordance with the authoritative conclusion by *Advocate-General Strikwerda* before HR 26 May 1989 NJ 1992, 105 NILR 1991, 408 [Zerstegen-Van der Horst B.V. v. Norfolk Line B.V.] and in accordance with the prevailing view in legal writing (*Vonken* 2002 (T&C Vermogensrecht), p. 1720). We believe that it is likely that a Netherlands court would for this reason qualify the EFET Power Contracts as "international market contracts" and can also be regarded as being international because the choice of German law which is, to a significant extent, international market practice, even in the event that two Dutch parties would enter into such EFET Power Contract in which they make a choice for German law, but in the absence of case law this is not certain;

on close out of certain or all Individual Contracts under the EFET Power Contract; or

(ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both Parties from terminated Individual Contracts pursuant to the EFET Power Contract.

For an analysis of the determination of the Termination Amount under the laws of this jurisdiction (pre-Insolvency) please see paragraph 4.13.

As to (i):

Under the laws of this jurisdiction there is no rule of law that, as a matter of principle, invalidates a calculation of damages that is valid under the Governing Law. Dutch law allows parties to stipulate in advance how damages will be calculated in case of early termination of certain or all transactions, due to breach or otherwise. In Insolvency Proceedings, such agreements remain effective. However, it is conceivable that the Dutch courts would test whether mandatory Insolvency set-off provisions are compatible with (i.e. achieve a result similar to that of) the determination of the Termination Amount as set out in the Netting Clause (see below).

As to (ii):

The Netting Clause does not appear to lead to a result contrary to mandatory Dutch Insolvency set-off provisions. In the event that a creditor of an insolvent debtor is also the latter's debtor, the BA (article 53 for bankruptcy and article 234 for moratorium) allows this creditor/debtor to plead a set-off provided that his claim(s) and his obligations (expressed in the same currency or "generic consideration"):

(a) have come into existence before the date of the Insolvency; *or*

(b) resulted directly from (one or more) transactions with the bankrupt entered into prior to the date of the judgement opening Insolvency Proceedings.

Insolvency set-off is therefore allowed and contractual set-off arrangements can be enforced in Insolvency Proceedings, provided that (a) claim and counterclaim have "pre-insolvency origins" and (b) there is "mutuality", (as explained in paragraph 2.2.8)[24] and (c) the claim and

[24] There is recent Supreme Court case law confirming the validity of multi-party contractual set-off clauses in Insolvency Proceedings (*HR 15 November 2019, JOR 2020/22, NJ 2020/166* [Crienen/Bontrup]), which means that the requirement of mutuality for a valid insolvency set-off has been relaxed in cases where there is a contractual arrangement governing multi-party set-off.

counterclaim are expressed in the same currency or "generic consideration". To the extent that either the claim or the counterclaim does not result from pre-insolvency transactions or there is no such mutuality or single currency, a contractual set-off will not be effective in Insolvency Proceedings. For the purpose of this Opinion Letter, we have assumed that there will be mutuality between the Parties.[25] Equally, we have assumed that none of the Individual Contracts will have been entered into between the Parties, and none of the counterclaims shall have arisen under legal relationships originated, after the Commencement Time in relation to the Insolvent Party. We also understand that the EFET Power Contract provides for conversion by the Terminating Party of all amounts due and payable into a single currency in accordance with a pre-agreed conversion rate of exchange which will satisfy requirement (c).

(d) ***Effect of EU Insolvency Regulation***

Treatment as Set-Off

In the event that the EU Insolvency Regulation applies to Insolvency Proceedings in this jurisdiction[26] ***and*** the Netting Clause would be treated as a contractual set-off arrangement by the courts in this jurisdiction, a set-off is permitted in each of the two following situations:

(i) if it is permitted under Dutch insolvency law (article 7.2(d) of the EU Insolvency Regulation); or

(ii) if it is permitted by the insolvency rules of the Governing Law that is applicable to the insolvent debtor's claim (article 9(1) of the EU Insolvency Regulation) even if not permitted under Dutch law.

Consequently, in principle the Insolvency law of this jurisdiction would determine whether a set-off is permitted, and if not, such a set-off may still be valid if permitted under the insolvency rules of the Governing Law. Thus, a set-off which is not possible due the restrictions mentioned in subparagraph (c) above or paragraph 5.2 below (but probably not 5.2.1[27]),

[25] We note that as a result of assignment under Clause 19 of the EFET Power Contract, the mutuality required for set off could be jeopardised.

[26] I.e. where the Insolvent Party is a Dutch Company, a Dutch Partnership or an Unregulated Fund with a COMI in this jurisdiction or a Foreign Company whose COMI is in another Regulation State and territorial or secondary proceedings are opened in this jurisdiction in respect of its Dutch Branch(es). One minor category of Dutch Credit Institutions are also subject to the EU Insolvency Regulation, namely "opt-in" banks as referred to in article 3:4 FMSA. At present there are no such banks having that status.

[27] There are some limitations of Dutch insolvency law which may adversely affect the enforceability of netting or set-off pursuant to the Netting Clause, even when a set-off would be permitted as a matter of the insolvency rules of

may still be accepted by the courts of this jurisdiction if it is permitted under the insolvency rules of the Governing Law.[28]/[29] However, we express no views as to the validity of the close-out netting and/or set-off provisions under the Governing Law.

Treatment as Set-Off Uncertain

The courts of this jurisdiction may not apply articles 7.2(d) and 9(1) of the EU Insolvency Regulation to the Netting Clause, particularly if they take the view that such Netting Clause includes features other than set-off[30], *i.e.* a method of valuation of Individual Contracts as well as the termination of Individual Contracts (see paragraph 4.3.3(c)(i) above). If this interpretation is followed, articles 7.2(d) and 9(1) EU Insolvency Regulation will not be applicable to the Netting Clause and the general rule of article 7 EU Insolvency Regulation will apply, which means that Dutch Insolvency law shall determine the effectiveness of the Netting Clause. Please refer to paragraph (c) above and the restrictions mentioned under paragraphs 4.15 and 5.2 below.

We express no view as to whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close-out netting for the purposes of the EU Insolvency Regulation.

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the Governing Law. Dutch courts could give effect to these limitations, in particular when they can be regarded as an expression of overriding principles (e.g. the 'fixation principle'; paragraph 5.2.1 below) prevailing in Dutch insolvency law, or because the results reached by the Governing Law's insolvency rules would be manifestly incompatible with Dutch public policy (article 27 EU Insolvency Regulation).

[28] This is sustained by analogy by the interpretation of article 16 EU Insolvency Regulation given in Dutch (Supreme Court and lower) case law and by the Virgós/Schmit Report. Article 16 EU Insolvency Regulation protects the rights of counterparties to transactions that could be challenged on the basis of "voidable preference" in the same manner as article 9(1) EU Insolvency Regulation does, i.e. by giving the *lex contractus* overriding effect if the *lex concursus* would permit such a challenge. Pursuant to unwritten Dutch international private law, article 16 EU Insolvency Regulation also applies if the Governing Law is non-EU law.

[29] This analysis also applies where the Insolvent Party's claims are not governed by an EU system of law. In our view, the right to demand set-off is not limited to situations where the Counterparty's claim is governed by the law of a Member State, but should also be allowed when this claim is governed by the law of a non-member state. Article 9 EU Insolvency Regulation does not require that this *lex causae* must be the law of a Member State. It does not explicitly refer to the laws of another Member State while other provisions of the EU Insolvency Regulation do expressly confine the applicability of a law other than the *lex concursus* to laws of a Member State. Moreover, the case law of the European Court of Justice of 16 January 2014 (*C-328/12 [Ralph Schmid v Lilly Hertel*]) provides an argument that article 9 also applies if the *lex causae* is the law of a third country. This is, in our opinion, the better view.

[30] This interpretation is supported by the fact that other EU legislation contains specific rules with respect to netting provisions distinct from the rules dealing with set-off (*e.g.* provisions in the WUDCI; see (g) below).

(e) ***Conclusion***

The general principles of insolvency set-off as outlined above lead to the conclusion that (subject to our observations in subparagraphs (c) and (d) above and in paragraphs 4.15 and 5.2 below) the Netting Clause will be recognised and is enforceable in Insolvency Proceedings, provided that the obligations to pay the Settlement and Termination Amount(s) have "pre-insolvency origins".

(f) ***Perfection requirements***

Furthermore, for set-off to be effective, it is not necessary under the laws of The Netherlands to file, register or otherwise record in any public office or elsewhere the claim and counterclaim or to comply with any other formality in The Netherlands in relation thereto. It is required, however, to notify the Insolvency Representative that the right to set-off has been exercised; failure to do so will not invalidate netting or set-off.

(g) ***Effect of the WUDCI***

In accordance with the WUDCI, the insolvency laws of The Netherlands determine the effects of Insolvency Proceedings on the EFET Power Contract and the Netting Clause with Counterparties that are Dutch Credit Institutions, Dutch Investment Firms[31] or Third Country Credit Institutions.

Treatment as Set-Off

If the Netting Clause qualifies as a set-off arrangement within the meaning of article 23 WUDCI, then in the event Insolvency Proceedings are commenced in this jurisdiction in respect of a Dutch Credit Institution, a Dutch Investment Firm or a Third Country, a set-off is permitted - solely as a matter of the rules implementing the WUDCI - in each of the two following situations:

(a) if it is permitted under Dutch Insolvency law (article 10.2(c) WUDCI); or

(b) if it is permitted by the law that is applicable to the entity's claim (article 23 WUDCI and article 212w BA).[32]

[31] The WUDCI was amended by article 117 BRRD to cover Dutch Investment Firms and EEA Investment Firms. This has been implemented in article 212oo BA.

[32] In our view, the right to demand set-off is not limited to situations where the Dutch Credit Institution's claim is governed by the law of an EU Member State (other than Denmark), but should also be allowed when this claim is

This means that a set-off, as contemplated by the Netting Clause, will be allowed if and to the extent that it is permitted under the Governing Law, being the law which governs such entity's claim under the EFET Power Contract, even if Dutch Insolvency law did not allow a set-off as contemplated by the Netting Clause.

Treatment as Netting

However, if the Netting Clause, together with the Termination Clause, is regarded as a "netting agreement" within the meaning of article 25 WUDCI, then in the event Insolvency Proceedings are commenced in respect of a Dutch Credit Institution, a Dutch Investment Firm or a Third Country Credit Institution, the effectiveness of the Netting Clause will be determined *solely* by the Governing Law[33], but without prejudice to the Resolution Measures under articles 1:76b, 3a:57 and 3a:54 FMSA (see paragraphs 5.3.2 and 5.3.4 below).

Article 25 WUDCI refers to the *lex contractus* as "solely" governing a netting agreement, which implies that the insolvency rules of the Governing Law exclusively determine the validity and effectiveness of a netting agreement in the relevant Insolvency Proceedings. Therefore, the restrictions outlined in (c) and (d) above and in paragraphs 4.15 and 5.2 below would then not apply.

We express no view as to whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close out netting for the purposes of the WUDCI.

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governed by the law of a non-member state. Neither article 23 WUDCI, nor article 6 of the EU Insolvency Regulation, nor article 212w BA require that this right of set-off is restricted to the law of an EU Mmber State. However, it has been argued in legal writing that the restriction to the law of an EU Member State must be implied in these provisions, because other provisions of the WUDCI and the EU Insolvency Regulation do expressly confine the applicability of a law other than the lex concursus (article 4) to situations where that other law is the law of an EU Member State. Even if this interpretation is correct (which we dispute), the Dutch courts may still apply article 23 WUDCI by way of analogy (i.e. to the situation where the governing law is that of a non-member state), so that set-off may still be possible if permitted under the law of a non-member state.

33 Article 25 WUDCI has been implemented in article 212ff BA (for bankruptcy). Unfortunately, in both articles a "netting agreement" is defined by reference to netting of payment or transfer orders in the context of payment or clearing systems designated in accordance with the EU Directive on the Limitations of Systems Risk in Payment and Securities Settlement Systems (the "**EU Settlement Finality Directive**") and it can therefore be argued that The Netherlands has incorrectly implemented the WUDCI in this respect. As the Dutch courts are required generally to interpret Netherlands law in accordance with the EU directives implemented by that law, we expect such courts to interpret article 212ff BA in accordance with the WUDCI and accordingly to determine the effectiveness of the Netting Clause solely by the Governing Law.

(h) ***Effect of Solvency II***

In line with the WUDCI, the laws of this jurisdiction provide that the laws of the home EU Member State will be applied in the event of insolvency of an EEA Insurance Company, even if such insurance company has branches in another EU Member State, including in this jurisdiction. Therefore, the laws of this jurisdiction will be applied by the Dutch courts in the event of an Insolvency of a Dutch Insurance Company or a Third Country Insurance Company.

The same rules with regard to insolvency set-off as are applicable to Dutch Credit Institutions, also apply to Dutch Insurance Companies and Third Country Insurance Companies. This follows from article 213r BA. There is no separate rule of law in Solvency II and in this jurisdiction with regard to "netting arrangements" entered into by Dutch Insurance Companies that is equivalent to article 25 WUDCI.

(i) ***Splitting-up or segregation***

There are no rules under Dutch Insolvency law that would lead to a splitting-up or segregation of the portfolio of Individual Contracts under an EFET Power Contract into two or more "netting pools". It is possible, however, that:

(a) certain Individual Contracts are subject to mandatory automatic termination (see paragraph 4.2.1 above), while others can still be terminated by notice after the judgment declaring the commencement of Insolvency Proceedings;

(b) in the special situations outlined in 4.2.2 above, termination of certain Individual Contracts may not be possible, while other Individual Contracts can be terminated (automatically or by notice).

(j) ***Documentary evidence with respect to Insolvency***

Other than published court judgements and the abbreviated publication thereof in the Official State Gazette (*Staatscourant*), there is no easily accessible and conclusive evidence available in this jurisdiction with respect to Insolvency of Counterparties. In addition, an application for bankruptcy or moratorium of payments is generally not known to the public. Despite not determining this conclusively, the following searches and enquiries evidence to a large extent whether a Counterparty is declared bankrupt, has been granted a moratorium of payments or has entered public WHOA Proceedings:

(i) an online search can be performed with the Central Insolvency Register (*Centraal Insolventieregister*) referred to in articles 19a and 222b of the BA[34] which can show that a Counterparty has been declared bankrupt, granted a moratorium of payments or is subject to public WHOA Proceedings (such WHOA Proceedings also registered (at https://www.rechtspraak.nl/Registers/Paginas/whoa.aspx) but sometimes with considerable delays).

(ii) the Dutch Chamber of Commerce (the "**Chamber**") can confirm by telephone that:

(1) a Counterparty has registered a voluntary winding-up resolution;

(2) such Chamber is itself taking any steps to have a Counterparty dissolved;

(3) it has registered an order placing any assets of a Counterparty under administration (*onderbewindstelling*); and

(4) there is a registration of any order by the Court of first instance for the dissolution (*ontbinding en vereffening*) of a Counterparty.

For the avoidance of doubt, here is no formal register of judgments, declarations or orders as referred to in (2), (3) or (4) above.

(iii) an online search can be performed with the EU Insolvency Register[35] (*EU Insolventieregister*) to verify that in respect of a Counterparty which is subject to the EU Insolvency Regulation none of the EU Insolvency Procedures have been registered in any other Regulation States.

Pending applications and Resolution Measures cannot be found in any public register.

4.3.4 Calculation and payment of a Termination Amount under an automatic termination scenario

The same analysis as set out in paragraph 4.3.3 with regard to the calculation and payment of a Termination Amount also applies in the

[34] www.insolventies.rechtspraak.nl . A subscription can be arranged so that new registraions are automatically notified to a subscriber.

[35] https://www.rechtspraak.nl/Registers/Paginas/EU-Registraties.aspx

event of an automatic termination scenario. With respect to a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, or an Dutch Investment Fund (or its Manager or Custodian), it is noted that Clause 10.5(c) of the EFET Power Contract is so wide that it may (depending on the interpretation under the Governing Law) also cover the appointment of a so called "silent" or "special" administrator under the FMSA although such an appointment does not qualify as an insolvency proceeding under Netherlands law. As the appointment of such "silent" administrator will by its nature not be known to the public, the EFET Power Contract and any Individual Contracts may be terminated without the other Party being aware thereof. This can be avoided by excluding such an appointment from the automatic termination provision (see Appendix B). The same risk applies to WHOA Proceedings and Clause 10.5(c).

4.4 Validity Challenges pre and post Insolvency: Voidable Preference

4.4.1 General Voidable Preference Regime

Under Dutch law every creditor, but in bankruptcy (*faillissement*) only the liquidator (*curator*), has the power to nullify (by simple declaration) a transaction performed or entered into by the debtor (in this case the Counterparty) with a third party (in this case the other Party to the EFET Power Contract) prior to its bankruptcy, provided that:

(i) the transaction was entered into by the Counterparty voluntarily (*i.e.* in the absence of a legal or contractual obligation); **and**

(ii) the transaction was prejudicial to the recourse possibilities of some or all of the Counterparty's creditors (*e.g.* if the transaction leads to a reduction in the assets available for recourse by its creditors[36]); **and**

(iii) one of the following applies:

(A) at the time of the transaction both Parties knew or ought to have known of the fact that the transaction would have such prejudicial effect (the mere possibility that such detrimental effect might arise is insufficient); or

(B) in the event that the transaction is for nil consideration (*i.e.* gifts and other gratuitous dispositions), at the time of the

[36] This is determined ex-nunc (*i.e.* at time of nullification) on a factual basis: the current financial position of the creditors is compared with the hypothetical situation in which the voidable transaction has not taken place. The transaction is in any case deemed to be prejudicial if the balance sheet of the creditor(s) has deteriorated as a consequence thereof.

transaction, the Counterparty knew (or ought to have known) of the prejudicial effect, regardless of whether the other Party shared such knowledge; as presumably the EFET Power Contract and any Individual Contracts are entered into on commercial arm's length terms, this element (B) should not be relevant.

Therefore, there is a risk of a voidable preference challenge only if both Parties knew or ought to have known at the moment when the EFET Power Contract or any Individual Contract was entered into that such would have a prejudicial effect on the recourse possibilities of the Counterparty's other creditors.

4.4.2 Burden of proof

The burden of proof of all of the above elements set out in paragraph 4.4.1 rests upon the creditor or the liquidator who wishes to nullify the transaction, although a reversal of this burden in respect of the "knowledge requirement" (under paragraphs 4.4.1(iii) (A) and (B) above) is provided in law if the voluntary transaction took place less than one year before the creditor invokes the nullity of the transaction or - as the case may be - one year prior to the start of the bankruptcy, and falls within one or more of the statutory categories of “suspect” transactions. Such suspect transactions include:

(a) transactions by the Counterparty conducted at an "undervalue" (*i.e.* that the obligations of the Counterparty are of a value in far excess of the value of the obligations of the other Party at the time the relevant transactions are entered into);

(b) transactions between the Counterparty and a group company and acts of the Counterparty vis-à-vis a group company;

(c) transactions between the Counterparty and a legal entity of which a managing director (being a natural person) or a close family member of such managing director, is also a managing director of the Counterparty;

(d) transactions between the Counterparty and a legal entity of which the managing director (being a natural person) or the supervisory director (or their close family members) hold as shareholder (directly or indirectly) at least 50% of the issued share capital in the Counterparty; and

(e) transactions between the Counterparty and a legal entity where the same legal person holds (directly or indirectly) at least 50% of the issued share capital both in the Counterparty and the legal person.

There are no specific rules with regard to the proof to be provided. Proof can be provided in various forms, e.g. written documents such as notes or memoranda, oral evidence such as testimonies or taped conversations, or even circumstantial evidence; it is up to the courts to decide whether the proof is acceptable.

Apart from the reversal of the burden of proof for suspect transactions entered into one year prior to invoking the nullity of the transaction or - as the case may be - one year prior to the start of the Insolvency Proceedings, there are no "suspect periods" in relation to the *Actio Pauliana* or otherwise under Dutch law.

4.4.3 Limitation period

Voidable preference has a limitation period of three years from the date on which a liquidator or prejudiced creditor discovered the detrimental effect of the transaction.

4.4.4 Analysis

In order to assess the potential impact of a nullity challenge, one must carefully distinguish between (i) the absence or presence of a contractual obligation for the Counterparty to enter into the EFET Power Contract and/or an Individual Contract and (ii) the actual performance of obligations under such EFET Power Contract and/or Individual Contract. The reason for this lies in paragraph 4.4.1(i) above: only voluntary transactions can be nullified. This means that where the Counterparty's entry into of the EFET Power Contract or an Individual Contract cannot be challenged, then any subsequent compliance with any obligations arising thereunder by the Counterparty will also be "safe", because they can then be characterised as involuntary transactions (*i.e.* transactions for which a contractual obligation exists). Therefore, in this opinion we will focus on the Counterparty's assumption of contractual obligations by entering into the EFET Power Contract and/or an Individual Contract.

It is likely that the assumption of contractual obligations by entering into the EFET Power Contract and/or an Individual Contract by the Counterparty could be considered as a voluntary act (unless the Governing Law analysis is different). If the EFET Power Contract or an Individual Contract was entered into within one year before the relevant creditor invokes the nullity, it should be assessed whether the EFET Power Contract and/or the Individual Contract may be considered a "suspect" transaction as described above. It is unlikely that the entering into of the EFET Power Contract and/or an Individual Contract would be considered as a 'transaction for nil consideration' (see 4.4.1(iii)(B) above), and therefore only issues 4.4.1(ii) and 4.4.1(iii)(A) above should be considered.

As to issue 4.4.1(ii): clearly if the Counterparty remains solvent (*i.e.* able to pay its debts and does not provide insufficient recourse to its creditors as a result of entering into the EFET Power Contract and/or an Individual Contract), then a creditor would not be able to nullify the EFET Power Contract and/or the relevant Individual Contract because the requirement under 4.4.1(ii) above will not be satisfied.

As to issue 4.4.1(iii)(A): unless the assumption of the obligations under the EFET Power Contract and/or the Individual Contract took place within one year before the creditor or liquidator challenges it, the creditor/liquidator will need to show that the Counterparty was aware or ought to have been aware of the fact that assuming the obligations under the EFET Power Contract and/or the relevant Individual Contract would give rise to such prejudicial effect (the real or constructive knowledge of the mere possibility that such detrimental effects might arise being insufficient). If an objective financial analysis of the Counterparty's position can only lead to the conclusion that no prejudice to the Counterparty's other creditors should occur, then this will be the Counterparty's best defence.

4.4.5 Additional claw back risk

In addition to the nullity challenge described above, in a bankruptcy (f*aillissement*) the liquidator (c*urator*) has the power (under article 47 BA) to invoke the nullity of and claw back any of the Counterparty's contractually required payments or transactions effected before the Commencement Time in the event that:

(a) the other party knew or ought to have known at the time of such payment or transaction that a petition for the Counterparty's bankruptcy had been filed with the court; or

(b) the payment or the transaction resulted from concerted action of the Counterparty and the other party aimed at preferring the latter to the detriment of the Counterparty's other creditors.

Accordingly, to the extent that it can be demonstrated that any act performed by the Counterparty prior to becoming subject to bankruptcy in order to satisfy or extinguish an obligation under the EFET Power Contract or an Individual Contract (each such legal act and extinguishments of debt (hereinafter referred to as "**Obligation Performance**"):

(i) occurred at the moment that the other Party knew or ought to have known that a request for bankruptcy of the Counterparty had been filed; or

(ii) was the result of collusion between the two Parties as referred to under (b) above,

such Obligation Performance could be nullified.

4.4.6 Protection under the Governing Law

Under the EU Insolvency Regulation[37], the WUDCI (implemented in article 212ee and 212oo BA) and Solvency II (implemented in article 213z BA), a claim by the liquidator for nullification on the basis of voidable preference as described above will only be successful if it would *also* be possible under the insolvency law of the Regulation State of the chosen law governing the preferential agreement or transaction itself (i.e. in this case the Governing Law, assuming this is the law of a Regulation State[38]). The relevant articles of law provide the Solvent Party the opportunity to prove that under such Governing Law (applicable to the relevant claim) no such nullification is allowed or that the conditions for nullification are not met.[39]

In case the Governing Law is not that of a Regulation State, for example English or Danish law, the same outcome will apply to protect the Solvent Party because (according to Supreme Court (*Hoge Raad*) case-law[40]) article 16 of the EU Insolvency Regulation constitutes a generally applicable rule of Dutch private international law (i.e. regardless of whether the governing law is that of a Regulation State).

[37] Article 16.

[38] This means that the requirements for nullification of both the BA and of the Governing Law and each Individual Contract should be satisfied. If it is not possible, for example, under German law for a German insolvency representative to set aside the EFET Power Contract, then the Insolvency Representative cannot do so either.

[39] See: ECJ 16 April 2015, JOR 2016/169 [Lutz/Bauerle]; ECJ 15 October 2015, JOR 2016/170 [Nike/Sportland]; ECJ 8 June 2017, JOR 2017/250 [Vinyls].

[40] HR 24 oktober 1997, *NJ* 1999, 316 (*Gustafsen/Mosk*)

4.5 Creditor's rights pre and post Insolvency: Procedural issues

4.5.1 Termination and close out netting at or before the time of the filing of a petition seeking a judgment opening Insolvency Proceedings.

Please see our opinion in paragraphs 4.3.1 and 4.3.2 on the effectiveness of the Termination Clause in the event of Insolvency Proceedings. The same analysis as set out in those paragraphs also applies in the event of termination prior to Insolvency for other Material Reasons than Insolvency. Also see paragraph 4.10 below.

If the EFET Power Contract is terminated prior to the Commencement Time of Insolvency Proceedings or prior to the opening of WHOA Proceedings in respect of a Counterparty, the analysis set out in paragraphs 4.8 and 4.13 with regard to the effectiveness of the Netting Clause pre-Insolvency applies.

4.5.2 Recognition of the filing of Insolvency Proceedings by a court

With regard to the effectiveness of the Termination Clause and the Netting Clause in the event a petition has been filed requesting Insolvency Proceedings in respect of a Counterparty, please see our analysis in paragraphs 4.3, 4.8, 4.13 and 4.17.

4.5.3 Date on which a court determines a Counterparty's Insolvency

Please see our analysis in paragraph 4.3, qualification 5..2.1 below and the general description of Insolvency Proceedings, WHOA Proceedings and Resolution Measures in Appendix A.

4.5.4 Any other stage of the proceedings where a creditor’s rights may be affected.

In addition to our analysis in paragraphs 4.1 - 4.4 above and the discussion of WHOA Proceedings and Resolution Powers in paragraphs 5.3 – 5.5 below, there are no other issues that should be brought to your attention in relation to the creditor's rights with regard to the Termination Clause and the Netting Clause. Note that in order to exercise the "bail-in" Resolution Power in respect of Counterparties that are BRRD Entities or Dutch Insurance Companies, DNB will be empowered to terminate derivatives contracts.[41]

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[41] Under the BRRD, a "*derivative*" is defined by cross-reference to article 2(5) of EMIR ("a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC [MiFID1] as implemented by article 38 and 39 of Regulation (EC) No 1287/2006"). This includes commodity derivatives.

4.6 Treatment of physically settled Commodity Options

We refer to our analysis with regard to certain forward transactions in paragraph 4.2 above. Although this is not settled, it may be argued that physically settled options such as Commodity Options, entail the future delivery of commodities as referred to in article 38/237 BA. If this is indeed the case, then with effect from the Commencement Time, all outstanding and exercised Commodity Options with a delivery and settlement date after the date of Insolvency are terminated by operation of law.

Furthermore, it is generally held that an option qualifies under the laws of this jurisdiction as an irrevocable offer to enter into an agreement, *i.e.* in the case of a Commodity Option the irrevocable offer to buy a certain quantity of Commodities against a certain pre-agreed price, the strike price. The acceptance of such offer is considered to be the exercise of the option. As a result of the fixation principle (as referred to in paragraphs 4.12 and 5.2.1), the rights of creditors are unalterably fixed as of the date of the Insolvency judgement. This implies *inter alia* that in the event of Insolvency of a Counterparty that is an option seller, the acceptance of the offer to enter into an agreement is not binding the Insolvent Party's estate after the Commencement Time.[42] For such binding effect of the exercise of an option such as a Commodity Option after the Commencement Time the cooperation of the Insolvency Representative is required.

4.7 Safe harbour for derivatives

Dutch Insolvency law does not provide for "safe harbour" provisions for certain types of derivatives from which the Transactions would benefit but if a BRRD Entity or a Dutch Insurance Company becomes subject to Resolution Measures, the Resolution Safeguards (such as those safeguarding close-out netting, set-off etc) will apply; these are discussed in paragraphs 5.3/5.4 below.

4.8 Pre-Insolvency Set off

4.8.1 Pre-Insolvency Set-off of claims arising under the EFET Power Contract

Please see our advice with regard to set-off in the event of Insolvency in paragraph 4.3.3(c) through (h). The following analysis applies in situations where no Insolvency Proceedings have been declared in respect of a Counterparty.

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[42] Confirmed by the Supreme Court on 5 januari 1923, NJ 1923, 359.

(a) Applicable law

Where the relevant claims subject to netting or set-off arise from the same agreement containing a netting or set-off arrangement, the law governing the agreement governs the set-off between these claims. This follows indirectly from article 17 Rome I, which provides that, where the right to set-off is not agreed between the Parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted. As the text indicates, this conflict rule does not apply where the set-off is agreed between the Parties, as is the case in the EFET Power Contract. The reasoning behind this presumably is that where set-off has been agreed, the law governing the contract (articles 3 and 4 Rome I) in which it has been agreed applies to the requirements for a valid set-off. Further support is provided by article 12(1)(d) Rome I, which provides that the proper law of an agreement governs "the various ways of extinguishing obligations".

Therefore, outside Insolvency Proceedings, the Governing Law of the EFET Power Contract should properly determine whether:

- the Netting Clause is valid and effective and whether the Settlement Amounts determined under the Netting Clause may be set-off in accordance with the provisions of the Netting Clause.
- whether the Parties are entitled to exercise the contractual rights of set-off under the Netting Clause in respect of the Settlement Amounts.

This analysis applies regardless of whether an Individual Contract is cash or physically settled and regardless of the underlying commodity or product.

(b) Set-off pre-Insolvency under the laws of this jurisdiction

The statutory provisions in this jurisdiction concerning set-off are of a non-mandatory nature. Article 6:127 DCC provides that where two parties are each others' mutual creditor and debtor, each of these parties can, *by means of a declaration to the other*, in principle set off the mutual claims up to the amount which they have in common. Outside Insolvency Proceedings (in addition to the requirement that there should be a declaration by the party invoking set-off, there being no requirement as to the form of such declaration, provided that the message has reached the other party) the following requirements apply to set-off:

(i) the parties have to be each others' mutual creditor and debtor and are acting in the same capacities;

(ii) the mutual claims should correspond to each other (*i.e.* in case of monetary claims, the claims should as a general rule be expressed in the same currency);

(iii) the party invoking set-off is entitled to pay his debt (*e.g.* the debt has matured or may be prepaid); and

(iv) the counter-claim of the party invoking set-off is enforceable.

Since the provisions of article 6:127 DCC are of a non-mandatory nature, the Parties can agree on a set-off arrangement which is broader than as set out therein, e.g. the set-off of obligations of multiple parties even if between such multiple parties the mutuality of claim and counterclaim is lacking.

Despite the requirement set out in paragraph (i) above, set-off by a debtor is allowed of (i) claims that are assigned under Clause 19.2 of the EFET Power Contract by the debtor's creditor to a third party with (ii) counterclaims such debtor may have on the original creditor, provided such counterclaims arise under the same legal relationship as the transferred claim or such counterclaims were already due and payable before the transfer. Therefore, if a Party were to transfer its rights under the EFET Power Contract to another party, the other Party could still invoke set-off of counterclaims that have risen under the EFET Power Contract, regardless of the transfer.[43]

4.8.2 Set-off of claims arising under the EFET Power Contract with claims between the Parties under another agreement

The same analysis as set out in paragraph 4.3.3(c) through (h) with regard to Insolvency set-off and in paragraph 4.8.1 with regard to pre-Insolvency set-off under the laws of this jurisdiction also applies to set-off of claims arising under the EFET Power Contract with claims between the Parties arising under another agreement, provided this is not ruled out in the EFET Power Contract or such other agreement. Your specific attention is drawn to the requirement of mutuality, as well as the requirements that claim and counterclaim are expressed in the same currency, both in relation to pre-Insolvency and Insolvency set-off.

[43] This follows from article 6:130 CC; please see paragraph 4.3.3 above.

If that law also applies to the set-off clause, the validity of such clause will be determined by the Governing Law. Please see also paragraph 4.8.1(a) on the laws applicable to set-off.

4.8.3 Set-off of claims arising under the EFET Power Contract between Affiliates or Credit Support Providers of Parties

Under the laws of this jurisdiction, the mutuality requirement for both pre- and post-Insolvency set-off requires that debtor and creditor under the cross-claims must be the same persons or entities. This requirement will not be met as generally the relevant affiliate (*i.e.* a subsidiary or likewise with legal personality) or Credit Support Provider will not be a debtor under the EFET Power Contract. However, this mutuality requirement can be contractually disapplied for both pre-Insolvency and Insolvency situations to create the possibility of a multi-party set-off (see paragraphs 4.3.3(c) and 4.8.1(b)), and such a pulti-party set-off will in that case be enforceable under the laws of this jurisdiction.[44] In our opinion, merely adding multiple (affiliated) parties to an EFET Power Contract is not sufficient to achieve the benefit of the new case law; there should be an actual multilateral set-off or netting clause in the relevant EFET Power Contract.

If that law also applies to the set-off clause, the validity of such clause will be determined by the Governing Law. Please see also paragraph 4.8.1(a) on the laws applicable to set-off.

4.9 Set-off and close-out netting as separate or similar rights?

The treatment of set-off in this jurisdiction pre- and post-Insolvency is described in paragraphs 4.8 and 4.3.3(c) through (h) respectively. For a description of close-out netting in the form of the Termination Clause and the Netting Clause please see paragraphs 4.3.1 - 4.3.3.

II. DISCUSSION OF SPECIFIC ISSUES RAISED IN INSTRUCTION LETTER

4.10 Termination for a Material Reason

Issue (a) on page 7 of the Instruction Letter

Assuming the Parties have not specified that Automatic Termination (as defined in Clause 10.4 of the EFET Power Contract) applies, the provisions of the EFET Power Contract permitting the Terminating Party to terminate the EFET Power

[44] As there is now Supreme Court caselaw confirming the validity of multi-party contractual set-off clauses in Insolvency Proceedings (*HR 15 November 2019, JOR 2020/22, NJ 2020/166 [Crienen/Bontrup]),*), the requirement of mutuality for a valid Insolvency set-off has been relaxed in cases where there is a contractual arrangement governing multi-party set-off.

Contract (including all Individual Contracts) upon the occurrence of a Material Reason are in principle valid and enforceable under the laws of this jurisdiction and Dutch Insolvency rules will not in principle affect these provisions. Please refer to paragraph 4.3.1 for a more detailed and extensive description.

4.11 Enforceability of Automatic Termination clause

Issue (bb) on page 8 of the Instruction Letter

On the basis of the arguments set out in paragraph 4.3.2 above, we believe that the Termination Clause as referred in Clause 10.4 of the EFET Power Contract automatically terminating the EFET Power Contract, including all Individual Contracts entered into thereunder, upon the opening of Insolvency Proceedings in respect of a Counterparty is in principle enforceable under the laws of this jurisdiction and should be upheld by the Dutch courts. Please refer:

- to paragraph 4.3.2 for a more detailed explanation;
- to paragraph 4.3.4 for a particular risk in electing Automatic Termination when dealing with certain regulated entities; and
- to paragraph 4.2.2 for a particular termination risk when dealing with Electricity Companies.

4.12 Election of Automatic Termination clause

Issue (a) and (b) on pages 7 and 8 of the Instruction Letter

Whether or not to elect Automatic Termination to apply upon a Material Reason described in Clause 10.5 (c) of the EFET Power Contract and to modify the scope of this clause depends on a number of factors.

There are two main risks involved in not using Automatic Termination:

(a) Firstly, Individual Contracts which are outstanding as of the Commencement Time and which are within the scope of article 38/237 BA (see paragraph 4.2.1 above) would be terminated by operation of law regardless of whether Automatic Termination applied or not. In our view, parties that do not apply Automatic Termination are more likely to overlook the fact that they need to take prompt action to cope with the potentially harmful effects of these articles from the BA.

(b) Secondly, for all outstanding Individual Contracts at the Commencement Time – irrespective of whether they are within the scope of article 38/237 BA – the 'fixation principle' enshrined in case law on the BA (see paragraph 5.2.1 below) could entail that the enforceability of the Netting Clause may be subject to the limitation that all calculations must be made by reference to a date not later than the date of the insolvency judgment. This means, inter alia, that the computation of the Termination Amount in accordance with the Netting Clause will have to be made on the basis of the rates prevailing on the date of the insolvency judgment. The result would be that the amount by which the net amount owing to the Solvent Party increased between the judgment date and the later date by reference to which the calculation was made becomes irrecoverable. When Automatic Termination is applied, all calculations in respect of an Individual Contract will by virtue of the EFET Power Contract have to be made by reference to the day of the default, while not electing Automatic Termination: (a) would give a Solvent Party the freedom to terminate outstanding Individual Contracts by notice on or after the date of the Insolvency judgment, but (b) could also give rise to the mistaken belief that by having the option of giving notice against a later date, the Solvent Party would be entitled to calculate the Termination Amount by reference to rates and values applicable at such later date (e.g. at the time it concludes a replacement transaction).

There are two main risks involved in using Automatic Termination:

(a) Firstly, the Non-Defaulting Party would not necessarily be apprised immediately of any petition seeking an insolvency judgment or indeed any such judgment regarding the Counterparty, which entails the risk that Individual Contracts will have terminated without the its knowledge.

(b) Secondly, the defaults triggering Automatic Termination are so widely drafted that they may well (depending on the interpretation under the Governing Law) include (i) "silent administration" (*stille curatele*), which is a form of emergency administration applicable to Dutch Credit Institutions, Dutch Insurance Companies, Dutch Investment Firms, and Dutch Investment Funds (or their Managers or Custodians) or (ii) WHOA Proceedings, and of which the other Party would not normally be aware (see paragraph 4.3.4 and qualification 5.2.3) . This would create the risk that the Non-Defaulting Party might be informed by the silent administrator (or the Insolvency Representative in subsequent Insolvency Proceedings) or the Counterparty itself with the claim that all Individual Contracts had terminated long ago, without the Non-Defaulting Party having had an opportunity to mitigate its damages or to unwind related transactions such as hedges.

Whether or not one selects Automatic Termination is therefore not driven by the need to preserve close-out netting rights in relation to Counterparties, but more by the assessment of the relative weight given to the risks outlined above.

On the basis of the analysis set out in paragraph 4.2.2(b), it may be recommendable to implement a grace period in Clause 10.5 (c) (iv) when trading with Electricity Companies entered into Purchase Agreements. The grace period should be made subject to a term in which a license will typically withdrawn. This will typically be within a period of approximately 10 days.

4.13 **Netting Clause**
Issues (c) and (d) on pages 8/9 of the Instruction Letter

To the extent the Netting Clause qualifies as an agreed procedure for calculation of damages, and the EFET Power Contract is governed by the laws of this jurisdiction, such laws allow parties to stipulate in advance how damages will be calculated in case of early termination due to breach or otherwise (article 6:87 of the DCC). Please also refer to paragraph 4.3.3(c) for a more detailed explanation.

To the extent the Netting Clause qualifies under the Governing Law as an agreed procedure for calculation of damages and is valid under such Governing Law, the laws of this jurisdiction will recognize it as such. Conclusion: if valid under the Governing Law, the Netting Clause (viewed as an agreed procedure for calculation of damages) will also be valid under Dutch law.

To the extent that the Netting Clause qualifies as a contractual set-off arrangement, then prior to Insolvency Proceedings, Parties are permitted to agree virtually any form of set-off arrangement (see paragraph 4.8.1(b) for a more detailed explanation.

4.14 **Single agreement principle**
Issue (d) on page 9 of the Instruction Letter

It is not required for the enforceability of the Termination Clause or the Netting Clause in this jurisdiction to include the "single agreement" principle of Clause 1.1 of the EFET Power Contract. Also, all or some Individual Contracts may be terminated if a Material Reason occurs. Please also refer to paragraph 4.3.2 for a more detailed explanation.

4.15 **Currency**
Issue (e) on page 9 in the Instruction Letter

In the Insolvency Proceedings of a Counterparty in this jurisdiction, any amount payable to the Solvent Party must be filed by it with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the date of the Insolvency judgment). This is a result of the application of articles 133/260 BA. It is not possible to obtain a payment from the Insolvency Representative in a currency other than Euro. The BA is unclear as to whether an official exchange rate is to be used, or a rate determined for example by the Solvent Party. However, it is commonly accepted that the only consequence of articles 133/260 BA is that the net amount resulting from the Netting Clause, if any such amount is owed to the Solvent Party, must be converted in Euro at the market rate of exchange prevailing on the date of Insolvency judgment, in order to be admitted in the Insolvency Proceedings.[45]

This also means that it is, as a matter of Dutch insolvency law, unlikely that the application of a base currency other than Euro (e.g. USD) would frustrate the operation of the Netting Clause.

4.16 Termination and close-out rights in Insolvency Proceedings of certain Counterparties

Issue (f) on page 9 of the Instruction Letter

4.16.1 Corporations (Dutch Companies)

Our general opinions above relating to Insolvency Proceedings (*i.e.* not the specific opinions relating specifically to certain types of Counterparties such as Dutch Credit Institutions) apply to Counterparties that are Dutch Companies.

For Counterparties that are Electricity Companies there is a risk that certain Individual Contracts that qualify as Delivery Agreements may not be capable of being terminated; please refer to paragraph 4.2.2.

4.16.2 Dutch Partnerships

(a) Overview of partnership concept

In this jurisdiction a general partnership *(vennootschap onder firma)* is a partnership created for engaging in a business under a common name. Unless the partnership agreement provides otherwise, each partner (a "**General Partner**") has authority to act on behalf of the general partnership. This authority includes the right to require the performance of all contracts entered into for and on behalf of the general partnership by any General Partner. General Partners are jointly and severally liable for all the obligations of the general partnership towards third parties.

A limited partnership (*commaditaire vennootschap*) is a partnership created for engaging in business and in which one or more of the partners agree to manage the business (the "**Managing Partners**") while one or more other partners, whose identity must remain undisclosed, agree to

[45] This is based on the view that insolvency set-off pursuant to articles 53/234 BA operate, in effect, outside the insolvent estate and therefore does not require the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 133/260 BA to be applicable.

abstain from involvement in the management and to contribute money or property on the condition that their liability for the Limited Partnership's losses is limited to the value of their contribution (the "**Limited Partners**"). Such agreements are generally set out in writing in a limited partnership agreement. Managing Partners are jointly and severally liable for all the Limited Partnership's obligations towards third parties. The "public" Limited Partnership makes itself known as such to the public (e.g. by using the letters "*c.v.*" or "*& Co.*") whereas the "silent" Limited Partnership only trades under the name of the Managing Partner(s).

General Partnerships and Limited Partnerships are not recognised under the current law of the Netherlands as entities with separate legal personality (*rechtspersoonlijkheid*), but as associative agreements aimed at a longer term co-operation for the conduct of a business (*uitoefening van een bedrijf*) for a joint account under a common name. For this purpose the partners undertake towards one another to contribute money, goods, rights and/or labour, in order that all of them shall share in the resulting profits. Where a General Partnership or a Limited Partnership is expressed to be a "party" to any document, this will be construed as a reference to the General/Managing Partner(s) acting in its or their capacity as general/managing partner(s) of the General/Limited Partnership.

The General/Managing Partner(s) may act in the Partnership's name, thereby creating (a) personal liability for debts so incurred, and (b) if there are two or more General/Managing Partners, the joint and several liability of all such General/Managing Partners. Limited Partners are not liable for such debts. Pursuant to Netherlands law, Limited Partners may not control the Limited Partnership in any way (except as set out below) or be active in its business in any way. A Limited Partner that breaches such prohibition shall be jointly and severally liable for all debts and obligations of the Limited Partnership. Limited Partners are also not allowed to represent the Limited Partnership under a power of attorney. Although there is some dispute about this, it is generally assumed that the Limited Partners may perform some internal activities.

Although general partnerships and limited partnerships are not separate legal entities under Netherlands law, they may be subject to Insolvency Proceedings and such Insolvency Proceedings do not automatically result in the insolvency of the General or Managing Partners. The court must be petitioned separately to declare Insolvency Proceedings in respect of such partners. Moreover, although the partnership's assets are not owned by the partnership as such (as it not a separate legal entity), to the extent that they are owned by the partners jointly, they do constitute a so-called 'segregated asset pool' (*afgescheiden vermogen*) in respect of which the partnership's creditors have rights of recourse ranking prior to the partners' personal creditors.[46] In the event of Insolvency Proceedings of a Partnership, its assets shall be distributed among the Partnership's creditors (taking into account insolvency costs) in priority over any creditors which any of the General/Managing Partners may have in any capacity other than that of General/Managing Partner.

(b) ***Partnerships and Insolvency / Set-Off***

The same analysis as set out above in paragraph 4.3.3 applies *mutatis mutandis* to Partnerships, subject to the following observations.

The Insolvency of a General Partner, Managing Partner or Limited Partner will not by operation of law result in the Insolvency of the Partnership itself.[47] Nevertheless, as the Insolvency of a General/Managing Partner may affect its ability to effectively manage the Partnership, it would generally be prudent to provide in the EFET Power Contract that where a General/Managing Partner is declared bankrupt or granted a moratorium of payments, automatic termination shall take place in the event that that General/Managing Partner is the sole general/managing partner of the Partnership or in the event that the other General/Managing Partner(s) is/are also declared bankrupt or granted a moratorium of payments, while termination by notice can take place in the event there are one or more remaining General/Managing Partners which have not been declared bankrupt or granted a moratorium of payments. The Insolvency of such a General or Managing Partner will, in principle, result in the dissolution (*ontbinding*) of the relevant Partnership. However, partnership agreements often contain a continuation arrangement (*voortzettingsregeling*) to avoid automatic dissolution of the Partnership as a whole in the Insolvency of a General or a Managing Partner. If this is the case, the enforceability of the Termination Clause and the Netting Clause vis-à-vis the relevant Partnership will in principle remain unaffected in the event of Insolvency of such a partner.

However, as set out in paragraph 4.3.3(c), a Dutch court may test whether mandatory Insolvency set-off provisions are compatible with the Netting Clause. One of the requirements of Dutch Insolvency set-off under articles 53/234 BA is the requirement of "mutuality". Insolvency set-off will be

46 Partnership creditors may also have rights of recourse against a partner's personal assets, if the segregated asset pool is not sufficient to meet all liabilities. Such rights of recourse may not effectively exist where these partners do not have a COMI or an establishment in The Netherlands.

47 Vice versa the Dutch Supreme Court has recently ruled that the Insolvency of the Partnership does not automatically lead to the Insolvency of the individual Partners.

allowed even where new partners are admitted to the Partnership or existing partners withdraw from that Partnership. This is because the Supreme Court has ruled[48] that new partners will also be jointly and severally liable for obligations already existing when they joined the partnership, so that Claims arising under Individual Contracts entered into before the appointment of a new partner can be set off with claims accruing under Individual Contracts entered into after such appointment.

In exceptional circumstances, however, the changing of General or Managing Partners could lead to the dissolution of the original Partnership and the creation of a new Partnership. It is generally held in legal writing that this will only be the case where the original partners have unequivocally stated their intention to this effect, in particular by publication of the dissolution in the Commercial Register of the Chamber of Commerce with which the Partnership is registered. If dissolution of the Partnership takes place, no set-off will be allowed in subsequent Insolvency Proceedings between claims arising under Individual Contracts entered into by the original Partnership and claims arising under Individual Contracts entered into by the new Partnership, as the required mutuality will be lacking.

With regard to a limited partnership (*commanditaire vennootschap*) it is noted that any change with regard to a Limited Partner should not affect the analysis on enforceability of the Netting Clause. Such a Limited Partner is generally not a contracting party to any agreement and also not liable vis-à-vis the creditors of the limited partnership.

4.16.3 Dutch Credit Institutions and Dutch Insurance Companies

Special Dutch Insolvency provisions apply to credit institutions and insurance companies. Please refer to paragraph 4.1 and Appendix A and for the specific netting analysis to paragraphs 4.3.3(g) and (h).

4.16.4 Dutch Investment Firms

No special Dutch insolvency procedures apply to Dutch Investment Firms. The set-off and netting analysis under the WUDCI (see paragraph 4.3.3(g) above) applies to Dutch Investment Firms.

4.16.5 Dutch Investment Funds

FGR Investment Funds are non-incorporated pools of cash, securities or other assets raised or obtained for collective investment for the purpose of

[48] HR 13 March 2015, NJ 2015/241 [Hoekzema v. SBPBW].

allowing the participants to share in the proceeds of such investments. An FGR Investment Fund is not a legal entity, but a multiparty contractual arrangement. The Fund Contract (which contains this contractual arrangement) will typically be entered into between the participants, the Manager (which may be licensed as a manager under the FMSA) and a separate Custodian[49], and will contain the applicable terms and conditions for management and custody (*voorwaarden voor beheer en bewaring*) of the pool of investments.

The Manager manages the FGR Investment Fund's assets, which should be done in compliance with the investment objectives and restrictions set out in the relevant terms and conditions and/or the relevant prospectus. It is market practice that the Manager in its capacity as manager of the FGR Investment Fund enters into investment and hedging agreements and any transactions in the Custodian's name and for the account of the relevant FGR Investment Fund.

The Custodian holds legal title to the Investment Fund's assets and holds the contractual rights and obligations. This structure is obligatory for Regulated FGR Investment Funds and normally used by Unregulated FGR Investment Funds. Custodians usually grant a power of attorney (*volmacht*), which may be subject to certain conditions or limitations, to the Manager to enter into agreements on behalf and for the account of the Custodian acting in its capacity as legal title holder (*bewaarentiteit*) of a specific FGR Investment Fund.

It is advisable to ascertain whether this power of attorney is in place and in force in each specific case when dealing with an FGR Investment Fund.

It is therefore the Custodian that can be subject to Insolvency Proceedings, although this would in practice mean that the FGR Investment Fund itself would become subject to the relevant Insolvency Proceedings.

Apart from the ranking of debts mentioned below, the following should be noted. The EU Insolvency Regulation does not apply to "collective investment undertakings", which refer to collective investment undertakings qualifying as UCITS or AIFS[50]. Consequently:

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49 The Manager and Custodian are normally organised in the form of a legal entity incorporated under the laws of this jurisdiction, either a foundation (*stichting*), a public company with limited liability (*naamloze vennootschap)* or a private company with limited liability (*besloten vennootschap)*.

50 Based on our reading of the EU Insolvency Regulation in combination with the Virgos/Schmidt Report and the EU Insolvency Regulation.

(i) the EU Insolvency Regulation does not apply to Regulated Funds and therefore Insolvency Proceedings in respect of Regulated Funds do not need to be given effect in other Regulation States; and

(ii) only Unregulated Funds are within the scope of the EU Insolvency Regulation and therefore paragraph 4.3.3(d) applies only to such Unregulated Funds.

However, a Dutch court would apply Dutch insolvency rules in the event of the Insolvency Proceedings of a Regulated Fund.

To the extent a Dutch court would apply Dutch Insolvency rules in the event of Insolvency of an Investment Company or an FGR Investment Fund's Manager and/or Custodian, the analysis set out in paragraphs 4.3 above is applicable. As set out therein, under Sections 53/234 BA it is required for Insolvency set-off to be effective that there are mutual claims for payment of money between an Insolvent Party and its creditor.[51]

In case the Investment Fund is an Investment Company, it does have legal personality and is itself the legal owner of the Investment Fund's assets and may enter into contractual relationships.

Pursuant to articles 4:37j and 4:45 FMSA, the assets of any Investment Fund are segregated from other assets (i) in case of an FGR Investment Fund, held by the Custodian, or (ii) in case of an Investment Company, of the Investment Company itself, and such assets are to be exclusively used to satisfy any claims arising from:

(i) debts relating to the management, safekeeping and ownership of the Investment Fund's assets; and

(ii) participations issued by the Investment Fund.

If in a bankruptcy the assets are insufficient to satisfy both (i) and (ii), creditors covered under (i) will be paid first and any remaining proceeds will be distributed among holders of participations. It is generally held that debts incurred under derivatives contracts entered into by an Investment

[51] With regard to EFET Power Contracts entered into with FGR Investment Funds, we have assumed that in accordance with current Dutch market practice the FGR Investment Fund's Custodian enters into the EFET Power Contract and any Individual Contracts thereunder not in the FGR Investment Fund's name (since that is not a legal entity) but in its own name as principal (acting through the Manager as the case may be). In such case, the requirement of mutuality for Dutch Insolvency set-off will be met.

Fund "relate to the management of its assets" and therefore qualify as category (i) debts.

Please note that it is not unusual for a Manager or, if applicable, Custodian to also require limited recourse wording to be included in agreements such as the EFET Power Contract, e.g. stating that for claims in relation to a transaction with a specific (sub)fund recourse can only be taken against the Custodian to the amount of the relevant (sub)fund's assets.

4.16.6 **Municipalities**

(a) ***Restrictions to municipalities entering into Individual Contracts***

With regard to municipalities and other non-central governmental authorities we note that various Dutch legal restrictions apply to their use of financial derivatives, inter alia, as to the scope of entities with which they are allowed to contract.

(b) ***Municipalities and Insolvency***

Article 2:1 in combination with article 2:5 CC provides that a Municipality possesses legal personality and that, therefore, they are equivalent to a natural person as regards the law of property, rights and interests. This means that in principle creditors have a right of recourse for their claims against municipalities. Municipalities do not enjoy any right of immunity from legal proceedings although certain assets cannot be seized by creditors (any assets that have a public utility function).

No special Dutch insolvency provisions apply to Municipalities and Dutch Insolvency law does not explicitly rule out the possibility that a Municipality can be made subject to Insolvency Proceedings (see our comments in paragraph 4,1 above). However, as a result of the Financial-Ratio Act (*Financiële-verhoudingenwet*), the risk of a Municipality becoming subject to Insolvency Proceedings is only theoretical.

Article 12 of the Financial-Ratio Act entitles a Municipality with a "material and structural deficit" in its financial means, causing the Municipality not to be able to fulfil its necessary requirements (*noodzakelijke behoeften*), to apply for financial support by the Dutch State.

Such financial support may be granted if the income the Municipality generates itself out of taxes, retributions, levies etc is at a "reasonable level".

Decrees based on the Financial-Ratio Act contain objective criteria to assess whether a "material and structural deficit" exists and whether the income the Municipality generates itself is at a "reasonable level".

In practice State support is always granted to municipalities meeting these requirements. When State support is granted the Municipality is placed under increased supervision to improve its financial position.

As article 12 of the Financial-Ratio Act provides a Municipality the ability to apply for additional funding from the Dutch central government if it experiences financial difficulties to prevent it from becoming Insolvent, article 12 provides additional comfort that the Municipality will be reinstated in a position, in which it will be able to repay its debts.

4.16.7 **Electricity Companies**

No special Dutch insolvency provisions apply to Electricity Companies.

4.16.8 **Local Government Entities**

No special Dutch Insolvency provisions apply to Local Government Entities. We note, however, that Municipalities or other local authorities participating in such Local Government Entities in practice often act as a guarantor for their obligations.

4.16.9 **Publicly-owned Corporations**

No special Dutch Insolvency provisions apply to Dutch publicly-owned corporations (other than those that are BRRD Entities, Dutch Insurance Companies credit institutions or insurers).

III. TERMINATION FOR MATERIAL REASONS OTHER THAN INSOLVENCY

4.17 Early Termination outside Insolvency

Issue (g) on page 9 of the Instruction Letter

As set out in paragraph 4.3.3(a) and (b), because the Termination Clause will normally be governed by the Governing Law and such choice of law will in principle be upheld by the Dutch courts on the basis of Rome I, the Governing Law will determine the validity of such Termination Clause.

If the laws of this jurisdiction apply to the EFET Power Contract, the same analysis as set out in paragraph 4.3.1 with regard to termination in the event of Insolvency applies *mutatis mutandis* to termination in the event of other circumstances described in Clause 10.3 in conjunction with Clause 10.5 of the EFET Power Contract.

PART B

MULTIBRANCH PARTIES

4.18 **Effect on close-out netting and set-off obligations; Netherlands Multi-Branch Party**
Issues (h) and (i) of the Instruction Letter

We do not consider that the use of the EFET Power Contract with a Counterparty incorporated under the laws of this jurisdiction, but with branch offices in a number of different jurisdictions, including some where netting may not be effective (e.g. where an insolvency official in those jurisdictions may be entitled to "cherry-pick" obligations), would jeopardise the effectiveness of the Termination Clause or the Netting Clause (as explained in paragraph 4.3) in the event that such Counterparty became subject to Insolvency Proceedings. In particular, there is no danger that an Insolvency Representative of such an Insolvent Party could treat the obligations in respect of Individual Contracts entered into in this jurisdiction separately from other obligations arising under the EFET Power Contract or other Individual Contracts entered into through branch offices outside this jruisdiction.

Where a Counterparty is incorporated under the laws of - and has its COMI in - this jurisdiction and has branch offices in a number of other jurisdictions, an Insolvency Representative is required under the laws of this jurisdiction to include obligations arising from all transactions (regardless of the office from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would (subject to our observations under Part (A) above) be bound by the provisions of the EFET Power Contract in accordance with its terms.

For Counterparties that are:

(a) subject to the EU Insolvency Regulation,[52] this rule follows from article 3 of the EU Insolvency Regulation; insolvency proceedings may be opened by the courts of the Regulation State where a debtor has its COMI and such proceedings shall have universal effect throughout the other Regulation States, *i.e.* (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located, unless a

52 I.e. where the Insolvent Party is a Dutch Company or an Unregulated Fund. One minor category of Dutch Credit Institutions is also subject to the EU Insolvency Regulation, namely "opt-in" banks as referred to in article 3:4 FMSA.

"secondary insolvency proceeding" is opened in another Regulation State (except as otherwise provided in the EU Insolvency Regulation);

(b) Dutch Credit Institution, Dutch Insurance Companies or Dutch Investment Firms: this rule follows from the WUDCI and Solvency II.

We believe that in Insolvency Proceedings before Netherlands courts the insolvency law applicable in the jurisdiction of the non-netting branches is irrelevant in this respect and that the conclusions reached in this Opinion Letter concerning the enforceability of the Netting Clause under the EFET Power Contract should remain the same.

4.19 **Foreign Company with only assets in The Netherlands**
Issue (l) on page 11 of the Instruction Letter

In the absence of a Dutch Branch, the mere fact that certain assets and liabilities of a Foreign Company are located in this jurisdiction, does not give the courts of The Netherlands jurisdiction to declare Insolvency Proceedings with regard to that Foreign Company, whether or not initiated by local creditors. Netherlands courts only have jurisdiction to open Insolvency Proceedings against legal entities having their COMI in The Netherlands and against any legal entity (other than an EEA Credit Institution, an EEA Investment Firm (in certain scenarios) or an EEA Insurance Company) that carries on business or professional activities *through a branch office in The Netherlands*.

4.20 **Foreign Company with COMI in a Regulation State**
Issues (j) and (k) on page 10 of the Instruction Letter

If a Foreign Company's COMI is located in a Regulation State, then, pursuant to article 3 EU Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings have universal effect throughout the other Regulation States, *i.e.* (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located (except as otherwise provided in the EU Insolvency Regulation). Consequently, the courts of another Regulation State:

(i) must recognize any insolvency proceedings opened by such courts as having effect also in their jurisdiction (*i.e.* such insolvency proceedings must be given effect by such courts) and the applicable law of such main insolvency proceedings will be the law of the Regulation State where the COMI is situated;

(ii) may open "territorial proceedings" or, after the commencement of main proceedings "secondary proceedings" in the event that such a Foreign

Company possesses an "establishment" in the territory of such other Regulation State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Regulation State[53].

Thus, if a Foreign Company:

(i) is declared insolvent in accordance with the EU Insolvency Regulation in a Regulation State where its COMI is situated, the enforceability of the Netting Clause must in our view be determined in accordance with the law of such Regulation State;

(ii) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the EU Insolvency Regulation in respect of the assets of that Dutch Branch. The applicable law with respect to such Insolvency Proceedings will be Dutch law and such Insolvency Proceedings will be territorial in scope, meaning that the effect of such proceedings will be restricted to the Foreign Company's assets situated in this jurisdiction; it should be noted that the determination of the "location" of a contract is not free from doubt[54].

4.21 **EEA Credit Institution / EEA Insurance Company**
Issues (j) and (k) on page 10 of the Instruction Letter

In relation to an EEA Credit Institution or an EEA Insurance Company, neither bankruptcy nor moratorium can be imposed in this jurisdiction with respect to their Dutch branch office(s).

Reorganisation or liquidation measures with regard to such institutions should be taken by the authorities of their home Member State. Such measures shall include all assets and EU branches of that EEA Credit Institution or EEA Insurance Company and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution or EEA Insurance Company. Where any EEA Credit Institution or EEA Insurance Company is subject to insolvency proceedings in another Member State then based on (the rules implementing) the

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[53] However, territorial or secondary insolvency proceedings are limited in scope to the Foreign Company's assets in that Regulation State and so will not extend beyond the Regulation State where they are opened. Furthermore, under article 3(3) EU Insolvency Regulation, secondary proceedings are limited to winding-up proceedings. Generally, secondary insolvency proceedings will be opened following the opening of main insolvency proceedings, but there are exceptions to this principle as set out in article 3(4) EU Insolvency Regulation. Although the EU Insolvency Regulation does allow the process of liquidation in the secondary proceedings to be stayed at the request of the liquidator in the main proceedings, this remains subject to such liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. In this regard we would refer you to article 33 EU Insolvency Regulation.

[54] Art. 3.2 and 27 EU Insolvency Regulation.

WUDCI or Solvency II, the enforceability of the Netting Clause must in our view be determined in accordance with the paragraphs 4.3.3(g) and (h).

4.22 EEA Investment Firm

Issues (j) and (k) on page 10 of the Instruction Letter

In relation to an EEA Investment Firm, Insolvency Proceedings can be imposed by the courts of this jurisdiction upon DNB's request. Reorganisation or liquidation measures with regard to such institutions can also be taken by the authorities of their home Member State and will in that case include all assets and EU branches of that EEA Investment Firm and must be recognised in The Netherlands[55] and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Investment Firm. Where any EEA Investment Firm is subject to insolvency proceedings in another Member State, then, based on (the rules implementing) the WUDCI, the enforceability of the Netting Clause must in our view be determined in accordance with paragraph 4.3.3(g).

4.23 Foreign Company with COMI outside a Regulation State

Issues (j) and (k) on page 10 of the Instruction Letter

The EU Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside the jurisdiction of the Regulation States (recital 25 of the EU Insolvency Regulation), so that it does not govern:

(a) the consequences of the opening of an insolvency proceeding in a Regulation State concerning a Party whose COMI is situated outside the Regulation States, and

(b) the consequences of the opening of an insolvency proceeding in third party states (*i.e.* Denmark and any other States).

To what extent foreign insolvency proceedings of foreign companies whose COMI is situated outside the Regulation States are recognised in The Netherlands, is unclear. It appears from Supreme Court case law that, absent international treaty provisions to the contrary, such foreign insolvency proceedings in principle have no extra-territorial effect in this jurisdiction.[56]

This means:

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[55] Articles 212s, 212t and 212oo BA.

[56] This is different for foreign companies which are subject to insolvency proceedings in Curaçao, St. Maarten or Aruba.

(a) that the foreign general attachment of the insolvent Foreign Company's estate (or similar effects, such as the transfer of the estate to a receiver in bankruptcy) does not include the assets of the debtor that are situated in The Netherlands;

(b) that, in principle, the legal effects of insolvency proceedings under foreign insolvency laws cannot be invoked in The Netherlands;

(c) that creditors of the Foreign Company can petition the Dutch courts to open Insolvency Proceedings in respect of that Foreign Company's Dutch branch office (article 2(4) BA).

Although Netherlands international insolvency law is based on the territorial effect of foreign insolvency proceedings, this does not mean that these proceedings do not receive any recognition at all. The foreign receiver generally has *locus standi* in The Netherlands. The powers granted to a liquidator by the foreign *lex concursus* should therefore in principle be recognised in The Netherlands. Also in other respects foreign insolvencies can have legal consequences in The Netherlands. It could be argued that the legal consequences created by the foreign insolvency law can be recognised in The Netherlands, as long as (i) they are not closely connected with the fact that the foreign insolvency must be regarded as a general attachment on the insolvent company's assets for the benefit of all his creditors, and (ii) this does not lead to unsatisfied creditors no longer having recourse in respect of assets of the insolvent company that are situated in The Netherlands.

4.24 **Foreign Company with Dutch Branch**
Issue (k) on page 10 of the Instruction Letter

You specifically requested us to consider the issue whether an Insolvency Representative or a Dutch court considering a single EFET Power Contract could require a counterparty of a Dutch Branch of a Foreign Company to pay the mark-to-market value of Individual Contracts entered into with the Dutch Branch to the Insolvency Representative of the Dutch Branch, while at the same time requiring the counterparty to claim in the main Insolvency proceedings in the jurisdiction of the Foreign Company for its net value from other Individual Contracts with that Foreign Company under the same EFET Power Contract.

Under Dutch law, a branch is not considered to have legal personality. Hence, the Foreign Company and <u>not</u> its Dutch Branch will at all times remain the counterparty under the EFET Power Contract. Because the mutuality requirement as set out in paragraphs 2.2.10, 4.3.3(c) and 4.8 is fulfilled in this scenario, set off can take place, however, in respect of the claims between the Solvent Party and the Foreign Company only. This remains true even in case the Dutch Branch qualifies as an "establishment" under the EU Insolvency Regulation and on the basis thereof territorial insolvency proceedings have been initiated in The Netherlands. In the latter case it is uncertain whether the EFET Power Contract and all Individual Contracts will be comprised in a Dutch Insolvency, save that the analysis of set-off under the EU Insolvency Regulation (paragraph 4.20 above) does not appear to be any different, such that if the Solvent Party has a net claim against the Insolvent Party it can file proof of such claim both in the main insolvency proceedings and in the secondary Dutch proceedings. The opening of territorial proceedings is only relevant because the *lex concursus* (*i.e.* the Dutch set-off provisions) then determines whether set-off is allowed or not. As explained in paragraphs 4.3.3(c) and 4.8 above, Dutch set-off provisions, are in general, however, creditor-friendly and should thus in such situation not give rise to any problems, in particular where mutuality exists.

PART C

COLLATERAL

4.25 **Choice of law**

The CSA supplements, amends, forms part of and is subject to the EFET Power Contract. Therefore, the same opinion as set out in paragraph 4.3.3(a) above and 4.44 below applies also to the CSA.

4.26 **Recharacterisation of transfer of Cash Collateral**
Issues (m) and (n) on page 11 of the Instruction Letter

Where the Cash Collateral is simply transferred pursuant to a contractual arrangement to the effect that the Counterparty transfers cash from its own account to that of the Transferee and that in case of the Counterparty's default the Counterparty's claim for repayment of the transferred cash is set-off against the Transferee's claims under the EFET Power Contract, as seems to be the case under the CSA and the EFET Power Contract, the law applicable to this contractual arrangement applies. In respect of Cash Collateral transferred under the CSA this leads to the conclusion that the Governing Law is applicable to the question of characterisation, validity and effectiveness of the arrangement.

Therefore, assuming that the Governing Law characterises a transfer of Cash Collateral under the CSA (where such transfer is directly in favour of the Transferee and not any third party) as effecting an unconditional transfer of "ownership" of such Cash Collateral, which will not be recharacterised as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in such Cash Collateral, such characterisation will be recognised by the courts of this jurisdiction.

If Dutch law would be the Governing Law, or if the Transferee's bank account is located in this jurisdiction, the result would be the same. Under the laws of this jurisdiction the transfer of Cash Collateral (where the cash is paid to the Transferee and not to any third party) will be characterised as the payment of a bail sum (*waarborgsom*)[57] and the courts of this jurisdiction would not recharacterise transfers of such Cash under the CSA's title transfer provisions as creating a security interest, provided this is also the case under the Governing Law.

On the basis that a Letter of Credit is issued in favour of a Party and cannot be transferred, the question whether a "transfer" of a Letter of Credit would be recharacterised is not relevant. With respect to Letters of Credit, we therefore assume that there is no "transfer" but rather that the Letter of Credit is issued directly by a third party issuer in favour of the Party seeking credit support. Therefore, in this Opinion Letter, we shall not address the "transfer" of Letters of Credit and, where applicable, Eligible Credit Support shall be read as "Cash Collateral".

For the sake of completeness, we note that:

(i) the characterisation of the provision of a Letter of Credit as Eligible Credit Support under the CSA shall be subject to the laws applicable to such Letter of Credit. On the face of the CSA, there is no reason to assume that the provision of a Letter of Credit as Eligible Credit Support will be recharacterised as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest; and

(ii) if the Cash Collateral is located (i.e. repayable) in a jurisdiction other than this jurisdiction (e.g. the jurisdiction of the Transferee's bank account) the laws of that other jurisdiction should be examined to ensure that the transfer would not be recharacterised since there is a risk that the courts of this jurisdiction would apply the law of the jurisdiction where the relevant account is are situated to the question of the proper characterisation of a transfer of Cash Collateral.

4.27 **Pre-insolvency: perfection requirements**
Issue (o) on page 11 of the Instruction Letter

Assuming the Transferee receives an outright transfer of a cash amount on a bank

[57] Although there is no express basis for this in statutory law or case law there is ample reason to assume that the payment of a bail sum by a debtor to its creditor for its present or future claims would be permitted under Netherlands law. We base our view, *inter alia*, on the legislative history of the DCC, dealing with the possibility of depositing (other than by way of a pledge) a sum of money with one's creditor, against which recourse can be taken by the creditor in case of default. In the DCC's legislative history the question is discussed whether "the payment of a bail sum constitutes a pledge consisting of money". According to the legislator this will depend on the intention of the parties. It is conceivable - according to the legislator - that the party having asked and obtained a sum of money to serve as collateral simply becomes the debtor for repayment thereof. In particular where the recipient is obliged to pay interest (see Clause 9 of the CSA), indicating that he is entitled to use the money and is therefore not under a duty to segregate the money from his other assets, this would suggest (according to the legislative history) that the parties must have intended a "bail sum". Thus, in the legislative history the possibility of the "bail sum", as an alternative means of obtaining security over money, albeit with the debtor taking credit risk on the creditor, has been recognised. Since the recipient of the bail sum will become the debtor for repayment thereof, it may set-off its repayment obligation against any obligation the transferor of such bail sum owes to it.

account in its own name and subject to the observations in paragraph 4.26 above, there will be no need to take any subsequent action to ensure that the Transferee's rights in the Cash Collateral are safeguarded. There are no requirements in this jurisdiction necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval or 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.

4.28 **Pre-insolvency: Substitution of Eligible Credit Support**
Issue (p) on page 11 of the Instruction Letter

The right of a Transferor that is a Counterparty to exchange Eligible Credit Support pursuant to Clause 6 of the CSA is valid and legally binding and enforceable in accordance with its terms (assuming this is also the case under the Governing Law). As Clause 6 of the CSA presupposes that the Transferee approves such exchange, such exchange shall only be valid if such approval is given by the Transferee in accordance with Clause 6 CSA.

4.29 **Substitution of Collateral**
Issue (p) on page 11 and issue (s) on page 12 of the Instruction Letter

Any obligation on the Counterparty to accept substitution of Eligible Collateral by the Transferor under the CSA should follow from the contractual obligations in the CSA. If on the basis of the analysis in paragraph 4.4, the CSA cannot be nullified based upon voidable preference, then the exchange of Eligible Collateral should not be subject to such voidable preference risk either. However, some degree of risk is constituted by the additional claw back powers outlined in paragraph 4.4.5 above, unless avoidance would not be possible under the Governing Law.

4.30 **Transfer of additional Eligible Credit Support and voidable preference risk**
Issue (s) on page 12 of the Instruction Letter

In case of a transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the CSA, the same analysis as set out in relation to the substitution of Eligible Collateral in paragraph 4.29 above will apply.

Under Clause 3 of the CSA, the Counterparty will be obliged to transfer additional Eligible Credit Support upon demand of the Transferee. This constitutes a prior legal and contractual obligation to effect such a transfer and, therefore, the transfer of additional Eligible Credit Support will not be voluntary as described in paragraph 4.4.1(i).

4.31 **Enforceability of the CSA in the event of Insolvency Proceedings in this jurisdiction**
Issues (q) and (r) on pages 11-12 of the Instruction Letter

The CSA supplements, amends, forms part of and is subject to the EFET Power Contract. Therefore, the same analysis as set out in paragraph 4.3 applies to the enforceability of the CSA in the event of Insolvency Proceedings.

4.32 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferee**
Issues (q) and (r) on pages 11-12 of the Instruction Letter

The same analysis as set out in paragraph 4.26 with regard to recharacterisation of an outright transfer of Cash Collateral applies in the event of the Counterparty (as Transferee) becoming subject to Insolvency Proceedings. The Transferor of such Cash Collateral will have a claim for repayment against the Counterparty. The CSA will be effective to the extent that it provides that the value of the Cash Collateral provided and not yet transferred is to be included as an "other amounts payable" (owing to the Transferor) in the calculation of the net amount payable under the Netting Clause, subject to the limitations arising from Netherlands insolvency law (as outlined in Part (A) above and in our qualifications below) with the following exception.

If, under the Governing Law, the CSA's title transfer provisions qualify as a financial collateral arrangement (as assumed in paragraph 2.2.14(d)),[58] the requirements for a valid set-off in insolvency (as stated in paragraph 4.3.3 above) are partly disapplied. Netting and set-off will be allowed in respect of claims that have arisen *after* the Commencement Time **provided that** Terminating Party was not aware of the insolvency judgment at the relevant time. Equally, Cash Collateral may be transferred in respect of a debt that has arisen on the date of the Insolvency judgment, **provided that** the Transferee was not aware of such judgment at the relevant time.

With regard to Letters of Credit the same analysis as set out in the last paragraph

[58] Pursuant to article 7:52 CC, financial collateral arrangements are only subject to the FCA Rules if at least one of the parties falls within one of several specified categories. It is not entirely clear when – in an international transaction – article 7:52 CC is applicable. The purpose of article 7:52 CC is to prevent certain parties from granting rights of use or appropriation rights in relation to financial collateral. This is clearly a matter of property law. In our opinion, article 7:52 CC should be treated in the same manner. For this reason it is our opinion that where the transfer of Collateral under a financial collateral arrangement is governed by the law of another jurisdiction, that law should determine which parties can enter into financial collateral arrangements in order to achieve the property law benefits of the FCD (the insolvency law benefits will remain to be determined by the *lex concursus*). Therefore, in our view, where the transfer of the Cash Collateral is governed by the law of another jurisdiction, the limitations as to the qualifying parties imposed by article 7:52 CC are not applicable insofar as the property law benefits are concerned.

of paragraph 4.26 above will apply in the event of Insolvency.

4.33 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferor**
Issues (q) and (r) on pages 11-12 of the Instruction Letter

The same analysis as set out in paragraph 4.26 with regard to recharacterisation of an outright transfer of Cash Collateral applies in the event of the Counterparty (acting as Transferor) becoming subject to Insolvency Proceedings. The latter's Insolvency Representative will have a claim for repayment of such Cash Collateral against the Transferee subject to the limitations arising from Netherlands insolvency law (as outlined in Part (A) above and in our qualifications below).

If, under the Governing Law, the CSA's title transfer provisions qualify as a financial collateral arrangement (as assumed under paragraph 2.2.14(d))[59], the requirements for a valid set-off in insolvency (as stated in paragraph 4.3.3 above) are partly disapplied. Netting and set-off will be allowed in respect of claims that have arisen *after* the Commencement Time **provided that** Terminating Party was not aware of the insolvency judgment at the relevant time. Equally, Cash Collateral may be transferred in respect of a debt that has arisen on the date of the Insolvency judgment, **provided that** the Transferee was not aware of such judgment at the relevant time.

With regard to Letters of Credit the same analysis as set out in the last paragraph of paragraph 4.26 above will apply in the event of Insolvency.

4.34 **Other local law considerations**
Issue (u) on page 12 of the Instruction Letter

There are no other local law considerations that a Transferee of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a Transferor that is a Counterparty which is incorporated or organized under the laws of this jurisdiction.

[59] See previous footnote.

PART D

GENERAL ENFORCEABILITY

Issue (v) on page 12 of the Instruction Letter

4.35 **Enforceability of the EFET Power Contract**

If the EFET Power Contract were to be governed by the laws of this jurisdiction, it is valid and legally binding and enforceable against the Parties in accordance with its terms save as set out in 4.36.1 (the overriding principle of "fairness and reasonableness" between contracting parties under Dutch law) and qualifications mentioned elsewhere in this Opinion Letter. We are not aware of any Clauses in the EFET Power Contract, the Annexes or the Appendices that may infringe upon the *ordre public* (public policy) in this jurisdiction, irrespective of the Governing Law.

4.36 **Enforceability of Clause 7: Force majeure**

Clause 7 of the EFET Power Contract on *force majeure* is valid and enforceable under the laws of this jurisdiction; if the EFET Power Contract is governed by a Governing Law, the conclusion will be the same if and to the extent this is also the conclusion under the Governing Law.

4.36.1 **Force majeure or similar legal concepts**

Under the laws of this jurisdiction, there are no mandatory rules with regard to *force majeure* or any public policy on this subject. However, the reliance on or the enforcement of contractual terms and conditions contained in an agreement may under certain circumstances be contrary to the overriding principle of "fairness and reasonableness" (*redelijkheid en billijkheid*) which governs the relationship between the parties to an agreement as a matter of the laws of this jurisdiction and which may affect, *inter alia*, the reliance on and/or enforcement of contractual provisions (and by this expanding the Party's right to claim) such as the following, without limitation:

(a) any provision in a contract or document providing that certain calculations or certifications are to be conclusive and binding; such a provision will not be effective if such calculations or certificates are reached on an arbitrary or unreasonable basis or are fraudulent or manifestly inaccurate and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto;

(b) any provision of any such contract or document vesting any party with a discretion or a power to determine a matter in its opinion with binding effect for the other party or parties; the laws of this jurisdiction may require that such discretion or power is exercised reasonably or that such opinion is based on reasonable grounds;

(c) any provision of any such contract or document stating that no failure or delay in exercising any rights or remedies shall operate as a waiver of such rights or remedies (to the effect that under the proper circumstances a delay or failure to exercise a right within the contractual period of time may operate as a bar to the exercise of such rights or remedies thereafter);

(d) provisions providing that agreements may only be amended or varied or any provision thereof waived by an instrument in writing may not be effective insofar as they suggest that oral or other modifications, amendments or waivers could not be effectively agreed upon or granted between or by the parties; and

(e) provisions in an agreement stating that such agreement is the only agreement between the parties may not be effective if one of the parties proves that other agreements, to the extent relevant, validly exist between the parties.

Furthermore, such principle of fairness and reasonableness may in the proper circumstances impose certain additional duties upon the parties concerned, notwithstanding any provision to the contrary.

4.37 **Enforceability of Clause 8: Remedies for Non-Performance**

Clause 8 of the EFET Power Contract on remedies for Failure to deliver and accept is valid and enforceable under the laws of this jurisdiction subject to the overriding principle of "fairness and reasonableness" as set out under 4.36 above.

4.38 **Enforceability of Clause 12: Limitation of Liability**

4.38.1 **Clause 12.2**

Clause 12.2 of the EFET Power Contract on the exclusion of liability is valid and enforceable under the laws of this jurisdiction. If the EFET Power Contract is governed by a Governing Law, the conclusion is the same provided that this is also the conclusion under that Governing Law.

4.38.2 **Clause 12.3**

Clause 12.3 of the EFET Power Contract on the limitation of indirect and consequential damages and including a cap on the liability equal to the amount payable for the electricity supplied or to be supplied under the relevant Individual Contract is also valid and enforceable under the laws of this jurisdiction. If the

EFET Power Contract is governed by a Governing Law, the conclusion is the same provided that this is also the conclusion under that Governing Law.

4.38.3 **Clause 12.4**

Under Clause 12.4 of the EFET Power Contract a Party's liability for intentional fault, fraud, or any action which endangers the fundamental rights of the other Party or which violates the other Party's fundamental contractual obligations cannot be limited or excluded. This clause is also valid and enforceable under the laws of this jurisdiction. The term "*Kardinalspflichten*" as used in this paragraph is not known in this jurisdiction, however, the concept as included in Clause 12.4 of the EFET Power Contract is recognised.

4.38.4 **Clause 12.5**

Clause 12.5 of the EFET Power Contract regarding the duty to mitigate Damages is valid and enforceable under the laws of this jurisdiction. If the EFET Power Contract is governed by a Governing Law, the conclusion is the same provided that this is also the conclusion under that Governing Law.

PART E

CONFIRMATION PRACTICES

4.39 **Formal requirements regarding entering into legally binding Individual Contracts**

4.39.1 **Taped oral agreements**

Under the laws of this jurisdiction parties are generally free to choose the manner in which they conclude an agreement. An agreement will be validly entered into if the offer of one party to enter into a specific agreement is accepted by the other party to which the offer is directed. The acceptance of the offer should be based on the same conditions as the offer is made. An acceptance of the offer subject to deviating conditions is considered to constitute a new (counter-)offer. Oral and written agreements are equally binding. It may, however, be more difficult to prove the contents of an oral agreement as opposed to a written agreement. A taped conversation can be used as evidence of the existence and terms of the orally entered into agreement. There are no specific rules with regard to evidence to be provided. Evidence can be provided in various forms, e.g. written documents such as notes or memoranda, oral evidence such as testimonies or taped conversations, or even circumstantial evidence; it is up to the courts to decide whether the proof is acceptable.

4.39.2 **Electronically transmitted confirmation**

The electronic transmission of an Individual Contract (such as using the EFET eCM System) would be acceptable under the laws of this jurisdiction. As set out in the previous paragraphs, there are no specific rules with regard to evidence that an agreement exists.

4.39.3 **Is there a signature requirement?**

There is no specific requirement that a signature is required to enter into a valid agreement; oral and written agreements are equally valid. However, to prove that both parties have agreed to enter into the relevant agreement, a signature showing such agreement is helpful.

4.39.4 **Timing**

As mentioned in paragraph 4.39.1 above, an agreement is deemed to be concluded when a legally binding offer has been unconditionally accepted by the offeree. Therefore, an Individual Contract will be deemed to be entered into on the moment such acceptance takes place. If the Individual Contract is entered into orally and later confirmed in writing, the Individual Contract has been agreed at the moment of the oral acceptance.

4.39.5 **Incorrect terms in a Confirmation**

If a Confirmation includes incorrect terms, which are not in compliance with the agreement made between the Parties on the relevant Individual Contract, the Party that does not agree with such terms should notify the other Party without delay. If a Party does not object at all against such incorrect terms or only at a much later stage, it will become difficult in practice to prove that there is no mutual agreement on the conditions of the relevant transaction. Clause 3.3 of the EFET Power Contract is valid and enforceable under the laws of this jurisdiction.

4.39.6 **Telephone recordings**

In The Netherlands, the processing of personal data, such as recording telephone conversations, is governed by the General Data Protection Regulation (EU) 2016/679 (the "**GDPR**"), which became effective in all EU Member States on 25 May 2018. The GDPR defines "personal data" as “any information relating to a data subject” (article 4(1)). A data subject is the identified or identifiable person to whom the personal data relates. This term therefore also covers data relating to contact persons within legal entities, however it does not include any legal entities themselves.

This is not the place to discuss the restrictions imposed by the GDPR on recording telephone conversations..

4.39.7 **Electronic exchange of data to enter into Individual Contracts**

We understand that automated computer systems have been established to compare key commercial terms of an individual transaction to be entered into under the EFET Power Contract, such as price, quantity, delivery point and schedule, in a process known as electronic confirmation matching. This process enables both Parties to input the key terms of an Individual Contract and quickly determine whether or not there is a discrepancy between them.

As set out in paragraph 4.39.1 above, there are no specific rules with regard to evidence to be provided on the terms and the entry into of an Individual Contract. Evidence can be provided in various forms. If the Parties agree to the procedure of entering into of an Individual Contract by the electronic exchange of data, there is no rule of law in this jurisdiction that prohibits this.

4.40 **Confirmation Practices**

4.40.1 The Parties enter into an Individual Contract orally, such as over the telephone, or otherwise, e.g., through a electronic trading or matching system, and make reference to it being an Individual Contract for the purpose of the EFET Power Contract between the Parties.

In Clause 1.1 of the EFET Power Contract it is agreed that the provisions of the EFET Power Contract constitute an integral part of each Individual Contract. Therefore, if the Parties designate a transaction as being an Individual Contract within the meaning of the EFET Power Contract, such Individual Contract will be subject to the terms of the EFET Power Contract.

4.40.2 The Parties orally enter into an Individual Contract without any reference to the EFET Power Contract between them, but subsequently confirm the Individual Contract in writing, via telex, facsimile, SWIFT, or other means of electronic transmission by using one of the sample Confirmations attached to the EFET Power Contract as Annex 2 a – d. or by otherwise referring to the Individual Contract as a Individual Contract for the purposes of the EFET Power Contract between the Parties.

As at the moment of orally entering into the Individual Contract no reference in relation to that Individual Contract is made to the terms of the EFET Power Contract, and therefore the Individual Contract is in principle not subject to the terms of the EFET Power Contract. Once the Confirmation with reference to the applicability of the EFET Power Contract is accepted by the other Party, the Individual Contract will become subject to the EFET Power Contract. It is noted, however, that if it has become common practice for the Parties to enter orally into transactions without reference to the EFET Power Contract and subsequently send a Confirmation designating such transactions as Individual Contracts subject to the EFET Power Contract, it may be argued that the relevant transaction is already subject to the terms of the EFET Power Contract from the moment it was orally entered into, as this follows from the intentions of the Parties, based on their common practice.

4.40.3 The Parties orally enter into an Individual Contract and subsequently confirm the Individual Contract in writing, via telex, facsimile, SWIFT, or other means of electronic transmission, but without specifically confirming or disapplying the terms of the EFET Power Contract.

As set out in paragraph 4.40.2 above, if it is common practice between the Parties to apply the terms of the EFET Power Contract to any transactions entered into between them, it can be argued that applicability of the terms of the EFET Power Contract follows from such common practice. If this is not the case, the relevant transaction will not become subject to the terms of the EFET Power Contract in this case.

PART F

CORE PROVISIONS

4.41 Elections contemplated by the EFET Power Contract, CSA or Appendices

Issue (cc) on page 14 of the Instruction Letter

4.41.1 Elections contemplated by Election Sheet

The standard elections contemplated in the Election Sheet pertaining to the EFET Power Contract (the "**Election Sheet**") will not change the substance of our opinions with respect to the enforceability of Close-out Netting (under Part (A) above). For the avoidance of doubt, any additional provisions that are inserted in Part II of the Election Sheet can, however, change the substance of those opinions and are therefore outside the scope of this Opinion Letter. Please also refer to paragraph 4.42.2, in which amendments to the core provisions are addressed.

4.41.2 **CSA**

The standard elections contemplated in Clause 14 of the CSA (except for election 12 (*Additional provisions*) which falls outside the scope of this Opinion Letter for the reasons mentioned in paragraph 4.41.1) will not change the substance of our opinion with respect to Enforceability of Close-out Netting (under Part (A) above).

You requested us to elaborate specifically on the effects of electing to allow substitution with or without consent. However, we did not find any election to this effect in the CSA. The provision dealing with the exchange of Eligible Credit Support (Clause 6 in the CSA) states that such exchange by the Transferor is subject to the approval of the Transferee. In this respect, we note that the obligation on the Counterparty to accept substitution of Eligible Credit Support or Eligible Collateral under the CSA should follow clearly from the contractual provisions of the CSA in order to minimize the risk of voidable preference outlined in paragraph 4.4 above. Hence, we advise to insert an additional provision to this effect in Clause 14 of the CSA which provides that, contrary to what is stated in Clause 6, the substitution or exchange of Eligible Credit Support and/or Eligible Collateral is not subject to any approval requirements. Please also refer to paragraphs 4.25 through 4.30 above.

Please note that where under the applicable Governing Law the exchange would be regarded as the creation of new security interests, this could have an impact on general bankruptcy issues, in particular the voidness of post-Insolvency dispositions by the Counterparty and the voidability of preferential transactions.

4.41.3 **Elections contemplated by VAT Annex and Appendices**

Our opinion as set out herein will not be affected if the VAT Annex, the Allowances Appendix or Italian Appendix is entered into, regardless of whether Commodity Options and Commodity Transactions, Commodity Swaps and/or Allowances Transactions are entered into. Please note, however, that any additional provisions that are agreed between the Parties in the Appendices can of course change the substance of our opinions, in particular with regard to the Core Provisions mentioned in paragraph 4.42 below; these amendments are therefore 38/237outside of the scope of this Opinion Letter.

Specific attention is drawn to:

(a) the analysis with regard to forward physically settled transactions under articles 38/237 BA in paragraphs 4.2, 4.6 and 4.12(a) above, that may *mutatis mutandis* apply to Allowances Transactions to the extent such transactions qualify as a forward transaction as described therein; and

(b) the analysis with regard to set-off of interest accrued post Commencement Time in paragraph 5.2.2 below, which may apply *mutatis mutandis* to the Default Interest stipulations in Clause 8.1(a) of the Allowances Appendix.

4.41.4 **Qualification of allowances and Allowances Transactions**

According to the *travaux préparatoires* to the Dutch implementation law for the EU Directive 2003/87/EC establishing a scheme for greenhouse gas emissions allowance trading, an Allowance qualifies as a property right (*vermogensrecht*) within the meaning of article 3:6 DCC. An Allowance in this jurisdiction is both transferable (*overdraagbaar*) and likely to have a certain monetary value (*op geld waardeerbaar*). There has been some debate in legal literature on whether an Allowance would qualify as a "registered property" (*registergoed*). The discussion focussed on the transfer of an Allowance by book entry in the Dutch Allowances registry. It was questioned whether such Dutch Allowances registry would qualify as a public registry and hence the Allowances as registered property.

However, the Dutch Allowances registry does not qualify as such a public registry. Only persons maintaining an account with the Dutch Allowances registry can access the Allowances registry and then only with regard to their own Allowances account. Also, all public registries, in which public property is registered, are listed in a separate act, the *Kadasterwet*. The Dutch Allowances registry is not included in the list of public registries in the *Kadasterwet*. Therefore, the better view is that Allowances should not qualify as registered property and that no notarial deed for their transfer is required.

4.42 **Core Provisions**
Issue (dd) on page 14 of the Instruction Letter

4.42.1 Core provisions

The following Clauses are considered to be "Core Provisions", meaning that such core provisions may not be amended without affecting the conclusions reached in section (A) (*Enforceability of Close-Out Netting*) of this Opinion Letter:

(a) Clause 1;

(b) Clauses 10.3, 10.4 (except as stated in 4.42.2 below) and 10.5; and

(c) the Netting Clause,

including any definitions used in these Core Provisions. Please note that this does not imply that any other amendment would not affect our opinion as set out herein. Any amendment to the EFET Power Contract should be carefully considered and appropriate legal advice should be taken to assess the consequences of such impact.

4.42.2 **Effect of specific amendments to Core Provisions**

Clause 10.4 (Automatic Termination)

Any change to the effect that Clause 10.4 (Automatic Termination) shall only apply in respect of an event specified in Clause 10.5(c)(iv), if the relevant proceeding is instituted by, or the relevant petition is presented to a court or authority in the jurisdiction where the Party is incorporated or organized in certain other jurisdictions.

This amendment would not affect our opinion as set out herein. Specific attention is drawn to the possibility that under the EU Insolvency Regulation main and secondary insolvency proceedings may be opened as explained in paragraphs 4.19 and 4.20 above and in Appendix A.

Clause 10.5(c) (Material Reason)

Any change replacing Clause 10.5(c) with new wording describing the events intended to be covered as "Winding-up/Insolvency/Attachment" differently, provided that the following events are included: (i) a party becomes insolvent or becomes unable to pay its debts, when they fall due, (ii) a party makes or offers a general assignment, arrangement or composition with or for the benefit of its creditors, and (iii) a petition is filed with respect to a party for (a) seeking a judgment of insolvency, bankruptcy or other similar proceeding or (b) appointing an administrator, liquidator, receiver or other similar officer its assets or substantially all its assets; the change may or may not be combined with a grace period.

This amendment would not affect our opinion as set out herein. It is noted that:

- adding Resolution Measures or WHOA Proceedings to Clause 10.5(c) may not be enforceable as discussed in paragraphs 5.3 – 5.5 below; and

- as mentioned in 4.3.4, it is advisable to exclude the appointment of a silent administrator and WHOA Proceedings from the automatic termination provisions.

Netting Clause

The (pre- and post-Insolvency) set-off regime under Dutch law covers most claims and amounts. Hence, the Terminating Party will under the Netting Clause be able to set-off most amounts against the Settlement Amount mentioned in Clause 11.2 of the EFET Power Contract. However, to avoid any discussion whether Clause 11.2 constitutes an exclusive set-off regime between Parties and whether or not some amounts are indeed capable of being set off by the Terminating Party, we would advise to include an additional Clause 11.3 to the Netting Clause in the Election Sheet which provides that the Terminating Party may set off the Termination Amount mentioned in Clause 11.2 against any or all other amounts, whether or not matured, contingent or invoiced, and irrespective of the relevant Delivery Point, currency, place of payment or place of booking of the obligation between the Parties or under any other agreements, instruments or undertakings between the Parties.

4.43 **Inclusion EFET Power Contract in CPMA**
Issue (ee) on page 14 of the Instruction Letter

The substance of our conclusions reached in Part (A) above would not be changed by the inclusion of the EFET Power Contract in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "**CPMA**"). Unless this would be different under the Governing Law, we are of the view that the Netting Clause of the EFET Power Contract would not be invalidated due to their inclusion under the broader netting provisions of the CPMA.

PART G

GOVERNING LAW, ARBITRATION AND JURISDICTION

4.44 Choice of law

Issue(ff) on page 14 of the Instruction Letter

Save as set out in paragraph 4.3.3(a) and (b) above, if the EFET Power Contract is governed by the Governing Law, the courts of The Netherlands will observe and give effect to the choice of the Governing Law as the laws governing the contractual obligations arising under or pursuant to the the EFET Power Contract in any proceedings in relation to the EFET Power Contract.

4.45 Submission to jurisdiction

Issue (ff) on page 14 of the Instruction Letter

The submission by a Counterparty to the jurisdiction of the German Institution of Arbitration or the courts of Germany or any other arbititration or court, if so expressed in the EFET Power Contract, is valid and binding upon such Counterparty. A Dutch court would declare itself not competent (*onbevoegd*) in the event that a Party to the EFET Power Contract (containing *an exclusive* choice of forum clause or choice of arbitration clause) attempted to sue the other Party before the courts of The Netherlands. As to arbitration, The Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and arbitration clauses are upheld, and arbitral awards are enforced, in accordance with that Convention.

Notwithstanding such submission to jurisdiction, a Dutch Court would assume jurisdiction:

(a) if the defendant enters an appearance and does not contest the jurisdiction prior to defences relating to the merits and, in the event that Section 1 of Title 1 of Book 1 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) applies, there is a reasonable ground for jurisdiction of such Netherlands court;

(b) pursuant to article 254 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in urgent matters, when, in view of the interests of the parties, provisional measures are required; and

(c) in the context of an attachment against the Counterparty or any of its assets located in The Netherlands.

PART H

REGULATORY REGIME

4.46 **Financial regulatory and Exchange Control issues**
Issue (gg) on page 15 of the Instruction Letter

Financial Regulatory Licences

4.46.1 Under the FMSA, a license requirement applies to anyone providing investment services or performing investment activities in The Netherlands in respect of financial instruments as listed in Annex I Section C of MiFID2. These include emission allowances (and derivatives on such allowances) as well as derivatives transactions with regard to climatic variables, freight rates, emission allowances, inflation rates or other economic statistics.

Commodity derivatives are defined separately in article 2(1)(30) of MiFIR to include securitized derivatives.[60] Excluded are REMIT wholesale energy products traded on an OTF that must be physically settled, spot contracts and contracts for commercial purposes.[61] Subject to the same exceptions, Commodity Transactions, Commodity Options and Commodity Swaps may well be considered to be "financial instruments" and "commodity derivatives" under the FMSA.[62] Commodity Transactions relating to emission allowances are not commodity derivatives but financial instruments as they fall within C(4) of Annex I.

A failure to obtain an FMSA license (or passport an EU MIFID2 license or CRDIV license into The Netherlands) will not however affect the validity or enforceability of the EFET Power Contract or the Individual Contracts (any such nullity or voidness is ruled out in the FMSA itself).

Currency or exchange controls.

4.46.2 Counterparties are obliged to comply with all notification and registration requirements of DNB in connection with all payments to be made by the parties under the EFET Power Contract to or from non-residents of The Netherlands in accordance with the General Reporting Instructions 2003 (*Rapportagevoorschriften betalingsbalansrapportages 2003*) issued by DNB pursuant to the External Financial Relations Act 1994 (*Wet Financiële*

60 Regulation (EU) 600/2014, OJ L.173

61 Being contracts that meet both of the following conditions: (i) entered into by/with operators/administrators of energy transmission grids/balancing mechanisms or pipeline networks and (ii) necessary to keep in balance the supplies and uses of energy at a given time.

62 Regardless of the fact whether these transactions are physically or cash settled.

Betrekkingen Buitenland 1994), although a failure to perform any of these formalities will not adversely affect the validity, effectiveness, enforceability or admissibility in evidence of the agreements or any payment made or to be made thereunder.

PART I

OTHER PROVISIONS

Issue (hh) on page 15 of the Instruction Letter

Apart from the recommendations mentioned in paragraphs 4.3.4, 4.12, 4.41.2 and 4.42.2 above, we have also set out a few other textual suggestions that EFET members may wish to consider in Appendix B.

PART J

EXECUTIVE SUMMARY ON CLOSE-OUT NETTING AND REGULATORY ISSUES

I. On the basis of the scope of reference and the assumptions in paragraphs 1 and 2 respectively, and subject to the excluded matter and the qualifications set out in paragraphs 3 and 6, this is an executive summary of the opinion expressed in paragraph 4 with regard to close-out netting and energy and financial regulations only. This executive summary does ***not form part of this Opinion Letter*** and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having any interpretative effect on the opinion expressed in Parts (A) through (I) above, which is the only opinion which can be relied upon.

II. The choice of law provisions of the EFET Power Contract will be recognised under the laws of this jurisdiction if there is an "international connection".

III. Clauses with regard to early termination by notice and clauses with regard to automatic close-out, each in the event of Insolvency Proceedings, will generally be upheld by the Netherlands courts; specific considerations apply to certain types of Transactions which are within the scope of Articles 38 and 237 BA as these would be terminated by operation of law; the imposition of Resolution Measures with respect to BRRD Entities and Dutch Insurance Companies may have a detrimental effect on the ability of the non-defaulting Party to terminate and close-out Individual Contracts because either such termination is disallowed or because the resolution authorities terminated certain or all derivatives transactions with the BRRD Entity or the Dutch Insurance Company for purposes of bail-in. If Automatic Termination of Individual Contracts is not selected to apply to the EFET Power Contract, the Terminating Party would be able to terminate all outstanding Individual Contracts between the Parties upon the Insolvency of its Counterparty in this jurisdiction and such termination would be enforceable under the laws of this jurisdiction subject to our observations in paragraph 4.2 (which relate, *inter alia*, to Individual Contracts which are outstanding as of the day of the Insolvency judgment and which are within the scope of articles 38/237 BA as these would be terminated by operation of law) and in our qualifications below (which relate to the ability of resolution authorities to terminate outstanding derivatives agreements with BRRD Entities and Dutch Insurance Companies for purposes of bail-in).

IV. The exercise, imposition or implementation of Resolution Powers with respect to a BRRD Entity or a Dutch Insurance Company may prevent the non-Defaulting Party from terminating and closing-out Individual Contracts based solely upon these events if the BRRD Entity continues to perform its obligations thereunder. DNB/SRB may impose a suspension of all such rights for two (2) business days. If Individual Contracts are not fully secured by a CSA and out-of-the-money for the BRRD Entity, DNB/SRB may terminate these Individual Contracts and bail-in the amount due to the Non-Defaulting Party. Similar suspension and bail-in powers apply to Dutch Insurance Companies under the Recovery and Resolution (Insurers) Act.

V. Under the laws of this jurisdiction it is not necessary that (i) the Individual Contracts and the EFET Power Contract are part of a single agreement in order for netting under the Netting Clause to be effective or (ii) the Parties to agree to an automatic, rather than an optional, termination of Individual Contracts. If Automatic Termination is selected to apply to the EFET Power Contract, such selection would be enforceable under the laws of this jurisdiction. Individual Contracts within the scope of articles 38 / 237 BA as referred to above would still be terminated by operation of law. With respect to certain Counterparties Automatic Termination cannot be validly agreed.

VI. Upon the occurrence of a Material Reason in relation to a Party, the Terminating Party would be entitled to exercise its rights under the Termination Clause and the Netting Clause, and the terms of the Netting Clause would be valid and effective under the laws of this jurisdiction with the effect that the amount due in respect of the obligations of each Party under Individual Contracts to which this Opinion Letter relates would be a net sum.

VII. The collateral arrangements under the CSA are effective and enforceable in accordance with their terms in the event of the insolvency of the Counterparty, to the extent that they provide that the value of any Collateral posted by the Counterparty and not yet retransferred is to be included as an "other amounts payable" (owing to the Counterparty as Transferor) in the calculation of the net amount payable under the Netting Clause.

VIII. Certain Individual Contracts with Electricity Companies that qualify as Purchase Agreements or Delivery Agreements may be incapable of being terminated in the circumstances set out hereinabove.

IX. The physical delivery of electricity over the Dutch grid may require certain formalities. A license is required to supply electricity to small customers.

XI. Close-out netting may be delayed in case of WHOA Proceedings, where a stay order has been issued before the other Party has been able to invoke a pre-stay Event of Default. In such circumstances, the other Party, unless it has entered into a CSA which qualifies as a financial collateral arrangement, can only exercise its rights under the Termination Clause after having demanded collateral from the Counterparty subject to the WHOA Proceedings (to cover its obligations arising during the stay period) and having failed to obtain such collateral in a timely manner. A post-stay order Event of Default may be utilized immediately under the Termination Clause, but there is no entitlement to collateral. In either case, a net liquidation amount payable to the non-defaulting Party cannot be enforced against the Counterparty until the end of the stay period (which can be as long as 8 months). An overview is provided in Appendix A of this Opinion Letter and the main risks are outlined in qualification 5.5.

5. QUALIFICATIONS

The opinion expressed above is subject to the following observations:

5.1 Meaning of "Enforceable"

5.1.1 the terms "*enforceable*", "*enforceability*", "*valid*", "*binding*" and "*effective*", where used in this Opinion Letter, mean that the obligations assumed by the Parties under, and the relevant provisions of, the EFET Power Contract are of a type which Netherlands law generally enforces or recognises; it being understood that enforcement before the courts of The Netherlands will in any event be subject to the degree to which the relevant obligations are enforceable under their governing law (if other than the laws of this jurisdiction), the nature of the remedies available in such courts (the power to order specific performance or to grant injunctive relief being at the court's discretion), the acceptance by such courts of jurisdiction, the effect of provisions imposing prescription or limitation periods (within which suits, actions or proceedings must be brought), the availability of defences such as fraud, duress, misrepresentation, undue influence, error, set-off (unless validly waived), abatement (i.e. the discretion to decrease the amount of agreed damages, indemnities or penalties) and counter-claim and to the effect of any sanctions and emergency management legislation (such as the Dutch Financial Relations Emergency Act (*Noodwet Financieel Verkeer*) and articles 1:28/1:29 FMSA);

5.1.2 no part of this Opinion Letter is to be read as a statement that judgments rendered by foreign courts would be enforceable in The Netherlands without relitigation or that all the procedures of such courts (such as discovery of documents or the compulsion of witnesses by subpoena) will be available against a Counterparty; generally speaking:

(a) an enforceable judgment obtained in a foreign court against a Counterparty in an action instituted in the manner contemplated by the EFET Power Contract will be recognised and enforced by the courts of The Netherlands without re-trial or re-examination of the merits, on the basis of and subject to the limitations imposed by the applicable enforcement treaty or European regulation (such as for example Council Regulation (EC) No. 1215/2012 on Jurisdiction and the Enforcement and Judgments in Civil and Commercial matters of 12 December 2012 (the "**Judgments Regulation**")) and in the absence of such an internationally binding arrangement no such recognition or enforcement will be afforded to the foreign judgment;

(b) because the Judgments Regulation no longer applies between this jurisdiction and the United Kingdom since 1 January 2021, an enforceable judgment obtained in the UK courts against the Counterparty in the manner contemplated by the EFET Power Contract will only be recognised and enforced by the courts of The Netherlands (if it contains a mutually exclusive jurisdiction clause which was entered into after 1 January 2021) on the basis of and subject to the limitations imposed by the Hague Convention on Choice of Courts Agreement of 30 June 2005;

(c) an arbitral award rendered pursuant to the arbitration clause as set forth in the relevant Master Agreement shall be enforceable in The Netherlands in accordance with and subject to the limitations of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Trb. 1959, nr. 58) and the relevant provisions of Book 4 of The Netherlands Code of Civil Procedure;

5.1.3 any enforcement of the EFET Power Contract and of any foreign judgments in The Netherlands will be subject to the rules of civil procedure as applied by the courts of The Netherlands; such courts have powers to mitigate the amount of damages, indemnities or penalties provided for in the EFET Power Contract (including any agreed costs payable in respect of litigation or collection), to the extent it regards them as manifestly excessive and, if so requested, to make an award in a foreign currency; such courts may also refuse to give effect to any provision in an agreement which would involve the enforcement of foreign revenue or penal laws; enforcement of a judgment for a sum of money expressed in foreign currency against the Counterparty's assets located in The Netherlands would be executed, however, in terms of Euro and the applicable rate of exchange would be that prevailing on the date of payment; service of process for any proceedings before the courts of The Netherlands must be performed in accordance with Dutch laws of civil procedure; the taking of concurrent proceedings in more than one jurisdiction in which the Judgments Regulation is applicable may - notwithstanding the terms of the EFET Power Contract - be precluded by one of the provisions of Section 9 (*Related Actions*) of that Regulation and the Dutch courts may be obliged to decline jurisdiction as a result thereof; as regards jurisdiction generally, the courts of The Netherlands have powers to stay proceedings if concurrent proceedings are brought elsewhere; finally, the ability of any party to assume control over another party's proceedings before the courts of The Netherlands may be limited by Dutch rules of civil procedure;

5.1.4 enforcement of a judgment for a sum of money expressed in foreign currency against the Counterparty's assets located in The Netherlands would be executed in terms of Euro and the applicable rate of exchange would be that prevailing on the date of payment;

5.2 Insolvency Proceedings/Regulatory Interventions

5.2.1 all calculations under the Netting Clause and the CSA may have to be made by reference to a date not later than the date on which the judgment declaring the Insolvency Proceedings was rendered.[63] Although there is no express provision in the BA stating this, it is held that as a general rule an Insolvency

[63] This is a result of the so-called *fixation principle*. Although there is no express provision in the Bankruptcy Act stating this (there is, however, a line of case law starting with Supreme Court 18 December 1987 NJ 1988, 340), it is held that as a general rule the insolvency judgment fixes the rights of the creditors unalterably as of the bankruptcy date. Please note that in our opinion this fixation principle does *not* prevent a Party to give a notice of termination after the Commencement Time.

judgment fixes the rights of the creditors unalterably as of the Commencement Time. Any amount by which any Settlement Amount and/or the Termination Amount increased between the Commencement Time and the (later) date on which the Solvent Party exercises the remedies under the Netting Clause or the CSA, may not be recoverable (or indeed included in the netting and set-off process contemplated under the EFET Power Contract). Accordingly, all amounts included in the calculations or the set-off under the Netting Clause may have to be determined by reference to a date not later than the insolvency judgment date which may occur prior to the date of close out and/or the valuation date for the purpose of netting. This risk does not arise in case the Insolvent Party is a Dutch Credit Institution or a Dutch Investment Firm and the Netting Clause is treated as a 'netting arrangement' (see paragraph 4.3.3(g) above). The risk is furthermore somewhat mitigated where the CSA qualifies as a financial collateral arrangement (as assumed under paragraph 2.2.14(d));[64]

5.2.2 interest accruing after the Commencement Time cannot be admitted on a claim against the Insolvent Party, unless the Insolvent Party is a Dutch Credit Institution or the claim is secured by a right of pledge or mortgage (article 128/260 BA).[65] This means that any net amount resulting from the Netting Clause (and/or the CSA), if any such amount is owed by the Insolvent Party (not being a Dutch Credit Institution), will not be capable of accruing interest after the Commencement Time, in order to be admitted in the Insolvency Proceedings unless the Solvent Party has a security interest (or title transfer) in respect of that amount;

5.2.3 if the DNB or the AFM finds that a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, or a Dutch Investment Fund (or its Manager or Custodian) does not comply with the solvency, liquidity and administrative directives ("*richtlijnen*") issued by it, or if there are other indications of a development which in the judgment of the DNB or the AFM endangers or could endanger the solvency or liquidity of such an entity, then the DNB or the AFM can determine that, as of a certain moment in time, all

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64 The Retroactive Effect Rule is partially disapplied for financial collateral arrangements and for acts performed pursuant to such arrangements (e.g. transfer of additional Collateral) in that: (i) the actual time of the judgment applies, instead of the Commencement Time, to such financial collateral arrangements and acts; and (ii) if such financial collateral arrangements or acts were entered into, or took place, on the same day as the judgment opening the Insolvency Proceedings, they are valid provided the other party is able to show that it was not aware, nor should have been aware, of such judgment. This has the result that any changes in the final liquidation amount based on (i) and/or (ii) should be taken into account, even though generally for determining the final liquidation amount under the Netting Clause, the fixation principle could require that the Commencement Time should be used. This is why we refer to "somewhat mitigated."

65 This should, in our view, also include foreign law security interests or title transfer arrangements granted by a Counterparty.

or certain bodies of the Dutch Credit Institution, Dutch Insurance Company, Dutch Investment Firm or Dutch Investment Fund (or its Manager or Custodian) can only exercise their powers with the approval of one or more persons (known as silent administrators, "*stille curatoren*") designated by the DNB or AFM. Pursuant to the FMSA, the Dutch Credit Institution, Dutch Insurance Company, Dutch Investment Firm or Dutch Investment Fund (or its Manager or Custodian) can challenge the validity of any act performed without such approval, if the other party to that act knew that no such approval was given, or could not have been ignorant thereof. The appointment of a silent administrator and accordingly the necessity of the approval referred to is not normally published. It is likely that without a publication or without it being otherwise obvious to the other party that the person or persons was/were designated as referred to, the other party will not know, nor ought to have known, that the approval referred to was required;

5.2.4 at the start of and during bankruptcy proceedings in respect of a Dutch Credit Institution or a Dutch Investment Firm, the bankruptcy court can authorise the liquidator to transfer all or part of the *funding liabilities* of such a Dutch Credit Institution or a Dutch Investment Firm to a third party (without the counterparty's consent) and to amend the relevant contracts prior to such a transfer (without the counterparty's consent), save that the following liabilities can not be amended: (i) liabilities secured on the Dutch Credit Institution's or Dutch Investment Firm's assets by way of pledge or mortgage, (ii) liabilities arising from hire-purchase agreements; (iii) liabilities arising from a financial collateral agreement (which includes repo agreements); (iv) liabilities owing to clients under derivatives positions which the Dutch Credit Institution or the Dutch Investment Firm has entered into for these clients' account and which are protected under the segregated pool rules of articles 49f-h of the Dutch Securities Giro Transfer Act (*Wet giraal effectenverkeer*);

5.3 Resolution Measures affecting BRRD Entities

5.3.1 The FMSA and the SRMR contain various provisions which might affect the effectiveness of the Netting Clause. In particular they provide for various remedies for a failing BRRD Entity, which include the Resolution Powers.

Mandatory Default Override

5.3.2 Under article 1:76b and article 3a:57 FMSA, provided that the BRRD Entity's substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed, the taking of a crisis prevention measure (as defined in the BRRD) or a crisis management measure (as defined in the BRRD; this includes a Resolution Power) in relation to a BRRD Entity, or the occurrence of any event directly linked to such a measure, cannot constitute an enforcement event (within the meaning of the FCA Law), and shall not make it possible to exercise against the BRRD Entity any termination, suspension, modification, netting or set-off rights, to obtain possession, exercise control or enforce or create any security over any asset of the BRRD Entity, or to enforce security interests. However, rights to terminate based on the existence or occurrence of other circumstances and the operation of the Netting Clause in relation to them, should not be affected (article 68(4) BRRD).[66]

5.3.3 The above applies *mutatis mutandis* to any Nationalisation Measures in respect of any financial undertaking (*financiele onderneming*) established in this jurisdiction (or its parent undertaking if established in this jurisdiction).

Suspension Powers & Pre-resolution Moratoria

5.3.4 DNB or the SRB (as applicable) has the power:

(i) under article 3a:52 FMSA, to suspend the payment and delivery obligations of a BRRD Entity subject to resolution, but in those circumstances the payment and delivery obligations of the counterparty are also suspended;

(ii) under article 3a:53 FMSA, to restrict the enforcement by secured creditors of security interests over the assets of a BRRD Entity; and

(iii) under article 3a:54 FMSA, to suspend the contractual termination, acceleration or close-out rights[67] of a party to a contract with a BRRD Entity provided that such BRRD Entity's substantive obligations under the contract continue to be performed.

Any period of suspension as referred to above must end no later than midnight at the end of the first business day following the day on which

[66] This default override also applies to contracts entered into by the subsidiary of an BRRD Entity in resolution whose obligations have been guaranteed by a parent or other member of the group and it thereby operates to exclude the effect of cross-default provisions.

[67] Article 2(1)(82) BRRD/article 1:1 FMSA defines a termination right as a right to terminate a contract, a right to accelerate, close-out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise.

the order providing for the suspension is published. Thereafter the suspension or restriction is automatically lifted.

5.3.5 Under articles 3A:20b – 20c FMSA (article 33a BRRD2), in a pre-resolution situation, DNB has the power to impose the following on a BRRD Entity (which is not yet subject to resolution) subject to certain conditions being satisfied and for the same duration as a resolution suspension or restriction:

(a) suspend any payment or delivery obligations pursuant to any contract to which a BRRD is a party;

(b) restrict secured creditors of that BRRD Entity from enforcing security interests in relation to any of the assets of that BRRD Entity; and

(c) suspend the termination rights of any party to a contract with that BRRD Entity.

The powers under (b) and (c) should be exercised simultaneously with those under (a). All such suspensions and restrictions are subject to the same conditions and duration as when they are applied in case of resolution (see above). However, if these powers are exercised in a pre-resolution phase they cannot be exercised again during resolution (article 3A:54a).

Partial Property Transfers

5.3.6 A property transfer may apply to only part of the assets and liabilities of a BRRD Entity (such a transfer being referred to as a "*partial property transfer*").[68] A partial property transfer could cause the transfer of some, but not all, of the Transactions (or obligations arising under Transactions), with the result that the ability to net the amounts due in respect of different Transactions against the amounts due in respect of others is impaired. The same could also result from the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party to an agreement.

Safeguards in case of Partial Property Transfers, Substitutions and termination/Modification of Contracts

5.3.7 The Resolution Safeguards ensure that in the case of a partial property transfer to a transferee (or the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party

[68] This may be the case because the property transfer instrument concerned expressly applies to only part of the business of the BRRD Entity or because it is ineffective in relation to foreign property, which may include Transactions, or obligations arising under Transactions, which are governed by the laws of a different jurisdiction.

to an agreement), the Netting Clause and the title transfer provisions in the CSA are protected because these qualify as set-off arrangements[69], netting arrangements[70] or title transfer financial collateral arrangements. Even in case the title transfer provisions in the CSA do not qualify as a financial collateral arrangement (because the parties to the CSA are not eligible parties), they will be protected as a netting or a set-off arrangement.

5.3.8 The Resolution Safeguards also provide that any partial property transfer made in contravention of the Resolution Safeguards, will not affect the exercise of the right to set-off or net (i.e. these rights can be exercised irrespective of the partial property transfer).[71]

Bail-In Powers

5.3.9 Bail-in (article 26 SRMR/article 3a:44 FMSA) may be applied to liabilities owed by a BRRD Entity under or in connection with the EFET Power Contract, or an Individual Contract, and would then reduce or eliminate the amount owed with the effect that the ability of the non-defaulting Party to net amounts due in respect of that liability against liabilities owed by the non-defaulting Party to the BRRD Entity is commensurately reduced or eliminated. However, in this regard article 3a:44 FMSA prohibits bail-in from being applied in relation to a liability which:

(i) is a secured liability (as defined in article 2(1)(67) BRRD which includes title transfer collateral arrangements) but only to the extent secured, the unsecured portion of the liability being eligible for bail-in;

(ii) has an original maturity of less than 7 days;

(iii) relates to a derivative[72] which has not been converted into a net debt, claim or obligation in accordance with the relevant arrangement; or

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69 Defined as an arrangement under which two or more claims or obligations owed between the BRRD Entity and a counterparty can be set off against each other (article 3a:1 FMSA).

70 As defined in article 2(1)(98) BRRD.

71 There are RTS (Commission Delegated Regulation (EU) 2017/867, OJ. 2017, L.131/15) which further specify the classes of arrangements to be protected under article 76 BRRD and thereby affect the scope of protected arrangements also under Dutch law.

72 Under the BRRD a "*derivative*" means a derivative as defined in article 2(5) of EMIR *("a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC [MiFID1] as implemented by article 38 and 39 of Regulation (EC) No 1287/2006*"). This includes most Commodity Transactions (other than spot transactions).

(iv) is excluded from bail-in pursuant to article 44 BRRD.

Bail-in may therefore only be applied in respect of derivatives liabilities after close-out of the relevant derivatives contract (article 49(2) BRRD), and for that purpose article 63(1)(k) BRRD (article 3a:51 FMSA) grants the resolution authority the ability to terminate and close out any derivatives (whether collateralised or not). Any resulting net close-out amount payable by a BRRD Entity, to the extent that it is not a secured liability, is consequently subject bail-in, even though the actual contract (prior to close-out) was a secured liability. The power to close-out derivatives is only given in order to apply bail-in to the net amount (if owing by the BRRD Entity), but if (a) there is no such amount because of full collateralisation or (b) that amount is itself secured (including secured by a financial collateral arrangement), close-out of such derivatives positions is not possible, because there is nothing to bail-in post-close-out. Therefore, if the non-defaulting Party has a net exposure to a BRRD Entity and such exposure is fully collateralised, there should be no possibility for DNB to exercise its close-out and hence bail-in powers. Where derivative transactions are subject to a netting arrangement, the resolution authority or an independent valuation expert must determine as part of the valuation the net value of such liabilities on the basis of the derivative transactions and to simultaneously or subsequently apply the bail-in tool to the net claim.[73]

5.4 Resolution Measures in respect of Dutch Insurance Companies

As a result of the Recovery and Resolution (Insurers) Act, the resolution powers of DNB in respect of Dutch Insurance Companies have been broadly harmonized with those for BRRD Entities and the analysis in paragraph 5.3 above applies *mutatis mutandis* to Dutch Insurance Companies, save that (i) the Recovery and Resolution (Insurers) Act does not provide for pre-resolution suspension and restriction powers and (ii) the other resolution powers and overrides do not extend to crisis prevention measures, as the Recovery and Resolution (Insurers) Act does not include such measures.

[73] Based on article 49(4) BRRD, which states that a Resolution Authority must determine the value of liabilities arising from derivatives in accordance with the following: (1) appropriate methodologies for determining the value of categories of derivatives, including transactions that are subject to netting agreements; (2) principles for establishing the relevant point in time at which the value of a derivative position should be established and (3) appropriate methodologies for comparing the destruction in value that would arise from the closing out of and application of the bail-in tool for derivatives with the amount of losses that would be borne by such derivatives upon the application of the bail-in tool. There is no guidance to what extent the valuation expert or the Resolution Authority must comply with the terms of the relevant netting agreement (to which express reference is made in article 49(3) BRRD) on valuation in connection with the close-out of transactions.

5.5 **Effect of WHOA Proceedings**

Mandatory Default Override

5.5.1 Under the new article 373 BA (introduced under the WHOA), the preparation or proposal of a restructuring plan covered by the WHOA, the appointment by the court of a restructuring expert or the occurrence of any other event or act directly related or reasonably required for the plan's implementation (e.g. a court ordered stay; see paragraph 5.5.2 below; together the "**WHOA Events**"), shall not in themselves allow the non-defaulting Party to invoke contractual or other powers (i) to terminate or dissolve a contract (whether automatic or by notice), (ii) to amend obligations owing to the counterparty or (iii) to suspend the performance of its own obligations towards the counterparty. Events of default clauses that could be triggered by such events cannot be validly invoked against the debtor (the WHOA overrides such contractual provisions).

Court ordered Stay Period

5.5.2 During a court-ordered stay period (4 months with possible extensions with no more than a further 4 months), the Counterparty will be protected against:

- the filing of bankruptcy petitions,
- the enforcement of security interests over assets owned by the Debtor unless a safe harbor applies (see paragraph 5.5.5 below); and
- the levying of attachments for contract/payment enforcement,

except, in each case, with prior court approval;

- the use of an event of default (not being an event as described in 5.5.1; hereinafter a "**Regular EoD**") that has occurred before the stay order and that allows the non-defaulting Party to suspend, amend or terminate an agreement or contract: such use will be blocked once the stay order takes effect (i.e. in all cases where the stay order is issued before the suspension, amendment or termination is declared). For exceptions to this blocking effect, see 5.5.3 and 5.5.4 below. For using a Regular EoD occurring after the stay order takes effect, see 5.5.8 below.

5.5.3 In the latter case the non-defaulting Party can be required to continue the performance of its obligations BUT ONLY IF the debtor provides it with collateral security for its obligations arising during the stay period.[74] In the event the debtor fails to offer or provide such collateral security, this shall allow the non-defaulting Party to exercise its termination, suspension, close-out netting rights.[75] If any collateral security made available to the non-defaulting Party becomes (or threatens to become) insufficient during the stay period, it can petition the court to allow it to exercise its termination/close-out rights and enforce its security interests forthwith and the court will – according to the WHOA Memorandum of Reply - have no option but to grant a permission in such circumstances.

5.5.4 The non-defaulting Party's termination, suspension, and close-out rights arising from a pre-stay default are NOT frozen if they form part of a financial collateral arrangement (because (i) such arrangements are excluded from the freeze on enforcement (see below) and it would be inconsistent for enforcement to be allowed, but not the necessary step of invoking an event of default) and (ii) article 7 of the FCD (which Directive prevails over the EU Restructuring Directive (2019/1023)[76]) would be breached if such close-out were barred by the stay order).[77]

5.5.5 As regards enforcement of security interests, a stay order does not affect: (i) creditors who are unaware of the fact that a restructuring plan was being prepared (i.e. had no knowledge of the filing of a scheme declaration[78] and had not otherwise been informed by the debtor) or that a stay order had been granted, (ii) security interests in respect of collateral located in other EU Member States or in non-EU countries,[79] (iii) security interests in the form of title transfers (as the collateral no longer belongs to the debtor) provided these qualify as a financial collateral arrangement in terms of the parties involved, or (iv) security interests over the debtor's assets n the form of a qualifying financial collateral arrangement (i.e. a "security financial collateral arrangement" within the meaning of article 2.1(c) of the FCD

74 The WHOA Memorandum of Reply explicitly states that the collateral should be sufficient to cover the non-defaulting Party's exposure under a financial master agreement and that such exposure can fluctuate.

75 The same applies in case the stay period expires without an approved restructuring plan binding upon the counterparty (in this case the non-defaulting Party).

76 Article 31(1) of the Restructuring Directive.

77 This is also supported by the WHOA Memorandum of Reply which confirms that close-out netting arrangements under financial master agreements should not be adversely affected by the WHOA.

78 Before offering a WHOA restructuring plan, the debtor must file a confidential scheme declaration with the competent Dutch court in which it commits to offer a restructuring plan within 2 months and it may then simultaneously request the court to order a general or specific stay against creditor action for a period of 4 months.

79 This safe harbour is only useful if no event of default is required, otherwise a pre-stay Regular EoD would be frozen for the duration of the stay period (see 5.5.2 – 5.5.4) and thereby block the exercise of the security interest or title transfer.

between eligible parties and involving eligible collateral (cash or securities)).

5.5.6 Provided the title transfer provisions in the CSA constitute a financial collateral arrangement,[80] we consider the safe harbour under (iii) above to be available to the non-defaulting Party *for both* termination/close-out under the EFET Power Contract *and* for enforcement against collateral. However, during the stay period, any enforcement of the post-close-out net termination amount owing to the non-defaulting Party against the Counterparty's assets would only be allowed if the Dutch court grants approval.

5.5.7 If the non-defaulting Party does not have the benefit of a CSA to cover its exposure on a Counterparty, then if a pre-stay Regular EoD triggering a close-out right has occurred, it can ONLY exercise that close-out right during the stay period:

(a) if the Counterparty fails to immediately provide collateral security for all liabilities that arise during the stay period upon the non-defaulting Party's request; or

(b) if the Counterparty does provide collateral security immediately, but it becomes insufficient; in that case the non-defaulting Party needs prior court approval to exercise its close-out right, thereby incurring a significant timing risk by having to petition and argue before the courts;

but if there is a net liquidation amount owing to the non-defaulting Party after 5.5.7 (a) or (b):

- recourse against the Counterparty's assets in the EU is not permitted for the duration of the stay period; but
- claiming under a Letter of Credit (or any other form of guarantee from an entity that is not affiliated to the debtor) for the net liquidation amount will be allowed.

5.5.8 If a non-defaulting Party has no CSA covering its exposure against a Counterparty subject to the WHOA's stay period, and there has not been a Regular EoD prior to the stay order, then it cannot terminate the EFET Power Contract based only on the occurrence of a WHOA Event (see 5.5.1); the non-defaulting Party needs a Regular EoD to occur during the stay period before it can take action. Once this Regular EoD occurs, the non-

[80] See assumption 2.2.14(d) of this Opinion Letter.

defaulting Party can exercise its normal termination, suspension and close-out rights (these are not frozen or barred by a stay order; see 5.5.2), but if the net liquidation amount is owing to it, it will need to wait until the end of the stay period to obtain payment (see 5.5.6 and 5.5.7).

Contract Termination by the Court

5.5.9 If the non-defaultingParty does not agree to a proposal by a Counterparty, which has entered into WHOA Proceedings, to amend or terminate the EFET Power Contract[81], and it cannot close-out this EEFT Power Contract itself based on a Regular EoD (see 5.5.2 – 5.5.8 above), the court can allow the unilateral termination of the EFET Power Contract (and all transactions thereunder) if such termination is part of the restructuring plan submitted to and approved by it and provided a reasonable notice period is observed by the Counterparty. [82] In the event of such a termination, the non-defaulting Party will be legally entitled to damages, which will be calculated on the basis of the agreed close-out netting arrangements (including the application of any collateral held by either Party);[83] the damages will therefore consist of the amount of the non-defaulting Party's net claim against the Counterparty after giving effect to the Netting Clause upon the date the termination becomes effective;[84] this claim can be marked down if it is

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81 The WHOA provisions dealing with contract termination only apply to mutual agreements (i.e. those giving rise to mutual obligations between the Parties). Strictly speaking any Transaction could qualify as such and in theory the WHOA could therefore give rise to "cherry-picking" in breach of the single agreement principle, but this result is extremely remote because the WHOA Memorandum of Reply clearly states that it is not intended to adversely affect the operation of master agreements or their netting arrangements.

82 When it approves the restructuring plan, the court can extend the notice period to a maximum of three months after the approval order, if it deems the period chosen by the debtor to be unreasonable.

83 This is confirmed by the WHOA Memorandum of Reply which states that the contractual netting arrangement will have to be followed in determining these damages.. In case the non-defaulting Party's claim for damages is included in the restructuring plan, an additional safeguard will apply, being the 'no creditor worse off' principle enshrined in the WHOA (article 384 BA (new)); no creditor can be forced to accept a restructuring plan which means it receives less value (whether in cash or in non-cash awards) than it would have received in case of regular insolvency proceedings. Although article 384 states that the court may dismiss any restructuring plan that breaches this principle, the commonly held view is that this should be read as "must dismiss". This is based partly on article 10(2)(d) of the EU Restructuring Directive (2019/1023) which was followed in drafting the WHOA and partly on the fact that the WHOA Memorandum of Reply confirms this stricter interpretation..

84 As this will be difficult to quantify up front given that market value of the positions and the collateral will vary over time, the WHOA Memorandum of Reply indicates that a restructuring plan would normally contain a bandwidth. Note that payment of the net close-out amount (damages determined in accordance with the relevant Agreement according to the WHOA Memorandum of Reply) may therefore be delayed until after the restructuring plan has been court approved and the notice period has expired. I.e. the debtor must include a notice period in the plan and if the court does not regard that period as too short, the period will start on the date of the court's approval. If the court does deem the period too short, it can replace the notice period in the plan with its own notice period which can be up to 3 months.

integrated into the restructuring plan[85] as the non-defaulting Party would also not have received 100% of its net claim in the counterparty's bankruptcy (note that the mark-down cannot be greater than that suffered in bankruptcy).

5.6 General Qualifications

5.6.1 where any Party is vested with a discretion or may determine a matter, and Dutch law governs the EFET Power Contract, Dutch law may require that such a discretion is exercised or such determination is made reasonably. Any provision in the EFET Power Contract providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto. A Dutch court may regard any calculation, termination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified;

5.6.2 no opinion is given (or may be inferred or implied) as to whether any of the Parties to the EFET Power Contract requires a license, exemption or dispensation for providing regulated banking, investment, or payment services in this jurisdiction (whether acting on a cross-border basis or otherwise). Nevertheless, any failure to obtain such a license, exemption, or dispensation will not render the EFET Power Contract or any Individual Contract null, void or voidable as matter of Dutch law;

5.6.3 each power of attorney (*volmacht*) and mandate (*lastgeving*) (including, but not limited to, powers of attorney and mandates expressed to be irrevocable) granted and all appointments of agents made by a Counterparty, explicitly or by implication, will terminate by law and without notice upon the Commencement Time with respect to bankruptcy (*faillissement*) and will become ineffective in case a Counterparty becomes subject to moratorium of payments (*surseance van betaling*), or the exercise of certain Resolution Powers. Notwithstanding the above, where the relevant power of attorney or mandate forms part of a financial collateral arrangement, and is necessary to realise the financial collateral, these rules will be disapplied;

5.6.4 with reference to our opinion in paragraph 4.45 above, it should be noted that with respect to proceedings resulting from or closely connected to

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[85] The debtor has a choice to either include the damages in the restructuring plan or not to do so. In the latter case, the damages will need to be paid in full. In the former case it can offer a partial payment, but the counterparty then has the right to contest the restructuring plan as an affected creditor.

Insolvency Proceedings (e.g. regarding verification of claims or voidable preference challenges) in respect of a Counterparty, the court of The Netherlands which has declared the Insolvency Proceedings shall have exclusive jurisdiction (articles 3 and 6 EU Insolvency Regulation);

5.6.5 in Insolvency Proceedings, a judgment of bankruptcy or moratorium has retroactive effect as from the Commencement Time and any dispositions by the Counterparty of property made after such time are void, but this does not apply to financial collateral arrangements nor to acts performed pursuant to such arrangements (e.g. a transfer of additional or substitute Eligible Credit Support). The actual time of the judgment applies to such financial collateral arrangements or acts. In addition, financial collateral arrangements or acts pursuant thereto are enforceable against third parties even if such arrangements or acts were entered into or took place after the judgment opening the Insolvency Proceedings was made, but on the same day, provided the counterparty is able to show that it was not aware nor should have been aware of such judgment;

5.6.6 if the effect of a final judgment of a court outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities;

5.6.7 if any creditor of a Party were to attach under Netherlands law (whether before or after judgment) any claim owing by the Counterparty to such other Party under the EFET Power Contract or in respect of an Individual Contract, either party would nevertheless be able to exercise its rights under the Netting Clause in relation to the then existing Individual Contracts, including the claim which is the subject of the attachment, but may not be able to exercise its rights in relation to post-attachment Individual Contracts;

5.6.8 to the extent that any assets owned by e.g. Municipalities or Local Government Entities have a public utility function, seizure of these assets is prohibited by virtue of articles 436 and 703 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

6. RELIANCE

This Opinion Letter:

(a) expresses and describes Dutch legal concepts in English and not in their original Dutch terms; consequently, this Opinion Letter is issued and may only be relied upon on the express condition that it shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with the laws of The Netherlands;

(b) speaks only as of its date hereof and is strictly limited to the matters set forth herein and no opinion may be inferred or implied beyond that expressly stated herein;

(c) is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity which has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by, or disclosed to, any other person, entity or corporation whatsoever without EFET's and our joint prior written approval, save for disclosure by EFET members to the appropriate regulatory and/or supervisory authorities, having jurisdiction over such members, on the basis that:

   (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms, but not for the purposes of reliance,

   (ii) we do not assume any duty or liability to any person to whom such disclosure is made; and

   (iii) such person agrees not to further disclose this opinion or its contents to any other person, other than as permitted above, without our prior written consent;

(d) may not be used for any purpose other than in connection with the EFET Power Contract;

(e) does not result in any obligation on our part to notify or to inform the addressees of any developments subsequent to its date that might render its contents untrue or inaccurate in whole or in part at such time.

Yours faithfully,

F.G.B. Graaf
advocaat
Clifford Chance LLP

APPENDIX A

OVERVIEW OF INSOLVENCY PROCEEDINGS, RESOLUTION MEASURES AND WHOA PROCEEDINGS

1. *Bankruptcy: general overview*

Bankruptcy (*faillissement*) is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate Dutch court (*Rechtbank*) for the benefit of the insolvent debtor's collective creditors. The objective of bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor's assets among its creditors. In practice, however, bankruptcy proceedings serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the BA, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business, practises an independent profession or not.

The court appoints a liquidator (*curator*) who is charged with the management and realisation of the debtor's assets (including by means of a transfer of (part of) the business as a going concern). The liquidator acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts of the receiver the law requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts. Under Dutch law a bankruptcy judgment takes effect retroactively from the Commencement Time on the date such judgment is rendered.

As a result of bankruptcy, the Insolvent Party loses with immediate effect all rights to administer and dispose of its assets. The liquidator manages the bankrupt estate, which consists of all of the Insolvent Party's assets and liabilities existing on the date of the bankruptcy judgment and extends to all after-acquired assets as well. The estate is not liable for obligations incurred by the Insolvent Party after the Commencement Time, except to the extent that such obligations arise from transactions that are beneficial to the estate.

The BA does not provide for the consolidation of bankruptcy proceedings opened in respect of companies belonging to the same group. However, there are some examples of cases in which courts have allowed such consolidation.

2. *Moratorium of payments: general overview*

Moratorium of payments is a court ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the moratorium of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Moratorium of payments proceedings can be opened in respect of natural persons carrying on a business or practising an independent profession and juristic persons. The moratorium of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary more than once) with a maximum of one and a half years.

As a result of the granting of a moratorium of payments, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of a court appointed administrator (*bewindvoerder*). Likewise, the administrator cannot act without the co-operation or authorisation of the debtor. In a moratorium of payments proceeding, the court may appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

The administrator in a moratorium has fewer powers than a liquidator in bankruptcy. The former can only act with the cooperation of the Insolvent Party, *i.e.* the management in the case of a company (and the debtor/the management can only act with the cooperation of the Insolvency Representative). It should be noted that moratorium of payments is also deemed to take effect retroactively from the Commencement Time on the date the order is rendered.

3. ***Insolvent Foreign Companies***

In relation to a Foreign Company both of the Insolvency procedures described above can apply in respect of its Dutch Branches, subject to the provisions of the EU Insolvency Regulation. A more detailed discussion of Multi-Branch Parties can be found in Part (B) below.

If a Foreign Company's COMI is located in a Regulation State[86], then, pursuant to article 3 EU Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings will have universal effect throughout the other Regulation States, *i.e.* (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be

[86] The EU Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside a Regulation State and therefore it does not govern (i) the consequences of the opening of an insolvency proceeding concerning such a debtor in such a Regulation State, and (ii) the consequences of the opening of an insolvency proceeding in non Regulation States.

located (except as otherwise provided in the Insolvency Regulation). Consequently, if a Foreign Company:

(i) is declared insolvent in accordance with the EU Insolvency Regulation in a Regulation State where its COMI is situated, the enforceability of the Netting Clause must in our view be determined in accordance with the law of such Regulation State;

(ii) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the EU Insolvency Regulation in respect of the assets of that Dutch Branch.

4. ***Nationalisation Measures***

If the creditworthiness of a Dutch Credit Institution, a Dutch Insurance Company, Dutch Investment Firm or any other regulated entity qualifying as a financial undertaking (*financiële onderneming*) within the meaning of the FMSA threatens the stability of the Dutch financial sector, the Dutch Minister of Finance can take Nationalisation Measures, which could include public ownership (nationalisation) of or any other measures in relation to such an entity. Nationalisation Measures do not qualify as insolvency proceedings as a matter of Dutch law.

5. ***Effect of Resolution Measures: General Overview***

5.1 The BRRD has created a new framework for the resolution of failing credit institutions and investment firms across the European Union. As this was introduced in the form of a European Union directive, it was necessary for the BRRD to be implemented into national law; in The Netherlands this was achieved pursuant to the BRRD Act. The rules that were introduced by the BRRD Act apply to a Party that is a Dutch Credit Institution, a BRRD Investment Firm or any other BRRD Entity.

5.2 In addition to the BRRD, the SRMR establishes uniform rules and procedures for the resolution of those credit institutions and certain investment firms which are established in EU Member States participating in the "single supervisory mechanism" established under the SSM Regulation (that is, Member States within the Eurozone) and groups of companies containing such a credit institution or investment firm.

5.3 The effect of SRMR and BRRD is that a distinction will have to be made between:

(i) Dutch Credit Institutions and BRRD Investment Firms for which the SRMR entrusts the SRB with the power to determine a resolution scheme; and

(i) less significant Dutch Credit Institutions and BRRD Investment Firms, for which such decision-making shall in principle be the responsibility of DNB as the national resolution authority, using the powers under the BRRD Act.

In the scenario that a group in resolution, containing in scope Dutch Credit Institutions and BRRD Investment Firms, includes credit institutions and investment firms established in both SSM and non-SSM EU Member States, the resolution process under the BRRD will apply with the SRB representing the national resolution authorities of participating EU Member States.

5.4 DNB is required to implement the resolution scheme, whether or not this has been devised by the SRB or DNB. In cases where this has been devised by the SRB, the SRB will monitor the relevant institution's resolution and may give instructions to DNB on any aspects of the resolution. In the event that DNB does not comply with the resolution scheme, the SRB will have the power to directly instruct the relevant institution in resolution.

5.5 Instead of or prior to any Insolvency Proceedings, a BRRD Entity may be subject to one or more of the Resolution Powers. In relation to termination rights, netting and set-off, the effects of any of the aforementioned Resolution Powers (and other ancillary powers exercisable under the FMSA) are considered in paragraph 5.3 above.

6. ***WHOA Proceedings: General Overview***

6.1 On 1st January 2021, a new Dutch law introduced the possibility of pre-insolvency debt restructuring schemes; this new tool will be available to all Dutch business entities (including, theoretically, Dutch Pension Funds[87]) except Dutch Credit Institutions and Dutch Insurance Companies. This new law is known as the Act on Court Approved Pre-Insolvency Restructuring Schemes ("**WHOA**" following the Dutch abbreviation). As WHOA Proceedings are privately negotiated debt restructuring proceedings conducted outside of insolvency procedures, they do not qualify as Insolvency Proceedings for the purpose of this Opinion Letter.

6.2 WHOA Proceedings can be either confidential ("*besloten*") or public ("*openbaar*"). Public WHOA Proceedings have soon be added to Annex A of the EU Insolvency Regulation, thus ensuring that these proceedings must be recognised for entities subject to the EU Insolvency Regulation in all Regulation States.[88]

[87] Theoretically, because pension funds are able under law to reduce their liabilities unilaterally.

[88] See: Regulation (EU) 2021/2260 of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B (OJ, 2020, L455/4).

The WHOA's goal is to introduce a restructuring procedure enabling debtors in financial difficulties to restructure at an early stage and avoid insolvency while remaining in control of their business. To use this new procedure, debtors must foresee that they will not be able to continue paying their due and payable debts.[89]

Under such circumstances, the debtor or a court appointed restructuring specialist may offer a restructuring plan to the debtor's creditors and shareholders. Before offering a WHOA restructuring plan, the debtor must file a confidential scheme declaration with the competent Dutch court in which it commits to offer a restructuring plan within 2 months (the "**Scheme Declaration**") and it may then simultaneously request the court to order a general or specific stay against creditor close-out, termination and enforcement action for a period of 4 months (with a possible extension of up to 4 months). A restructuring plan could propose amendments to debt instruments, payment deferrals, debt-for-equity swaps, haircuts / write-downs of all or certain creditors and termination of executory contracts (where the counterparty did not voluntarily cooperate with a proposal to amend or terminate the contract). Not all of the debtor's creditors need to be covered by the restructuring plan. Creditors are grouped in separate classes (depending on their ranking in an insolvency) that vote separately on the proposed plan. Subject to certain safeguards, creditors who voted against the restructuring plan could be (cross-) crammed down and bound by the restructuring plan if a majority (of 2/3 of the value) of creditors within a class (or a more senior class) vote in favour of such a plan and the court subsequently approves the plan.

6.3 The WHOA provides the following (insofar as relevant to this Opinion Letter):

(a) the preparation or proposal of a restructuring plan covered by the WHOA, the appointment by the court of a restructuring expert or the occurrence of any other event or act directly related or reasonably required for the plan's implementation (e.g. a court ordered stay; see (c) below), shall not *in themselves* allow the creditor to invoke contractual or other powers (i) to terminate or dissolve a contract (whether automatically or by notice), (ii) to amend obligations owing to the debtor or (iii) to suspend the performance of its own obligations towards the debtor; event of default clauses that could be triggered by such events cannot be validly invoked against the debtor (the WHOA overrides such contractual provisions).

(b) if a debtor, who is in the course of preparing a restructuring plan, proposes to a creditor to amend or terminate its mutual (i.e. executory) contractual arrangements[90] and the creditoor does not agree, the court can allow the unilateral termination of the contract if this termination is part of the restructuring plan that is eventually submitted to and approved by the court

[89] This means that the debtor must be able to pay its currently due and payable debts, but not those arising in the foreseeable future (looking as much as a year in the future). I.e. there must be no realistic prospect of avoiding future insolvency if the debtor's liabilities are not restructured.

[90] Clearly, the debtor would only do this for contracts that it deems financially onerous.

and then only subject to a reasonable notice period.[91] However, in that case, the creditor will have a legal right for damages; this claim can be marked down if it is part of the approved restructuring plan[92] as the counterparty would also not have received 100% payment of the claim in the debtor's bankruptcy. If part of the restructuring plan, the creditor can therefore object before the court on the basis of the 'no creditor worse off' principle enshrined in the WHOA; no creditor can be forced to accept a restructuring plan which means it receives less value (whether in cash or in non-cash awards) than it would have received in case of regular insolvency proceedings[93];

(c) During a court-ordered stay period (4 months with possible extensions with no more than a further 4 months) which can be requested at the same time as the WHOA Proceedings,[94] the debtor will be protected against the filing of bankruptcy petitions, the enforcement of security interests over assets owned by the debtor[95] and the levying of attachments for contract/payment enforcement (except, in each case, with prior court approval). In addition, if an event of default has occurred allowing the creditor to suspend, amend or terminate a contract, it will be entitled to do so, unless the court grants a stay period before the suspension, amendment or termination is declared. Consequently, the creditor's termination, suspension, and close-out rights arising from a pre-stay default are frozen and it can be required to continue the performance of its obligations BUT ONLY IF the debtor provides the counterparty with collateral security for such continued performance during the stay period. In the event the debtor fails to offer or provide such collateral security, this shall allow the creditor to exercise its termination, suspension, close-out netting rights.[96] If the collateral security available to the creditor becomes (or threatens to become) insufficient during the stay period, the creditor can petition the court to allow it to exercise its termination/close-out rights and enforce its security interests forthwith.[97]

91 When it approves the restructuring plan, the court can extend the notice period to a maximum of three months after the approval order, if it deems the period chosen by the debtor to be unreasonable.

92 The debtor has a choice to either include the damages in the restructuring plan or not to do so. In the latter case, the damages will need to be paid in full. In the former case it can offer a partial payment, but the counterparty then has the right to contest the restructuring plan as an affected creditor.

93 Article 384 BA (new).

94 A stay is not granted automatically, but needs to be requested by the debtor after it has filed a so-called Scheme Declaration and has confirmed that it has already offered a restructuring plan to its creditors or will do so within 2 months. A stay can cover all of the debtor's assets or be confined to specific creditors and specific assets.

95 Assets transferred to the creditor under title transfer arrangements are therefore not affected by the stay order, but enforcement may be affected by the bar on exercising a pre-stay Regular EoD.

96 The same applies in case the stay period expires without an approved restructuring plan binding upon the counterparty (in this case the non-defaulting Party).

97 The WHOA Memorandum of Reply is clear that in these circumstances the court will have no option but to grant a permission.

APPENDIX B

NECESSARY OR DESIRABLE AMENDMENTS

Although this is ultimately a matter to be determined under the Governing Law, we believe that the events specified in Clause 10.5(c) adequately refer to Insolvency Proceedings as defined in this Opinion Letter.

Resolution Measures and Nationalisation Measures do not necessarily qualify as insolvency or winding-up proceedings under Dutch law and it is uncertain whether Clause 10.5(c) covers Resolution Measures or Nationalisation Measures and we have suggested text under (B) and (C) below to extend the Material Reason events to cover Resolution Measures and Nationalisation Measures if Parties so wish. Certain Resolution Powers may result in the Counterparty being left with no assets, being run-off or being liquidated. If Resolution Measures were not included in Clause 10.5(c) by adding wording to that effect, then termination and close-out would only be possible if those Measures resulted in a Material Reason under any of the other sub-clauses of Clause 10.5. If Parties wish to have the ability to terminate on the occurrence of Resolution Measures and Nationalisation Measures, without making these insolvency related matters under 10.5(c), language is suggested to that effect under (B) and (C) below.

Although this is ultimately a matter to be determined under the Governing Law, WHOA Proceedings appear to be covered by the voluntary insolvency events in Clause 10.5(c), but it is necessary to ensure that these are not eligible for Automatic Early Termination.

None of the proposed language below has been reviewed or approved by non-Dutch law counsel.

(A) The risk in the case of an EFET Power Contract where parties have selected automatic termination is that (i) the appointment of a silent administrator (as mentioned in paragraphs 4.3.4, 4.12 and 5.2.3 above) or (ii) any filing, proposal to creditors, court appointment or court order under WHOA Proceedings qualifies as an insolvency related event covered by Clause 10.5(c), resulting in an immediate termination of all outstanding Individual Contracts without the non-defaulting Party knowing it. Therefore, much later the silent administrator or the Counterparty that entered into WHOA Proceedings could invoke the Event of Default that had taken place due to his appointment or the relevant WHOA-related filing, proposal, appointment or order. To address this risk and also to make sure that the other Party is able to terminate the EFET Power Contract if and when it becomes aware of an event under (i) or (ii), we would recommend inserting additional events of default in Clause 10.5 of the EFET Power Contract:

> *"if a non-disclosed silent administrator ("stille curator") pursuant to the Dutch Financial Markets Supervision Act ("Wet op het financieel toezicht") is appointed over or in respect of a Party established in The Netherlands (for the avoidance*

of doubt, such an appointment shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement)."

"if any filing, restructuring proposal, appointment of a restructuring expert or other court order or judgment is made or rendered in accordance with the Act on Court Approved Pre-Insolvency Restructuring Schemes ("Wet Homologatie Onderhands Akkoord") in respect of a Party established in The Netherlands (for the avoidance of doubt, any such filing, proposal, appointment, order or judgment shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement)."

The effect of this language would be that the appointment of a silent administrator or any filing, proposal to creditors, court appointment or court order under WHOA Proceedings would be an Event of Default, but would not be considered to be able to cause a "silent" termination of Individual Contracts in case automatic termination is selected.

(B) Equally, as it is unclear whether the taking of Resolution Measures or Nationalisation Measures is covered by Clause 10.5, it may be appropriate to expand these so that there is no doubt that the other Party is in a position to close-out the Individual Contracts. This can be achieved by inserting an additional event of default in Clause 10.5:

*"if a Party becomes subject to any form of crisis prevention or crisis management measure, any resolution measure, any special measure (*bijzondere maatregel betreffende de stabilitieit van het financiele stelsel*) within the meaning in Chapters 1, 3A or 6 of the Netherlands Financial Markets Supervision Act (*Wet op het financieel toezicht*) or any proceedings or steps to apply any such measures (for the avoidance of doubt such measures, proceedings or steps shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement)".*

Note, however, that invoking such events may be prohibited or delayed due to mandatory Dutch law (mentioned in paragraphs 5.3, 5.4 and 5.5 of our Opinion Letter), although non-Dutch courts may not give effect to the overriding effect of these mandatory Dutch law provisions.