To	:	EFET
From	:	Gladei & Partners Law Firm
Date	:	23 August 2022
Subject	:	EFET General Agreement Gas Version

MEMO

1. **INTRODUCTION**

1.1. **Purpose of this memorandum**

1.1.1. We, Gladei and Partners Law Firm, have been sought to advise in relation to certain issues related to various legal, tax and other implications that EFET member-companies may deal with in Moldova. Our advice was sought in the form of answering the questions referred to in Section 2 hereinafter.

1.2. **Documents examined**

1.2.1. For the purpose of this memorandum we have reviewed the following documents:

(i) Request for Quote,
(ii) EFET General Agreement Gas Version 2.0(a),
(iii) EFET General Agreement Gas Version 2.0(a) - Execution Pages (agreements available here);

1.3. **Assumptions**

1.3.1. Please note that our answers and assessment contained herein is confined to the laws of the Republic of Moldova as presently in force, speaks as of the date provided herein, and does not offer an assurance that another qualified person (e.g. a regulatory authority or a court of law) will share our view or endorse our assessment on the matters analyzed.

2. **LEGAL ADVICE**

2.1. *CAPACITY*

2.1.1. ***The intended transaction is with a state owned off taker Energocom, a state-owned entity and will occur on a cross-border basis with supply of gas of the border of Moldova with Ukraine or Romania. In some jurisdictions for example, state owned utilities are only permitted to enter into transactions for limited purposes, such as to hedge exposure to movements in commodity prices, for example. In relation to Energocom, please advise whether there are any limitations on the capacity (i.e. power) of Energocom enter into any of the Commodity Transactions that could lead to those transactions becoming void or unenforceable, e.g. because of local applications of the ultra vires doctrine.***

2.1.2. Generally, under Moldovan Civil Code, a legal entity can undertake any activity which is not prohibited by law, even if such activity is not stipulated in its constitutive act (Article 176(1)). However, a legal entity can assume the rights and obligations and perform these on the basis of its constitutive acts.

2.1.3. If Energocom's holds a valid license for supply of natural gas, than generally the limitations on capacity which exist and those from the constitutive acts. The scope of such a license is to grant a supplier the right to carry out the activity of supply of natural gas which involves the sale, including resale, of natural gas to consumers, which term, under the Natural Gas Law 108/2016 ("**Gas Law**"), means the wholesale consumer, the final consumer or a natural gas company that procures natural gas.

2.1.4. On the webpage of the National Agency for Energy Regulation ("**ANRE**"), which keeps the registry of licenses related to energetics, is indicated that Energocom holds the license for the supply of natural gas[1], valid until 16.01.2043. According to ANRE's registry, besides Energocom, there are 25 more companies which hold licenses for the supply of natural gas.

2.1.5. ***If limitations on capacity exist, what are the consequences of a Commodity Transaction being entered into in violation of those limitations? Does any legal or statutory relief exist in Moldova for persons entering into Commodity Transactions in good faith with counterparts who lack appropriate legal capacity?***

2.1.6. If Energocom has no valid licence, then the absolute nullity of the Commodity Transaction may be invoked. If Energocom has a valid licence, but the corporate limitations of Energocom have been breached, then the relative nullity of the Commodity Transaction may be invoked.

2.1.7. The condition of a valid license for carrying out supply of natural gas protects a general interest of the society, so its breach shall lead to the absolute nullity of the Commodity Transaction (Article 327(1) of the Civil Code). It should be mentioned that after the court declares the absolute nullity and orders application of its effects, the parties shall be put back in their original position. In other words, the principle of *restitutio in integrum* shall operate and each party shall restitute which it obtained based on the annulled legal document.

2.1.8. There is a high risk that the good faith would not operate, since the existence and/or validity of a license may be verified by any party prior to entering the Commodity Transaction. Anybody should be aware if its counter-party has the legal right to enter such transaction.

2.2. *AUTHORITY*

2.2.1. ***In relation to Energocom please list precisely what documentation (e.g., constitutional documents, board resolutions or other authority, copies of public registers etc.) should be obtained in order to avoid any argument by the counterpart that either a Commodity Transaction was not authorised internally or that an individual who purported to act on its behalf (e.g., in signing documentation or entering into a transaction over the telephone) was not properly authorised.***

2.2.2. The law does not provide for the list of documents, but it is advisable to obtain from Energocom the following documents:

[1] https://www.anre.md/registrul-de-licentiere-3-261

(i) the certified copy of the articles of associations of Energocom, with all the addendums – the last version dated 30.07.2021 is published by Energocom here (and 2 addendums here and here);

(ii) the original extract of Energocom from the State Register of Legal Entities;

(iii) the certified copy of the list with members of the management bodies – we found out that they were elected recently, on 16.06.2022 (see section II, point 6 from the document published here);

(iv) the certified copy of Energocom financial statements for 2021;

(v) the certified copy of the minutes of:

- the supervisory board of Energocom, adopted unanimously[2] - if all the Commodity Transaction(s) are in amount from 25%[3] up to 50% of the total value of Energocom's assets pursuant to the latest financial statements[4]; or
- the General Meeting of Shareholders, duly notarized – if all the Commodity Transaction(s) exceeds 50%[5] of the total value of Energocom's assets pursuant to the latest financial statements;
- the certified copies of Energocom's license for the supply with natural gas.

2.2.3. ***What are the consequences of a Commodity Transaction being entered into by a Moldovan state-owned utility such as Energocom in violation of its internal authorisation requirements for the enforceability of this?***

2.2.4. Potential nullity (absolute or relative) of the Commodity Transaction (Articles 202 and 327 of the Civil Code). Below we set a more detailed overview of the applicable legislation and principles.

2.2.5. The *absolute nullity* represents a refusal to recognize the legal effects pursued by the conclusion of the legal act. The alleged legal act, is devoid permanently (regardless of the lapse of time) of any intended legal effect in relation to the parties and third persons, from the moment of its conclusion. The absolute nullity is therefore a form of ineffectiveness of the legal act that occurs regardless of the will of one of the parties to the legal act or of both parties, and if in a judicial trial the judge finds out sufficient facts, he must ex officio refuse the legal effects of the alleged legal act and to establish the absolute nullity.

2.2.6. The *relative nullity* represents a sanction of the deficiencies that can be tolerated by the legal system, but the final decision must be made only by the person directly affected by such

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[2] Note that if the vote of the supervisory board is not unanimous, then the General Meeting of Shareholders shall decide on this matter.

[3] Under Moldovan law, such transaction shall be deemed as *Large-scale transaction* which means *a transaction or several mutually related transactions, performed directly or indirectly, in respect of:*
a) the acquisition or alienation, pledge or taking by the company as a pledge, lease, leasing or giving in use, lending (credit), surety of the goods or rights whose market value is more than 25 % of the value of the company's assets, according to the latest financial statements; or
b) the placement by the company of the voting shares or of other securities convertible into such shares, constituting over 25% of all the placed voting shares of the company.

[4] Under the financial statements for 2021, the total assets of Energocom are in amount of MDL 2,094,380,755

[5] Pursuant to the law and the articles of associations of Energocom.

deficiency. However, the legal act is treated, from the moment of its conclusion, as effective. If the entitled person decides to insist on the annulment of the legal act, he can obtain the annulment only by filing a lawsuit for the declaration of relative nullity. The judge cannot invoke it ex officio.

2.2.7. The legal effects of the nullity of the legal act are the same regardless of whether a legal act is void (absolute nullity) or has been annulled (relative nullity) — the law refuses to recognize all the legal effects that should have been produced by that legal act.

2.2.8. So, the Commodity Transaction shall not be affected, if at the time of the conclusion of the Commodity Transaction, Energocom's counter-party did not know and should not reasonably have known the grounds for invalidity (*i.e.* absolute or relative nullity), of the minutes/resolutions of Energocom's management bodies, based on which was concluded the Commodity Transaction (e.g. the minutes of Energocom's supervisory board or General Meeting of Shareholders) (Article 202(8) of the Civil Code).

2.2.9. To find out if the counter-party did not know and should not reasonably have known the grounds for invalidity, the test of good faith shall apply. Pursuant to Article 11 of the Civil Code, *(1) Good faith is a standard of conduct of a party, characterized by fairness, honesty, openness and taking into account the interests of the other party to the legal relationship. (2) In particular, it is contrary to good faith for a party to act contrary to the statements it has previously made or to the conduct which it has previously had if the other party, to its detriment, had relied on reasonable on those statements or that behavior.*

2.3. *CONFIRMATION PRACTICES*

2.3.1. ***General.***
We would like you to distinguish between
(1) the formal requirements and procedure in the formation of a legally binding and enforceable Individual Contract and its inclusion in the Agreement and
(2) the formal requirements a Confirmation should comply with under the procedural laws of Moldova in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the Agreement. When doing so, please base your opinion on the following additional assumptions:

As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties in each case

(i) ***make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or***
(ii) ***refer to the EFET General Agreement when subsequently exchanging confirmations (in whichever form, including telex, fax, SWIFT or electronic transmission).***

2.3.2. As regards the formal requirements and procedure in the formation of a legally binding and enforceable Individual Contract under Moldovan law, such contract shall be drafted:

– either in written, in one single paper document with ink signatures of the parties,
– either by an exchange of letters, telegrams, electronic documents, others such, signed by the party who sent them (Article 321(2) of the Civil Code).

2.3.3. As regards the second option, when it comes to the electronic means, to be enforceable such documents shall be signed with:

– advanced qualified electronic signature, or
– other types of electronic signatures (e.g. the simple one) if such is provided by the agreement of the parties (Article 318(3) of the Civil Code).

2.3.4. In other words, in order to be able to sign an email with a simple electronic signature (e.g. the name and surname) first the parties shall conclude an agreement regulating all the conditions on the signature which will be used in respect of a contractual relationship.

2.3.5. As regards the confirmation procedure, the Moldovan law does not provide such procedures and this depends only on the will of the parties and the conditions they agree to. The contract is considered concluded and enforceable when the parties reach an agreement on the essential terms thereof. In any case, if the contract has an object that exceeds the amount of MDL 1000 (cca. EUR 50), it shall be concluded in written form, as an oral agreement is not binding and enforceable.

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

2.3.7. We understand that the Individual Contract shall be governed by the English or German law, so it shall comply with the requirements of the respective laws. Under Moldovan law it shall be executed in written form and signed by the duly empowered representative (e.g. the Director of Energocom).

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

2.3.9. We understand that the Individual Contract shall be governed by the English or German law, so this issue shall be determined in accordance with these laws. Under Moldovan law, the risk of having the agreement agreed upon orally is the impossibility to prove it in court, in particular with witness statements/declarations.

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

2.3.11. We understand that the Individual Contract shall be governed by the English or German law, so this issue shall be determined in accordance with these laws. Under Moldovan law, including a wording such as “this Individual Contract forms an integral part of EFET General Agreement signed by Parties” should work.

2.3.12. Furthermore, pursuant to Article 1003(1) of the Civil Code, *The framework contract is the legal act by which the parties agree to negotiate and establish contractual relations <u>the terms of which will be agreed by subsequent contracts concluded under the framework contract</u>*. It results from these provisions that the Individual Contract of the Agreement, shall be executed in writing, containing the agreed terms such as the price and the amount of goods (gas).

2.4. BOOKING / BRANCHES ABROAD

2.4.1. ***Commodity Transactions will regularly be concluded in the name of a branch or head office located outside Moldova, i.e., our counterpart in Moldova will be contracting directly with a group entity based. Are there any laws or regulations that might prevent this occurring?***

2.4.2. No, as long as Energocom's counter party has legal capacity under the laws of its incorporation.

2.4.3. ***Is there a local statutory limitation for Energocom to establish a local branch or subsidiary outside Moldova, i.e. Romania and/or Ukraine? Would any such foundation require a government approval or other form of state approval.***

2.4.4. No. Section 2, point 9 from Energocom's Articles of Associations provides expressly that the company has the right to establish branches in Moldova in accordance with the national law and outside Moldova – including in accordance with the law of the foreign country if the international treaty to which Moldova is party does not provide otherwise.

2.4.5. The competence to decide on the establishment of a branch belongs to Energocom's supervisory board. The board is also competent to appoint the branch manager, as well to approve the amendments to Energocom's Articles of Association in relation to the new established branch. No other government/state approvals are required.

2.5. EXCHANGE CONTROLS

2.5.1. ***Are there any central bank, governmental or other legal or regulatory restrictions, consents or registrations required relating to either foreign or local currencies that would prevent or restrict Commodity Transactions with local counterparts?***

2.5.2. The legal provisions which regulate the payments in foreign currency between residents and non-residents are captured in the Law on foreign exchange regulation 62/2008. Pursuant to Article 20(1) of this law, on the territory of the Republic of Moldova, payments and transfers between residents and non-residents shall be made in national currency, also in foreign currency, except for the cases provided for in paragraph 2 of the same article which prohibits payments in limited instances such as payments for services in local shops, restaurants, hotels, gas stations, other similar units, payments for commination services, payment of salaries and the like. Therefore, as of yet, the Commodity Transaction between a resident and a non-resident is not restricted by the above provision and can pe paid in a foreign currency.

2.5.3. Moldovan banks as resident payment service providers, clear such payments in accordance with the pursuant to Section 2(a) of the Regulations regarding the conditions and manner of carrying out currency operations approved by the Resolution of National Bank of Moldova No. 29/2018 ("**NBM Regulations**"). Below we set a more detailed overview of the applicable rules.

2.5.4. Pursuant to Section 63 of NBM Regulations, *in order to make the payment/transfer without cash to the resident legal entity (except for the cases provided for in Section 64) or to the non-resident legal entity, the RPS provider undertakes at least the following actions:*

(1) *obtain information about the: (a) recipient of the payment/transfer; (b) purpose of payment/transfer; (c) payment/transfer amount;*

(2) *check whether the payment/transfer is made within the foreign exchange operations provided for in art. 5-16, 18-24 and 38 of Law No. 62/ 2008;*

(3) *requests the presentation by the legal entity of supporting documents, except for the cases expressly specified in sections 2 and 3 of this chapter;*

(4) *requests the presentation by the legal entity of the appropriate notification/authorization - in the event that, in accordance with Law No. 62/ 2008, the currency operation in which the payment/transfer is made is subject to notification/authorization* (not the case for payment of sale-purchase of natural gas).

2.5.5. From a practical perspective, a local bank from Moldova confirmed to us, orally and on a no-name basis, that the payment ordering entity shall provide to the bank the document (e.g. the Individual Contract) which confirms the amount to be paid, for which goods/services (i.e. the purpose), and the bank information of the non-resident entity. There is no need to provide the General Agreement, as the bank won't review all other agreement terms and conditions.

2.5.6. Usually, such transfer is completed in 3 to 5 days, depending of the corresponding bank. On the issues which can occur, the bank officer confirmed us that these can be of a technical nature due to bank's system or due to incorrect data provided by the payment ordering entity. In the last case, the bank contacts shortly the ordering entity to correct the data.

2.5.7. Also, it shall be noted that pursuant to Article 17(1) of the Law 62/2008, *Payments and transfers within current currency operations are received/made by residents and non-residents without restrictions.*

2.6. CONSENTS, APPROVALS AND OTHER REQUIREMENTS

2.6.1. ***Are there any local consents, approvals, licences or registrations which either the supplier/trader company or the local (state owned) Energocom should obtain in connection with entering into Commodity Transactions assuming that it will be a physical delivery at the border (Moldova/UA or Moldova/RO).***

2.6.2. Energocom, shall have a valid (i) license for the supply with natural gas at the date of entering into the Commodity Transaction (please see our answer to question 2.1.1. above), and (ii) Balancing Contract concluded with a transport system operator[6].

2.6.3. In respect of the seller, there can be 2 scenarios. First, the seller is a foreign entity which delivers the natural gas only to the border (interconnection point), and Energocom is the entity which imports the natural gas. Second, the seller is a national company, which carries out the activity of a natural gas trader.

2.6.4. On the first scenario, the seller has no obligation to conclude a Balancing Contract and/or to obtain a supply license, since it is not a participant to the national gas market within the meaning of Section 8 of Natural Gas Market Rules approved by ANRE resolution No. 534/2019 (the "**Rules**"), which provides that, *the natural gas market participants are: (1) producers; (2) suppliers; (3) consumers; (4) distribution system operator (DSO); (5) transport system operator (TSO); (6) storage warehouses operators; (7) other system users.*

[6] For the gas transport, the operator shall be designated by ANRE as a balancing entity.

2.6.5. On the second scenario, we note that starting from 10.09.2022, the Moldovan law will regulate the trading activity, which is defined as the *purchase and sale of natural gas on the wholesale market of natural gas, including in relation to the import/export of natural gas*, and as a rule[7] shall be carried out by a trader, which is defined as *the natural gas company holding a license for natural gas trading, which carries out its activity under the conditions of the law*. The purpose of the new provisions is to increase the competition on the natural gas market for all the participants, including to ensure more competitive prices of sale-purchase of natural gas. This means that starting from 10.09.2022, the wholesale consumers (not applicable for household and non-household consumers[8]), will have the option to purchase gas from a local trader.

2.6.6. To carry out activity on the natural gas market in Moldova, the trader (i.e. the seller) shall (i) obtain a trader <u>license</u> issued by ANRE, and (ii) conclude a Balancing Contract with a transport system operator. ANRE shall issue the license in up to 15 calendar days from the date of submission of the statement by the solicitor. Below we set a more detailed overview of the applicable legislation.

2.6.7. On the license:

(i) pursuant to Article 14(2^1) of the Gas Law, *To obtain a license for natural gas trading, the persons referred to in paragraph (1) shall: (a) to be registered in the Republic of Moldova and to present a document confirming this* (e.g. the extract from the register of legal entities)*; and (b) present the financial statements for the previous year, in the case of the active legal entity, or extract from the bank account, in the case of starting the business.*

(ii) pursuant to Article 14(4) of the same Law, *the administrator of the enterprise applying for a license must meet the following criteria: (a) to have higher education; (b) not have an active criminal record related to the activities carried out in the field of natural gas or a criminal record for committing intentional crimes provided for by the Criminal Code.*

(iii) pursuant to Article 14(7) of the same Law, *the deadline for examining the statement regarding the issuance of licenses for carrying out activities in the natural gas sector and the statement regarding the extension of their validity period is no more than <u>15 calendar days</u> from the date of submission to the Agency of the statement, as well as of the documentation established in this law*.

2.6.8. On the Balancing Contract:

(i) pursuant to point 30 of the Rules, it shall contain the following mandatory clauses:
(1) *The natural gas delivery point represents the point of transfer of the risk of loss and is identified as VTP (i.e. Virtual Trade Point).*

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[7] Pursuant to the new provisions, the license for natural gas supply also ensures the rights to carry out the trading activity on the wholesale natural gas market. However, a trader cannot hold the same time a supply license and a trading license (Article 84^2 (6) of the Law 108/2016). In other words, if you hold a supplier license, you can perform also trading activity, which is not possible viceversa.

[8] Pursuant to the Law 108/2016, <u>*wholesale consumer*</u> *– natural person, individual entrepreneur or legal person who procures natural gas for the purpose of their resale inside or outside the natural gas system;* <u>*household consumer*</u> *– natural person who procures natural gas for his own household needs, except for their use for commercial purposes, for carrying out entrepreneurial or professional activity;* <u>*non-household consumer*</u> *– natural person or legal person who procures natural gas for other purposes than for their own household needs.*

(2) *The transfer of ownership will require a commercial notification to BE (i.e. Balancing Entity), in accordance with the provisions of the Rules;*

(3) *The contracting party that purchase natural gas must make a commercial notification of purchase, while the contracting party that sells natural gas will make a commercial notification of sale;*

(4) *The amount indicated in the commercial notifications sent to BE will be agreed in advance between the contracting parties;*

(5) *Bilateral contracts on the wholesale market will define the responsibilities for cases where the commercial notifications presented by both contracting parties do not match and one contracting party has suffered losses due to such situations;*

(6) *The contracting parties will agree that the transfer of ownership of natural gas from one contracting party to another contracting party is determined by commercial notifications confirmed by BE;*

(7) *The contracting party that procures natural gas on the wholesale market will not be restricted in any way to resell the natural gas that is the subject of the contract, in particular with regard to export, supply to certain wholesale consumers or certain final consumers, the volumes and prices applied. The contracting party that trades natural gas on the wholesale market will not be restricted in any way to procure the natural gas that is the subject of the contract, especially in terms of import sources, production, volumes and applied prices.*

(ii) pursuant to Section 47 of the Rules, *the balancing contract regulates in particular the terms and conditions regarding: (1) the rights and obligations of the contracting parties; (2) the consequences of the suspension or termination of the balancing contract; (3) the procedure for presentation, coordination and confirmation of RPB (i.e. Responsible Party for Balancing) commercial notifications; (4) the procedure for determination and commercial settlement of imbalances in the balancing portfolio of RPB, including neutrality payments; (5) related data exchanges,*

(iii) pursuant to Sections 49 and 50 of the Rules, *The balancing contract is valid for an indefinite period, until the termination by one of the contracting parties with a reasonable notice*, and to *conclude a balancing contract with BE, the applicant must submit a registration application using the form published on the BE website and submit the necessary information, in accordance with point 48 of the Rules. The registration application form is drafted by BE.*

2.6.9. ***Is there a legal requirement to conclude contract documentation in Romanian language?***

2.6.10. No. The parties are free to choose the language. The practical inconvenience may be in case of a dispute in Moldovan courts where it is required to provide all the evidence/documents translated into Romanian, in accordance with Article 167(1) a) of the Procedural Civil Code.

2.6.11. Also, from a practical perspective, it is advisable to ensure the translation of the documentation or to draft it initially into Romanian. The reason is that the documentation (entirely or partially) may be requested by the Customs Service/banks when performing the customs clearance and/or when ensuring the transfer of the payments to Energocom's counterparty.

2.6.12. ***Is it correct that each IC needs to contain a reference to the relevant Incoterm (to be applied) regarding the transfer of title and risk?***

2.6.13. No, but it is advisable, for the purpose of customs clearance, and also for clarity in potential disputes. Note that even the Incoterms implementation rules suggest the inclusion of a reference. Pursuant to Section III, point 9 (*How Best to Incorporate the Incoterms Rules*), of Incoterms 2020 – ICC Rules for the use of domestic and international trade terms, issued by International Chamber of Commerce in 2019, it is provided that, *if the parties want the Incoterms 2020 rules to apply to their contract, the safest way to ensure this is <u>to make that intention clear in their contract, through words such as</u> [the chosen Incoterms rule] [named port, place or point] Incoterms 2020.*

2.7. ***What are the consequences of failing to comply with the requirements (etc.) you have identified in response to above points?***

2.7.1. The absence of valid license (natural gas supply license of Energocom and/or natural gas trade license of the seller, provided that it is a local company) may lead to absolute nullity of the Commodity Transaction (for details please see our answer to question 2.1.6.above).

2.8. GOVERNING LAW, SUBMISSION TO THE JURISDICTION OF THE ENGLISH/GERMAN COURTS OR ARBITRATION AND ENFORCEMENTS OF JUDGMENTS

2.8.1. ***Documentation governing Commodity Transactions will usually be governed by English or German law and the parties will usually submit to the jurisdiction of the English or German courts (or, alternatively, to DIS or LCIA-arbitration). Please confirm that: Energocom may enter into contracts governed by English or German law and submit to the non-exclusive (or exclusive) jurisdiction of the English or German courts or to arbitration;***

2.8.2. Under Article 2167(1) and (2) of the Civil Code, a contract is governed by the law chosen consensually by the parties. The parties to a contract may establish the law applicable both to the entire contract and to certain parts of it. Therefore, Energocom can enter into a contract that is governed by the laws of a jurisdiction other than counterparty's jurisdiction of incorporation.

2.8.3. In so far as the election of the jurisdictional forum is concerned, Energocom can submit for the non-exclusive (or exclusive) jurisdiction of the English or German courts or to arbitration. Pursuant to Article 461(1) of the Procedural Civil Code, which prescribed the cases where Moldovan courts have exclusive competence, the Commodity Transactions are not expected to fall within that scope.

2.8.4. ***Any judgment obtained in an English or German court will be enforceable in Moldova without excessive formalities, in particular, re-trial on the merits.***

2.8.5. Yes, please note though that pursuant to Article 470 of the Procedural Civil Code, there are certain formalities suggesting that the recognition and enforcement application shall be solved in a public hearing with the participation of the Ministry of Justice. The court has the right to ask explanations from the claimant, to interrogate the debtor and to request explanations from the foreign court which issued the judgement. The court is not entitled though to re-examine the merits of the case.

2.8.6. Below please find the grounds for refusal of the recognition and enforcement application, stipulated in Article 471(1) of the Procedural Civil Code:

(1) *the judgement, according to the legislation of the state on whose territory it was pronounced, has not become irrevocable or is not enforceable;*

(2) *the party against whom the decision is issued was deprived of the possibility to appear at the trial, not being legally notified about the place, date and time of the examination of the case;*

(3) *the examination of the case is the exclusive competence of the courts of the Republic of Moldova;*

(4) *there is a decision, even a non-final one, of the court of the Republic of Moldova issued in the dispute between the same parties, regarding the same object and having the same grounds or in the proceedings of the court of the Republic of Moldova there is a pending case in the dispute between the same parties, regarding the same object and having the same grounds at the date of notification to the foreign court;*

(5) *the enforcement of the judgement may prejudice the sovereignty, may threaten the security of the Republic of Moldova or may be contrary to its public order;*

(6) *the limitation period for the presentation of the judgement for enforcement has expired and the creditor's request for reinstatement within this period has not been satisfied by the judgment of the Republic of Moldova;*

(7) *the foreign court decision is the result of a fraud committed in the procedure abroad;*

(8) *by court decision it is ordered the transfer of the shares of the licensed bank in the Republic of Moldova. In this case, the recognition of the enforcement of the foreign court decision is allowed only on condition of presenting the National Bank's permission to hold a substantial share in the bank's share capital or the National Bank's opinion on the possibility of holding shares without prior permission.*

2.8.7. It shall be mentioned that pursuant to Article 467(1) of the Procedural Civil Code, *Foreign court judgements, including transactions, are recognized and enforced in the Republic of Moldova, either if this is stipulated in the international treaty to which the Republic of Moldova is a party, or based on the principle of reciprocity regarding the effects of foreign court judgements.*

2.8.8. Therefore, as the treaties on legal assistance which Moldova has signed are limited (16 – bilateral and 17 – multilateral[9]), the recognition request of the court judgement from the countries which are not parties to these treaties shall be performed on the basis of the principle of reciprocity. In other words, the Moldovan court (i) either shall be provided with evidence that the judgements issued by the Moldovan courts were recognized in the respective country or (ii) either shall be provided with a statement issued on a diplomatic level, through which is stated that the respective country will recognize the judgements issued by the Moldovan courts.

2.8.9. From a practical perspective, there are few requests on recognition and enforcement of foreign judgements solved in Moldovan courts. Per our independent research, based on the public data from the official court's database, which may be lacunary, we found out that for the last 4 years (2018-2021), Chisinau court solved 11 requests on recognition and enforcement of foreign judgements (1 in 2021, 3 in 2019 and 7 in 2018). In 2 cases the court refused the recognition

[9] Please see details in this list: https://www.asp.gov.md/sites/default/files/informatii-utile/lista-tratatelor-international/tratate-bilaterale-si-multilaterale-in-materie-civila-familiala-si-penala.pdf

and enforcement due to the following reasons: (i) the lack of foreign court competence[10] and (ii) the foreign judgement was not final and the party was not legally summoned[11].

2.9. PREPAYMENT

2.9.1. ***Are there any restrictions applicable under Moldovan law for pre-payment for commodity Transactions in part or in full?***

2.9.2. No restrictions applicable, moreover, please note that pursuant to Article 926 of the Civil Code, the advance payment shall be refunded in case of termination of the contract, in the amount for which the correlative obligation was not performed. As regards the clearance of such payments by the bank, please refer to our answers at Sections 2.5.5. - 2.5.8.

2.9.3. ***Can a prepayment for a specific Commodity Transaction be used to compensate damages under any other Commodity Transaction, should there be any damages applicable (in cases of non-payment/late payment or failure to accept/deliver)?***

2.9.4. The Civil Code does not prohibit this, so the parties may agree that an advance payment for a Commodity Transaction can be used to compensate any damages under another Commodity transaction, concluded based on the same General Agreement. Below we set a more detailed overview of the applicable legislation.

2.9.5. Pursuant to Article 934(1) of the Civil Code, *the creditor has the right to request compensation for the entire damage caused by the non-performance of the obligation, unless the debtor proves that the non-performance is justified* (*e.g.* force majeure).

2.9.6. Pursuant to Article 936(1) of the Civil Code, *the compensations for the patrimonial damage caused by the non-performance of the obligation represent the amount of money that will put the creditor, as much as possible, in the situation in which it would have been if the obligation had been performed properly. These compensations cover the actual damage suffered (including the incurred expenses and the decrease of the value of the good) and the missed profit by the creditor.*

2.9.7. Pursuant to Article 936(2) of the Civil Code, *the creditor has the obligation of proving the amount of the damage for which he claims compensations.* However, it is advisable to consult an accountant firm in respect of this matter, as when it will come the financial audit, issues could arise in respect on how will be treated and/or reflected such advance payment, if a part of it or the entire amount will be used to compensate damages.

2.10. TAXATION

2.10.1. ***Assuming a delivery at the border, are there any withholding taxes, energy taxes, stamp or other documentary taxes or other taxes on residents or non-residents which would apply for Commodity Transactions for commodities to be imported into Moldova?***

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[10] Ruling 9-14/19, dated 1 July 2019, issued by the Chisinau court (Centru headquarters) available on https://jc.instante.justice.md/ro/pigd_integration/pdf/e7d41bf9-049f-e911-80d7-0050568b021b

[11] Ruling 9-9/17, dated 21 February 2018, issued by the Chisinau court (Centru headquarters) available on https://jc.instante.justice.md/ro/pigd_integration/pdf/b551e786-f71e-e811-80d4-0050568b021b

2.10.2. Yes, an 8% VAT from the taxable value of the imported gas (Article 96(b) of the Tax Code). Please note that if the gas is imported:

(i) by Energocom directly from the foreign trader – the VAT shall be paid by Energocom until its introduction on the territory of the Republic of Moldova (*i.e.* the latest when submitting the customs statement) (Article 101(7) of the Tax Code).

(ii) by Energocom under the project "Security of natural gas supply", carried out under the Loan Agreement between the Republic of Moldova and the European Bank for Reconstruction and Development, in the amount of 300 million euros, signed in Chisinau on June 23 2022, - "Energocom" is exempted from VAT without the right to deduct, in accordance with the Law 234/2022 (i.e. the Law exempting Energocom from the payment of VAT and other customs duties)

(iii) by local licensed gas trader – the VAT shall be paid by the gas trader until its introduction on the territory of the Republic of Moldova (*i.e.* the latest when submitting the customs statement) (Article 101(7) of the Tax Code).

2.10.3. Also note that such import is exempted from import customs duty pursuant to position 2711 of the Combined Nomenclature of Goods approved by the Law 172/2014. However, there are applicable fees for customs procedures which shall be paid for the services provided by the customs authority and shall be calculated as a percentage of the customs value of the goods or in a fixed amount. Pursuant to Annex 2 to the Law on customs tariff 1380/1997, for the imported goods with the customs value more than EUR 1000, the customs fee is 0,4% from the customs value of the goods, but not exceeding EUR 1800.

2.10.4. On the customs procedure and formalities, please note that there are currently no particular rules for the import of gas. This results indirectly also from a draft Government Resolution from 2021 regarding the modification of the Regulation on the application of customs destinations provided for by the Customs Code of the Republic of Moldova, approved by Government Resolution no. 1140/2005. Namely, this draft Government Resolution purported to regulate the procedure of natural gas declaration. As of today, this draft Government Resolution is not approved and we are not aware if or when will it shall be approved.

2.10.5. Please note that general information (in Romanian and English) on the Moldovan customs formalities such as import, import duties, declaration of goods, can be found on the official Trade Information Portal of the Republic of Moldova. In addition to the general information from the above mentioned portal, it is advisable to consult and engage a customs broker familiar with the procedure and practical formalities. The key customs points for the import and export of natural gas are described below.

(i) The import and export declarations are made monthly, the later on the 20th day following the month which is declared. From a practical perspective, the import duties (VAT and fees for customs procedures) shall be paid before submitting the customs declaration on the imported gas, namely until the 20th day following the month which is declared.

(ii) In so far as the from of the documents needed for the customs declarations is concerned, the gas trader (i.e. the local company) shall provide the customs broker with the originals, with ink signature and stamp. This will be a rule until 1 January 2023, when electronic customs declarations will be possible. There is no need to share with the broker or the customs authority the General EFET Agreement, only bits from it referring to the gas quality and quality, the payment conditions and the parties of the agreement shall be sufficient.

(iii) The liability of declaring the imported or exported gas rests on the gas trader (i.e. it shall provide the correct data and in full volume as required by law). If a broker is engaged, this shall only bear liability for filing and submitting the customs declaration. Failure by the gas trader to declare the imported gas within the deadline (i.e. until the 20th day following the month which is declared) can be sanctioned with a fine from 4% to 10% of the value of the imported gas.

2.10.6. **Does *the tax advice differ depending on whether the Commodity Transaction is booked by an office/ branch of Energocom inside or outside Moldova?***

2.10.7. Not from a Moldovan law perspective. Pursuant to Article 240(3) of the Civil Code, the branch is not a legal entity, because it has no separate legal capacity from that of the mother company. Therefore, from a Moldovan law perspective, the import of the natural gas will be considered performed by Energocom as legal entity and not the branch, irrespective if the Commodity Transactions is booked by its branch inside/outside Moldova.

2.10.8. ***If a Moldovan branch of that company were used, would a mirror-image hedging Commodity Transaction between such branch and a branch outside Moldova (i.e., between two offices of the same legal person) have additional tax or legal consequences?***

2.10.9. We believe such transactions won't have legal effect in Moldova as long as local law does not recognise transactions between two offices of the same legal entity. As long as under Moldovan law the branches are not separate legal entities, unlike subsidiaries, and have no separate legal capacity from the company mother, then such Commodity Transaction shall be deemed as operation performed by Energocom through its branches.

2.11. GAMBLING/CONFIDENTIALITY

2.11.1. ***Are there any restrictions on wagering or gambling in which might prevent or inhibit the entering into of transactions in certain circumstances, e.g., if an Moldovan counterparty used a transaction to speculate on upward or downward movements in prices?***

2.11.2. No, there is no such express prohibition under Moldovan law. From the perspective of the Law on the organization and conduct of gambling, please note that pursuant to Article 1(1), *The organization and development of the activity in the field of gambling on the territory of the Republic of Moldova, except for the maintenance of casinos, constitutes a state monopoly and takes place under the conditions of this law.* Pursuant to Article 2 of the same law, *gambling is an activity carried out according to the established rules, based on risk, which cumulatively meets the following conditions: allows to win money, other goods or patrimonial rights, as a result of the public offering by the organizer of a potential gain and acceptance of the offer by the participant,, with the collection of the direct participation fee (gambling stake) or indirect, the winnings being attributed by random selection of the results of the events that are the subject of the game (except for bets for competitions / sporting events), regardless of how they are produced*

2.11.3. Moreover, pursuant to the same article, *the management of the activity in the field of gambling which constitutes a state monopoly is carried out by the state through the National Lottery of Moldova.* On the official webpage of the National Lottery of Moldova there are no options for gambling and/or wagering in the field of transactions with natural gas and (only sport, lottery and electronic games).

2.11.4. ***If so, please advise:***
(a) what types of contracts or arrangements fall within the restrictions, in other words, how do your jurisdiction's laws define gambling and wagering contracts?

2.11.5. Not applicable, given the definitions in our answer above.

2.11.6. ***(b) what are the consequences of a Commodity Transaction coming within those restrictions? Will it be void and unenforceable?***

2.11.7. Not applicable, given the definitions in our answer above.

2.11.8. ***Are there any specificities with regards to confidentiality obligations under Moldovan law?***

2.11.9. Yes, below we set a more detailed overview of the applicable legislation. Please note that the below provisions apply if the parties to a contract elected Moldovan law to apply in respect of confidentiality rules. The parties may also want to derogate from any of the below rules or include specific clauses in addition to the these cited.

(i) pursuant to Article 1026 of the Civil Code,
(1) If during the negotiations a person provides confidential information, the person who received it has the obligation not to disclose that information or to use it for his own purposes, regardless of whether the contract has been concluded or not.
(2) It is confidential the information about which, based on its nature or the circumstances in which it was obtained, the party who received the information knew or reasonably should have known that it is confidential to the person who provided it. In particular, the information that constitutes a commercial secret within the meaning of the provisions of Article 2047 paragraph (3) is confidential.
[…]
(5) The party that violates the obligation provided by this article shall be liable to the other party for the damage caused by the violation, as well as, in accordance with the law, may be obliged to hand over to the other party the profit obtained from the violation.

(ii) pursuant to Article 2047(3) of the Civil Code,
For the purposes of this Section, information which satisfies the following cumulative requirements shall be considered to be commercial secrets:
a) are secret in the sense that they are not, as a whole or as their elements are presented or articulated, generally known or easily accessible to persons in circles who normally deal with the type of information in question;
b) have commercial value due to the fact that they are secret;
c) have been the subject of reasonable measures, in the circumstances, taken by the person lawfully in control of the information in order to be kept secret.

2.12. GENERAL ENFORCEABILITY OF AND/OR MODIFICATION TO EFET DOCUMENTATION

2.12.1. ***Are the provisions of a 2007 EFET General Agreement for the Delivery and Acceptance of Natural Gas generally enforceable in Moldova?***

2.12.2. Yes, under Article 2615(1) of the Civil Code, the substantial conditions of a legal act are established by the law chosen by the parties or, as the case may be, by its author. Note though that Article 2581 of the same code, *(1) The application of foreign law is removed if it clearly violates the public order of the Republic of Moldova. In case of removal of the application of foreign law, the law of the Republic of Moldova shall apply. (2) The application of the foreign law clearly violates the public order of the Republic of Moldova if it would lead to a result obviously incompatible with the fundamental principles of the law of the Republic of Moldova or with the fundamental human rights and freedoms*.

2.12.3. While the national law does not define 'public order', the Ruling of the Plenum of the Supreme Court of Justice No. 9 (09.12.2013) fills in the gap by explaining that: *Public order in private international law is the exception available to the judge, in order to remove the normally applicable foreign law, based on the rules of private international law of the forum, when it is contrary to a fundamental principle of court law or contravenes good morals.*[12]

2.12.4. Notably, in certain cases (of recognition or arbitral awards) the courts found that the mere invocation of the public order is not sufficient to retain this ground.[13] On the other side, there are cases where the courts qualify the public order ground as a *door* to unlimited additional grounds for setting aside an arbitral award, entering into the merits of the case or providing a misinterpretation of the public order/fundamental principles concept.[14]

2.12.5. Under Article 2582(1) and (2) of the Civil Code, *The rules of immediate application are those rules the observance of which is regarded by a particular State as essential for the safeguarding of its public interests, such as political, social or economic organization, to such an extent that those rules correspond to any situation falling within their sphere of application, regardless of the law applicable to the legal relationship under this book. (2) The provisions of this book do*

[12] Similarly, the "Guide to the Interpretation of the New York Convention of 1958. Handbook for Judges", refers to the International Law Association (ILA) which has Recommendations on clarifying the public order concept. Thus, point 1 (d) of the ILA Recommendations states that the international public policy of any State includes:
i) fundamental principles relating to fairness and morality, which this State wishes to defend, even if it has not *been directly involved in the dispute;*
ii) rules (norms) meant to serve the political, social and economic interests of the state, called 'lois de police' or 'rules of public order';
iii) the obligation of the state to respect its commitments towards other States and international organisations.

[13] *As for the arguments of the appeal, that the recognition and endorsement of the enforcement of the above-mentioned foreign arbitral awards should be refused, because the recognition or endorsement of the enforcement of the arbitral awards is contrary to public policy of the Republic of Moldova, they are unfounded and should be rejected …, they have not been confirmed, and the mere assertion of the violation of public order without the express indication of this violation does not constitute an absolute ground for refusal to recognize and enforce the foreign arbitral award, all the more as the recognition of the arbitral award cannot be refused for any of its contradictions with public order, but only if the violation of public order is substantial, effective and flagrant, a condition that is not attested to the case*. (Judgment of the Supreme Court of Justice No. 2r-129/19 of 20.02.2019, p. 4-5);
*Thus, the court notes that no aspect of the grounds invoked in the request for setting aside of the arbitral award has been proved by the petitioner, or, in essence, the petitioner does not agree with the final solution on the merits adopted by the Arbitral Tribunal, a circumstance that does not fall on the grounds of setting aside of the arbitral award, provided by art. 480 para. (2) Civil Procedure Code. However, the mere disagreement of the petitioner with the arbitral award No. ***** is not the basis for admitting the request for annulment of the arbitral award*. (Order of the Chisinau Court No. 2c-702/21 of 25.05.2021);
The statements of the SE "State Road Administration" are to be critically appreciated that the decision whose recognition and execution is required is contrary to public order, or, they have not been confirmed, and the simple assertion of the violation of the public order without express indication as to this violation does not constitute an absolute ground for refusal to recognise and enforce the foreign arbitral award, all the more so as the recognition of the foreign arbitral award cannot be refused for any violation contrary to its public policy, but only if the violation of the order is substantial, effective and fragrant, a condition that is not the case. (Order of the Chisinau Court of Appeal No. 2-10/20 of 27.11.2020).

[14] e.g. In the order of the Chisinau Court No. 2-14856/19 dated 17 December 2019, the court indicated that: *The ground for setting aside the arbitral award by violating the fundamental principles of the law of the Republic of Moldova or good morals is an unlimited extension of various reasons, but it is a certainty that in case the other previous reasons will not sanction the violation of fundamental principles, such a violation would not remain without consequences. Given that the wording of this ground is general, it is for the court, through its guiding role, to carry out, in each specific case, the task of determining the extent of the infringement.*

not restrict the application of the norms of immediate application of the law of the Republic of Moldova. […]

2.12.6. So, the provisions of a EFET General Agreement for the Delivery and Acceptance of Natural Gas are enforceable, except for the Section 10.4 (provided that the Automatic Termination is specified as applying to a Party in the Election Sheet) in conjunction with Section 10.5 (c)(iv) and/or Section 11 (in case of termination due to insolvency), or only Section 10.5(c)(iv), as these provisions are contrary to Article 89(3) of the Insolvency Law 149/2012, which provides that *It is null and void any contractual clause that allows the termination of the contract in case of initiating the insolvency procedure of the debtor, except for the cases provided by law. These contractual clauses will be declared null and void by the insolvency court at the request of the administrator / liquidator*. Please note that for other scenarios provided in the EFET General Agreement for the Delivery and Acceptance of Natural Gas, the close-out netting is admitted provided that the foreign law which governs this agreement does not prohibit it.

2.12.7. ***If the election of § 13.6(a) enforceable in Moldova?***

2.12.8. Yes, as long as the EFET General Agreement and the Individual Contract shall be governed by the foreign law (i.e. English or German), there shall be no limitations to enforce the election of § 13.6(a). Please note though that pursuant to Article 874(1) of the Civil Code, *if, according to the law or the contract, the obligation bears interest, an interest equal to the base rate of the National Bank of Moldova applicable according to paragraph (2) is paid, if the law or the contract does not provide for another rate.* So, under Moldovan Civil Code the parties may agree on the Interest Rate without being limited by virtue of law.

2.12.9. Separately, it shall be noted that pursuant to Moldovan Civil Code there are certain limitations on the penalty, namely Article 953 (1)-(2) of the Civil Code which provides that, in exceptional cases, taking into account all the circumstances, the court may order, at the request of the debtor, the reduction of the disproportionately high penalty.

2.12.10. ***Is it mandatory to refer to Incoterms?***

2.12.11. No, but it is advisable. For details please refer to our answer on question 2.6.13 above.

2.12.12. ***Is it mandatory to specify an Expiration Date under § 10.2?***

2.12.13. No, under Article 966(1) of the Civil Code, the execution of the obligation extinguishes it only if it is carried out in the appropriate manner. In other words, the obligations of the parties to the agreement shall be valid until these are fully executed or extinguished by other legal means (e.g. extinguishment by compensation, debt remission).

2.12.14. Therefore, it is not mandatory to provide an Expiration Date, since the obligations of the parties shall be valid until their performance (i.e. Energocom to pay for the contracted natural gas and the counter-party to provide the contracted natural gas). However, under Moldovan law the parties shall take into account the general limitation period (3 years from the date the party knew or should have reasonable known on the infringement of its right) to submit a lawsuit in court.

2.12.15. ***Is it mandatory to specify a maximum total amount of gas quantities that can be delivered based on Individual Contracts concluded under the Master Agreement?***

2.12.16. Provided that the import is performed directly by Energocom from the foreign trader, then from Energocom's perspective the answer is yes. Provided that the import is performed by the local licensed gas trader, then from the perspective of both the answer is yes.

2.12.17. The reason is that Energocom or the local licensed gas trader and Energocom, as responsible party(ies) for balancing[15] are financially responsible for the imbalances between the values of the notified and confirmed quantities of natural gas and the values of the measured quantities of natural gas (Section 9 of the Natural Gas Market Rules approved by ANRE Resolution 534/2019). So, based on the maximum total amount of the delivered gas, it shall be able to ensure that there will be no disbalance in the system.

2.12.18. ***Are there any modifications which you consider it advisable for EFET members to make to its Election Sheet when dealing with entities incorporated in Moldova?***

2.12.19. Yes, when dealing with entities incorporated in Moldova, in Election Sheet it is advisable to take into account particularly our answer to question 2.12.4 above (*i.e.* the provisions which shall not be enforceable). Also, it is advisable to consider and articulate according clauses in relation to the rather often state of emergencies instituted in Moldova in the last couple of years. These as well as the war in Ukraine may affect the language of the Election Sheet.

2.12.20. ***Would EUR be an acceptable currency for payments under the agreement or the Termination Amount?***

2.12.21. Yes, for details on payment clearance by the bank, please see sections 2.5.3 - 2.5.6 above.

3. RELIANCE AND ADDRESSES

3.1. This Memo is given for sole benefit of EFET and may only be relied on by it. This opinion may not be disclosed to anyone else, except for EFET, its members and its and their professional advisers.

3.2. The reliance on this Memo is subject to the terms and limitations from the engagement agreement between Gladei and Partners Law Firm and EFET.

Faithfully yours,

Gladei and Partners Law Firm

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[15] Pursuant to Section 38 of the Rules, *RPB has the following obligations:*
1) to forecast the natural gas consumption of the final consumers served by it;
2) to take the necessary measures continuously (24/7) to maintain the balance between the quantities of natural gas entering and leaving their balancing portfolio, for each gas day, with the aim of minimizing the need to undertake balancing actions;
3) to send commercial notifications to BE for any transfer of ownership of natural gas;
4) to pay the imbalance payments and the neutrality payments;
5) to ensure qualified personnel, information systems and financial resources necessary to fulfill their functions and obligations provided in the Rules;
6) to transmit information to the Agency regarding transactions on the wholesale market.