A&D LIST
DRAFT

EFET
European Federation
of Energy Traders

EFET Legal Committee Meeting Q1/2023

27 February 2023, Brussels

1. Opening and approval of the last A&D list

Jan Haizmann (Chair) opened the Legal Committee meeting and introduced the agenda, inviting LC members to approve the A&D from the last meeting (12 December 2022).

Decision: The A&D list from the previous Legal Committee hybrid meeting, held on 12 December 2022, was unanimously approved by members, subject to no comments.

Legal Chair Transition – Mark Copley, EFET

Jan to leave EFET - After 18 and a half successful years as the Chair of the EFET Legal Committee, Jan Haizmann has decided the time is right to leave EFET to focus on his consulting activity. As Chair of the Legal Committee, Jan has played a significant role in creating and developing EFET's standardised trade agreements and in furthering the cause of market liberalisation throughout Europe. The Board and the Legal Committee thank Jan for everything he has done for EFET and wishes him well in future.

Recruitment of a legal committee chair – The process of finding a new chair for the legal committee has been a significant focus for February. Given the very specific skills required to perform the role, EFET management drew up a shortlist of suitable individuals and approached them to establish interest. This process led to the identification of two extremely capable candidates who would be a good fit. Both have also had discussions with Marcus Bokermann, as Chair of EFET, and Bernhard Walter, as Oversight Committee Chair. Following those discussions EFET management and LC Secretariat met to formulate a recommendation which will be presented at the Board meeting on 8-9 March.

Summary of Board decision on 2023 priorities – Mark Copley, EFET

The Board developed priorities in Q4 2022/ Q1 2023 and invited the EFET Secretariat to report to the Board in the same format. We have 8 cross-cutting priorities (5 "what" and 3 "how") to help steer the work of the Secretariat and Committees and to give the Board a sense of what's being achieved. In each case we have tried to provide an assessment of progress and to highlight relative milestones.

Board members encouraged a targeted approach where we consider the most important capitals/national markets and the effort required to influence them. The benefits of partnerships with national energy associations were mentioned.

Annual Membership Survey results – Aygul Adamson, EFET

Annual Membership Survey on the LC priorities is held on an annual basis, it is launched beginning of each year and serves as an outlet for members' opinions to help identify areas where legal standardisation could bring value. Respondent rate (18) is representative of the LC membership (further input is welcome). See the meeting slides deck for further details.

2. Update of EFET Netting Opinions (Jan Haizmann, Sonia Auguscik)

EFET is currently assessing the impact of green certificates on netting. With RES certificates gaining in value and significance, members felt the need to verify whether there is any impact on the overall netting effect following tendency of pulling green certificates under the EFET General Agreement or MNA level, as these certificates are not commodities but "ius sui generis" products. These issues are addressed in national laws as the subsidy systems differ fundamentally. Their legal qualifications is different and therefore the answer on netting may differ, depending on which RES certificate we deal with.

Action: interested members are invited to contact Legal Committee Secretariat to participate in the review of the draft legal netting opinions. The overview of the legal opinions is published on the EFET legal pages.

Jan reported on the legal reforms relating to close-out netting. Building on considerable experience in assisting numerous legislators in similar cases, the Legal Committee is pressing on to achieve statutory recognition of close-out netting for physical commodity trades in the Netherlands, Italy and Slovakia.

- **The Netherlands:** EFET together with Energie Nederland were jointly pursuing the opportunity to introduce a carve-out for energy wholesale agreements to avoid the negative effect of the WHOA Act on the wholesale energy markets. The Dutch Parliament remained unreceptive towards the requests of industry associations to change the legislation.
- **Italy:** EFET secured the carve-out in Italian Insolvency law beyond the initial phase out for the netting-carve-out, scheduled for 31 December 2022.
- **Slovakia:** EFET in cooperation with ISDA backed up the initiative of the Slovak energy companies aimed at broadening the scope of the current Slovak close-out netting legislation and offered its assistance to the Slovak authorities in discussing these issues further.

Action: interested members are invited to contact Legal Committee Secretariat and share intelligence on the national insolvency developments.

3. LNG Standardisation - Clément Gerthoffert, European Commission

Clément Gerthoffert presented a report on LNG contracting in the context of the new EU Energy Platform initiative but requested not to go on the record.

What transpired from EFET discussions with EC are the two types of locations for potential purchases on platform: virtual LNG (a location "just offshore EU" at an unspecified terminal which would need to be defined at negotiation stage); and a National Balancing Point, which could be a VTP, but may also be possible in markets where a VTP is not yet established.

EC acknowledged that shippers preferred to use own contract for buying LNG and use the EFET contract for buying at VTPs/NBPs. Buyers would need to indicate on the platform how they plan to finance an acquisition.

EFET history in LNG standardization – EFET Master DES LNG SPA (2010) and model clauses

EFET published an EFET form Master LNG Sale and Purchase Agreement in 2010 on a DES delivery basis (no provision for FOB trades) and covered all the usual provisions common to LNG MSPAs at the time. It was backed by Vitol but had limited uptake in the market at the time, so EFET retired the agreement.

With market moving and some of the big players publishing their forms publicly, we saw a possibility for an EFET initiative to build on this work. Despite our subsequent attempts to push for "plug and play" clauses (soft standardisation) a few years ago, this hasn't received wide support by the LC membership up to date, even the last initiative (also looked at by the LNGnet project sponsored by the Commission, co-led by Gunnar Steck). Both groups identified the possibility of some model clauses as a way into "soft" standardisation, but this was again dropped after insufficient interest.

More recently, EFET has published an in-tank appendix for Spanish in tank LNG trading.

Action: interested members are invited to contact Legal Committee Secretariat to voice support for re-opening the LNG standardisation workstream.

4. **Standard documentation for AVB transactions in Spain – Cristina Ludena, Ludena Consulting**

LC members discussed the proposal to produce EFET documentation to cover AVB trading. The Acuerdo Marco was originally designed for trading at physical points, therefore, legacy Acuerdo Marco contracts predating the move to virtual points in 2020 do not comprehensively cater for the virtual points unlike the EFET appendices. LC members agreed to reach out to Spanish members at the next IGG meeting on 16 March to see if they would support such a switch. The ultimate objective would be for market participants to have one set of terms, namely the EFET, to enhance liquidity at the Spanish virtual points, rather than incurring basis risk by trading the same products under two different contracts and different governing laws.

Action: LC Secretariat to approach IGG and Spanish counterparties to gauge whether they would be willing to use EFET documentation governed by English or German law for AVB trading instead of Spanish law documentation such as the Acuerdo Marco.

5. Introduction to eSM (electronic settlement matching) for bilateral settlement – Gavin Ferguson, EFET

Faster settlement has a role to play in limiting the amount of money tied up in the settlement system which is a practical issue for collateral (& liquidity) management and thus also implicitly for credit.

The electronic settlement matching process (eSM) as an enabler is now live. What it allows is a company who is going to send an invoice to send the invoice these days to a service provider, and the company who is expecting to receive the invoice sends a shadow document to their service provider. Those two documents should be the same, they get matched. At least 15 companies are either live on eSM or are moving towards implementation.

However, the general approach to eSM interoperability certification needs attention before moving on to other processes. Essentially there are two companies (Equias and Fidectus) providing services to companies using the EFET eSM standard. Those companies want to be able to interface with companies which use the other service provider – which is what the standard was intended to allow. Companies are able to be invoiced as of October 2022 across the two service providers. Up until now, you could only do electronic settlement matching with companies who were using the same service provider. Operations Committee may need to identify a process to change the nature of the EFET standards.

Action: The LC supports shorter settlement as part of a toolkit that companies can use to help manage counterparty credit issues. Companies who wish to follow a path to faster settlement can agree what steps can be taken early in 2023 and what steps are envisaged after that. Thus the LC appreciates to receive updates from/gets involved by the EFET Operations Committee as appropriate.

6. The German Supply Chain Act (LKSG) – review of compliance measures

The German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz*; "LkSG"), which applies to companies seated in Germany or operating a German branch with 3,000 or more employees, entered into force on 1 January 2023. Although Austrian and other non-German companies are not subject to the LkSG, they may form part of the supply chains of German companies bound by due diligence obligations under it. In a parallel step in February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence, which the European Council confirmed in principle in December 2022. Thus, another layer of compliance obligations for companies seems to be emerging.

Action: The LC agreed to have a deep dive into assessment of implications at the next LC meeting (notably with regards to respective clauses required in the EFET documents).

7. Update from Gas Committee on gas market interventions – Doug Wood, EFET

Doug Wood, Chair of the EFET Gas Committee, provided a short update report on the latest gas market developments. The Gas Committee is engaging in active advocacy relating to price caps, joint purchasing platform, new tranparency obligation and LNG price benchmark. Aggregate EU platform – there was an industry group advisory meeting on 21 Feb and a EU/PRISMA workshop planned on 7 March. Essentially it is to function as a broker, attempting to match supply and demand with a high degree of aggregation (i.e. 2 "virtual LNG delivery" areas defined for Europe), any subsequent negotiations around deliveries, capacity provision etc fall outside the platform's scope. Actual acquisition & delivery of gas to be done under an "agent on behalf/shipper on behalf" model. Such arrangement may end up compromising competition rules. The Q&A is here.

Article 3 transparency – as with other transparency provisions, these appear to have been written in a hurry and capable of multiple interpretations. The LNG data reporting TF has been working on the data reporting required to ACER for the LNG benchmark, has agreed to address this point also, with the support of the Gas Committee and Legal Committee as appropriate. DG ENER have already identified that the terms are vague and will need further definition. The next meeting of the LNG data reporting TF will be on 14 March.

Article 14 UIOLI – Regulation 2022/2576 art. 14 aims to enforce use-it-or-lose-it measures that threaten to confiscate capacity that is not used or offered in one month such that it can be re-sold in the following month and only available to the original holder on an interruptible basis.

Note: for more details, please refer to the EFET position on the Market Correction Mechanism, to the joint association statement on the proposed Market Correction Mechanism, and to the regular Gas Committee updates on the gas market interventions.

8. Focus Session on contractual impact of Market Correction Mechanism – Market Disruption Event in EFET contracts

Advice given to the Legal Committee determines that a triggering of the mechanism could result in the occurrence of a Market Disruption Event with respect to any floating price contract which uses as its reference price a price for a futures contract month covered by the dynamic bidding limit. Procedures exist for counterparties to agree an alternative reference in the event of discontinuation of an index, but this would be on a contract by contract basis and extremely laborious. LC is looking into establishing a protocol to simplify this and has been gathering views on whether this would be supported by EFET members. LC requested the assistance of the Gas Committee both in assessing support for this, but also in identifying what would be a suitable replacement index.

A leaked draft Commission Implementing Regulation proposes the extention of the dynamic bidding limit to ten other VTPs. The Commission is required to adopt an Implementing Act defining the technical details for the application of the gas market correction mechanism to derivatives linked to other VTPs by 31 March 2023.

In a nutshell, in light of the recent developments regarding price formation, the likelihood of the market disruption event resulting in "limitation of trading" appears the same as before, the likelihood of "material change in methodology of price fixing" is reduced, but not to zero. Inclusion of other VTPs will leave this likelihood unaffected, but will make it more difficult for contracting parties to arrive at fallback prices given the limitation of fallback markets. If none of fallback requirements under § 15 EFET could be exercised effectively, the potential for multiple disputes to arise from the use of disruption fallbacks, especially where derivatives based on several hubs are affected, becomes high.

Action: LC invites membership feedback on whether they would support an Alternative Settlement Price Protocol: https://www.surveymonkey.com/r/LJW8F6N
GC and LC members should be discussing with their traders/risk managers what would be the preferred indexes to shape a definitive view and steer from membership on this.

9. Hydrogen Certificate Trade Agreement – Bert den Ouden, HyXchange and Andreas Gunst, DLA Piper

HyXchange is running a certificate pilot, the Dutch GoOs went live in October 2022. Certificates are tradeable completely independent of the commodity. The GoOs (also RES electricity) are restricted to the Netherlands, unlike H2 GoOs mandated by the European Commission in the Delegated Act. The products scope includes unsubsidised green GoOs (transferable into Dutch HBE) and subsidised H2 GoOs (not transferable into HBE).

Note: please refer to slides from the HyXchange market session (28 November 2022) – first spot simulation runs / plans for 2023 activities.

The joint HyXchange/EFET standardisation initiative aims to create a contract tradable bilaterally, single trade agreement, based on EFET standard Certificate Master Agreement modified for H2. HyXchange and EFET foresee a transitory phase of this agreement in the first instance, to be moved later on into RFNBO/Union Registry type certification.

Draft now needs to be aligned with VertiCer (the joint standard issuing body in the Netherlands), to discuss some remaining operational points on certificate transfer and cancellation, as there will be no rulebook initially (similar to the AIB domain protocol).

Action: members are invited to review the draft Hydrogen Certificate Trade Agreement and share their comments.

10. Update on CEGH Biogas Standard Contract WG - Frederick Bernthaler, CEGH and Andreas Gunst, DLA Piper

The Central European Gas Hub (CEGH) has launched the CEGH GreenGas Platform for trade and marketing of "green gases", i.e., primarily biogas (including biomethane) and hydrogen, as well as guarantees of origin (GoOs) for green gases in the European Union.

Note: for more details, please refer to the slides and minutes from the CEGH GreenGas Stakeholder Committee meeting (20 October 2022).

The CEGH initiative is welcomed by EFET, and the standardisation effort in terms of contract design, is a very important topic and could help to facilitate the traded market. Therefore, it is important to get as much feedback from market participants that could be used as basis for the development of a standard contract.

Andreas Gunst elaborated on the drafting approach, as explained in Discussion Paper Biogas Trading & Contract Design. When trading GOs, the existing EFET CMA templates are not commonly used and there is a need to build up a standard for the green gas market. This means that it is important to define a contractual framework that fits trading of gas GOs (including sustainability criteria, proof or transport etc.) and related commodity transactions. It is discussed that at present there are no harmonised regimes all over Europe for biogas trading, but national regimes and separate registries.

Action: members are invited to review the Discussion Paper Biogas Trading & Contract Design, and share their drafting suggestions/comments. The first draft of the trade agreement shall follow later in December.

This initiative will be coordinated at EFET by joint Legal Committee - RES Gas WG so as to best address policy developments and legal expertise on contractual standardisation. Marianna Liakopoulou provided a quick summary from the RES Gas WG side. EFET is currently trying to engage bilaterally with ENER C2 on the operational design of the Unin Database for Biofuels (UDB) in lack of a clear legal basis.

Action: members are to contact EFET Secretariat to follow a joint Legal Committee – RES Gas WG on the biogas.

11. Progress report from related EFET working groups - Aygul Adamson, EFET

Aygul Adamson briefed on the progress of the initiative relating to real-time automated credit processing. The project, which was set up a number of years ago with the intention to reducing credit processing time and reducing error rates through automation, has been endorsed by the the EFET Credit & Collateral WG, and went live.

Credit & Collateral WG is also advancing drafting of the EFET PPA Credit Manual on PPAs, intended to provide guidelines to EFET members for assessing and mitigating PPA credit risk.

Note: The meeting recordings are available here:

EFET Legal Committee Meeting - 27 Feb, Stanhope Hotel, Brussels - RSVP-20230227_103356-Meeting Recording.mp4

EFET Legal Committee Meeting - 27 Feb, Stanhope Hotel, Brussels - RSVP-20230227_134526-Meeting Recording.mp4 EFET Legal Committee Meeting - 27 Feb, Stanhope Hotel, Brussels - RSVP-20230227_155256-Meeting Recording.mp4