A&D LIST
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EFET
European Federation of Energy Traders

EFET Legal Committee Meeting Q4/2023

14 & 15 December 2023

Hosted by Uniper Global Commodities in Dusseldorf, held in a hybrid format

Participants List
(present in person)

1.	Martin Hulena	Alpiq	17.	Marcelo Alvarez	Gunvor
2.	Anne Godde	Axpo	18.	Rosana Bovia	Iberdrola
3.	Annika Graf	Axpo (day 2)	19.	Judith Asiama	RWEST
4.	Leonor Baillie	BP	20.	Max Liesenhoff	STEAG (day 1)
5.	Julia Raboňová	CEZ	21.	Niels-Jakob Küttner	STEAG (day 1)
6.	Jan Michek	CEZ	22.	Oliver Frömmel	Uniper
7.	Riccardo Albieri	DXT Commodities	23.	Dora Benyusz	Uniper (day 1)
8.	Christoph Sänger	E.ON	24.	Anne-Theres Dahlenburg	Vattenfall
9.	Ashley Hofman	EDF Trading	25.	Safina Smak Gregoor	Vattenfall
10.	Aygul Adamson	EFET	26.	Irene Fenyösy	Verbund
11.	Mark Copley	EFET	**Guest speakers:**		
12.	Michaela Duve	EFET	27.	Michael Cieslarczyk	DLA Piper (day 1)
13.	Sonia Auguscik	EFET	28.	Florian Bruder	DLA Piper (day 1)
14.	Mathias Flecke-Bröer	EnBW	29.	Brett Hillis	Reed Smith
15.	Pierre Laspalles	Engie	30.	Katharina Lüken	RWEST (day 1)
16.	Justyna Pantelides	ESB	31.	Marek Dal-Canton	Statkraft (day 1)

Furthermore, about 60 people dialled into the meeting, including guest speakers: Giusi Squicciarini (Shell, day 1), Karl-Peter Horstmann (RWEST, day 2), Barbara Lempp (Treasurer of EFET, day 2), Lorenzo Biglia (EFET, day 2) and Doug Wood (EFET, day 2).

General remark: slides from day 1 & day 2 along with additional meeting materials are available at the dedicated EFET page: https://efet.org/home/documents?id=708.

Meeting Day 1

1. Opening and approval of the last A&D list (Michaela Duve, EFET)

Michaela opened the meeting with a *tour de table* and introduction to the agenda. It was reported that the proposal to explore the topic of US sanctions and ICE contracts did not gather substantial support. Topics that did attract sufficient interest, i.e., the classification of CBAM fees as a potential tax in the EFET General Agreements and the German Control and Profit Transfer Agreement (CPTA), will be addressed in the ongoing meeting. Members were invited to provide comments or remarks on the minutes of the last Legal Committee meeting held in London on September 21 & 22, 2023.

Decision: the A&D list from the previous Legal Committee meeting, held in London (in a hybrid format) on September 21 & 22, 2023 was unanimously approved by members, subject to no comments.

2. Report from the new Board and update on the EFET initiatives (Giusi Squicciarini, Shell Energy Europe, new Chair of the EFET Board)

Giusi presented the results of the EFET board elections held during the last Annual General Meeting on November 14, 2023, and provided a brief report on the EFET board activities.

The new composition of the EFET management board is available at this link. Giusi Squicciarini, General Manager Regulatory Affairs Europe & Africa at Shell Energy Europe, has been appointed Chair of the EFET board. She will be supported by Cemil Altin, Head of Regulatory and Political Affairs at EDF Trading, and Luka Jazbec, Head of Energy and Sustainability Regulation and Compliance at Gen-I, both acting as Vice-Chairs.

Giusi emphasized the significance of 2024 year, marking the 25th anniversary of EFET, and ongoing discussions on EFET identity, rebranding, core values and unique selling points. Key points for 2024 include external communication, engaging with political stakeholders, and continuous organisational enhancement. The board anticipates a deeper discussion on priorities during the meeting in January 2024.

3. Discussion on the revised Terms of Reference of the Legal Committee (in particular: endorsement rules, "sufficient support/interest") – Michaela Duve, EFET

Michaela invited members to discuss housekeeping rules of the EFET Legal Committee, recognising that the current working procedures, dating back to March 2005, are due for an update. Prior to the meeting, a revised set of Terms of Reference was circulated, key points and open questions highlighted for discussion include:

- sufficient support/interest (the main question is what percentage of member companies constitute sufficient interest; crucial role of member participation in expressing support and setting priorities; concerns regarding a low response rate and its potential impact on working programme and budget allocation);
- appointment of chair (proposal to introduce regular elections for committee chair, either yearly or biennially; rules for members to express confidence or call for a new chair; vice-chair function is open for consideration);
- endorsement process (clarification of what endorsement signifies, particularly in cases where only a small percentage of members engage in the online endorsement process).

Action: the updated draft of the Terms of Reference can be found in the meeting materials – members to review and provide comments by January 19, 2024. Feedback to be sent to Michaela Duve (m.duve@efet.org, with a copy to LCsecretariat@efet.org).

4. Update on the new EFET website – Our aim: where style meets convenience – Aygul Adamson, EFET

EFET is actively progressing in its initiative to create a completely redesigned website. This overhaul is aligned with efforts to boost the association's visibility, coinciding with upcoming European elections, the 25th-anniversary celebrations, and potential rebranding. The goal is to launch a user-friendly, intuitive website in the first half of 2024.

Features of the new website are: improved connectivity between the member section and EFET public domain, robust search functionality, and a better organised presentation of netting opinions and standard agreements. Netting opinions will be categorised by jurisdiction rather than date. Standard documentation will undergo a restructuring, placing EFET General Agreements at the top, followed by appendices bundled with guidance notes (if applicable), ordered by country and not by date. Special emphasis is placed on GDPR aspects and IT security. Furthermore, the EDRS platform will receive an update in 2024, including notifications for ratification letter expirations and colour-coding for expiring ratification letters.

One member raised a question about the potential introduction of a collaboration workspace, such as an MS Teams channel, for enhanced efficiency – this is under consideration.

5. The German Control and Profit Transfer Agreement as a collateral (in the light of the BMP Greengas case) – Michael Cieslarczyk & Florian Bruder, DLA Piper

Michael and Florian presented the findings of their analyses on the topic of the German Control and Profit Transfer Agreement (CPTA), particularly in the context of the BMP Greengas case.

- Legal framework: the presentation covered the legal characteristics of CPTA under German law, exploring termination, insolvency implications, and the role of so-called Letters of Awareness. It was pointed out that the effects of insolvency on CPTA are disputed in legal literature. There are strong views that CPTA is automatically suspended for the duration of the debtor-in possession insolvency proceedings – the suspension effects remain unclear.

- BMP Greengas case analysis: the session delved into the specifics of the BMP Greengas case, within the scope of publicly available information.

- Effects on EFET General Agreements: the slides covered different insolvency-related termination scenarios involving CPTA and Parent Company Guarantee (PCG) as credit support documents. Speakers affirmed that CPTA remains a viable credit instrument in the energy industry but it does not offer the same level of comfort as PCG.

Update: on January 15, 2024, the legal memorandum concerning enforceability of the Control and Profit Transfer Agreement (CPTA) as collateral was distributed to all Legal Committee members. This summary serves as a brief overview, and members are strongly encouraged to thoroughly review the draft opinion. Any comments or feedback should be shared by January 31, 2024, at 13:00 CET.

6. Potential categorisation of the CBAM fee as tax within the meaning of the definition "Tax" or "Other Tax" in the EFET General Agreements – Brett Hillis, Reed Smith and Michael Cieslarczyk, DLA Piper

Following the decision adopted during the Legal Committee meeting in London (hold on September 21 & 22, 2023), EFET mandated legal analyses under English law and German law to assess whether the EU Carbon Border Adjustment Mechanism (CBAM) fee could be considered a "Tax" and/or "Other Tax" under the EFET General Agreements.

Note: the legal memos on this matter were included in the meeting materials distributed among Legal Committee members on December 12, 2023, and can be found on the EFET meeting page. This summary is intended to provide a quick overview – members are advised to refer to the respective legal memos for a comprehensive understanding of the discussed legal matters.

The analyses focused on the EFET General Agreement for Electricity, concluding that natural gas imports are currently out of scope of the CBAM (and, accordingly, EFET General Agreement for Gas was excluded). Both opinions agreed that the CBAM fee would not qualify as "Other Tax" under EFET General Agreement for Electricity. As far as the definition of "Tax" is concerned – the conclusions differ.

- English law perspective: Reed Smith concluded that the CBAM would not be considered a "Tax" under the EFET General Agreement for Electricity. Even if the CBAM fee operates in a similar way to a tax or tariff, it is not a measure that is imposed "in respect of payment, nomination and allocation", and therefore does not meet all the limbs of the definition of "Tax".

- German law perspective: DLA Piper indicated that the legal review did not lead to clear results but there is a risk of a CBAM fee being considered a "Tax" under the EFET General Agreement for Electricity. It was noted that the definition explicitly refers to "nomination and allocation" – consequently, there seem to be good arguments that a payment requirement in relation to a respective delivery should be in scope of the "Tax" definition.

- Discussion: members discussed the potential modification of EFET wording to explicitly state that the CBAM fee should not be considered a tax. This could be achieved through changes in the definition wording or a clarification note, similar to the one EFET produced for the definition of "Affiliate." An opposing view suggested that such a clarification might not be beneficial. The default position is for the tax to be paid by the buyer – and if the CBAM fee was owed, the cost would also be also borne by the buyer (importer).

Action: members to review the legal analyses and advise whether EFET should further clarify this matter or take other actions. Feedback is requested by January 29, 2024, to Michaela Duve (m.duve@efet.org, with a copy to LCsecretariat@efet.org).

7. Update on REMIT II: practical take and potential implementation challenges, STOR obligation vs self-incrimination – Marek Dal-Canton and Katharina Lüken, Chairs of the EFET Trading Compliance WG

Katharina provided an update on REMIT II. Provisional political agreement has been reached among European co-legislators, pending formal approval by the Council and European Parliament in early 2024. The agreed text is expected to be published in the EU Official Journal around end of February 2024 – with most provisions taking effect within 20 days of publication (including algo trading surveillance). There are exceptions with a longer implementation period – 6 months – for STOR obligation for physical markets, and for third country firms to designate a representative in the EU Member State. The REMIT II implementing acts and delegated acts are expected in the last quarter of 2024 (at the earliest).

Note: to see details of the most significant changes introduced to REMIT II, kindly refer to the meeting slides available on the EFET meeting page.

Marek provided additional insights into STOR, i.e., Suspicious Transaction and Order Report, regime. This obligation mandates all persons professionally arranging and executing transactions (PPAET) to detect and report suspicious transactions and orders. This regime covers insider trading, inside information publication and market manipulation. It also includes "errors" that fall in the scope of market manipulation (without distinguishing between "intentional errors" and those resulting from "fat fingers").

During the discussion, concerns were raised regarding whether the STOR regime might be in conflict with the privilege against self-incrimination. Members of the Legal Committee were asked to consider instructing a legal opinion that would assess whether the STOR regime, in the aspect obliging companies to self-incriminate, is not in contradiction with national laws and European law.

Action: members to discuss internally and provide feedback by January 29, 2024, on whether EFET should instruct a legal opinion on STOR regime or take any other action. Feedback should be sent to Sonia Auguscik (s.auguscik@efet.org, with a copy to LCsecretariat@efet.org).

Meeting Day 2

8. Overview of the developments in relation to financial regulations – Karl-Peter Horstmann, Chair of the EFET Market Supervision Committee

Karl-Peter gave an update on the main advocacy activities of the EFET Market Supervision Committee. In the context of REMIT II, he repeated the implementation timeline and the most significant changes. Next steps involve preparing for REMIT II implementation, with a focus on identifying key issues, establishing positions, and determining priorities. A meeting with DG ENER is scheduled at the end of January 2024 to communicate EFET approach.

- EMIR 3.0. On a positive note, co-legislators have adopted final positions on EMIR 3.0, aligning with EFET advocacy and addressing concerns of energy market participants. The adopted safeguarding measures include limiting the clearing threshold calculation to non-cleared derivatives traded on a recognised CCP at the entity level; introducing new definition of intragroup for the purpose of the clearing and margining obligation; maintaining the intragroup transaction reporting exemption; increasing transparency and predictability of margin calls; accepting uncollateralised commercial bank guarantees as collateral for NFCs. This consensus serves as a positive starting point for trilogies, as all co-legislators politically agree on the main issues.

- MiFID II and review of Ancillary Activity Exemption (AAE). In February 2023, European Parliament has reopened the AAE discussion, along with other aspects like position limits. The MiFID II review is likely to fall under the next European Commission tenure, with the review report and proposal to be expected in late autumn / winter 2024. To get prepared, EFET has commissioned a study by Frontier Economics, Luther Law Firm, and KPMG to be completed by March 2024, addressing potential risks of narrowing or removing the AAE. Substantial changes to the MiFID II regime are anticipated, making it a major lobbying file (and a priority) for MSC in 2024, along with REMIT II implementation work.

9. Updated EMIR Risk Mitigation Techniques Agreement: progress report – Sonia Auguscik, EFET

Sonia reported on the workshop held on December 4, 2023, focusing on regulatory insights into EMIR REFIT (Regulation EU 2019/834). The workshop particularly delved into the classification of revised counterparty status and additional reporting requirements introduced by EMIR REFIT. Members are requested to provide feedback on the following set of questions:

- Would you like to address the alignment on reporting of complex derivatives in the EMIR RMTA?
- Would you like to agree on the UTI generation and communication in the EMIR RMTA?
- Would you like to update the EMIR RMTA to incorporate the required static data, and/or introduce fallback solutions in case the data changes?

Action: members are advised to engage with their regulatory reporting teams for internal discussions and submit their positions by December 29, 2023 (extended deadline until

January 10, 2024). Detailed information and specific points for consideration, along with an updated draft of the EMIR RMTA, can be found in the emails circulated in the Templates Development & Maintenance Working Group.

10. Budget planning 2024: general budget allocation to Legal Committee – Barbara Lempp, Treasurer of EFET

Barbara presented the membership fees for 2024, noting that the fee for membership in the Legal Committee amounts to EUR 19,000. She also introduced the activities of the EFET Finance Sub-Committee which oversights budget matters and reports directly to board. The budget for 2024 was drafted taking a conservative approach in terms of estimation of member numbers, cost increase and the risk of emergency situations. One of the main cost pools are admin costs, including development of a brand new EFET website and update of the EDRS platform.

The Legal Committee fee is integrated into the EFET general budget. EFET board allocates funds to the Legal Committee based on the working programme presented by the Legal Committee secretariat. The budget funds are exclusively designated for external costs, including activities such as updating legal netting opinions, drafting legal memos or other documents related to EFET standard documentation, organising educational workshops, covering costs associated with external experts, and addressing any additional expenses requested by the Legal Committee.

11. Budget planning 2024: preliminary allocation of the budget to the Legal Committee Working Groups – Sonia Auguscik, EFET

Sonia provided insights into the 2023 budget structure of the Legal Committee and presented a budget tracking overview. It was acknowledged that the existing structure, which allocated the budget funds per specific deliverables, lacked flexibility and did not align well with the working priorities and emerging issues. In response, a new budget structure was proposed for the upcoming year. This revised approach involves allocating budget funds per legal Working Group, enabling greater flexibility and adaptation to emerging needs. The new structure also assumes the creation of a fixed emergency reserve for crisis management, which may or may not be a trigger. Members were directed to a wording proposal in the updated Terms of Reference, suggesting that the Legal Committee secretariat should formulate a proposal for budget allocation based on members' expressed interests. This proposal would be subject to discussion and voting at the meeting in the fourth quarter each year.

Action: members to review the proposed budget structure and allocation for 2024, along with the budget-related provisions in the updated draft of the Terms of Reference. Feedback to be provided by January 29, 2024.

12. Legal Committee working programme for 2024 – Michaela Duve & Sonia Auguscik, EFET

In November 2023, members were invited to take part in a poll on priorities for 2024 and Michaela presented the survey results. For educational workshops, battery storage and voluntary carbon markets seem to be of interest. Respondents also provided additional ideas for educational workshops such as: supply chain/due diligence, new electricity market design, GoOs and REGOs, CBAM, LNG and sustainable bio-LNG, hydrogen. On this occasion, Michaela mentioned that the workshop planned for the first quarterly Legal Committee meeting in March 2024 will focus on LNG trading. For Templates Development and Maintenance Working Group, respondents expressed interest in reviewing the Emissions Allowance Appendix and Master Netting Agreement.

Note: this is just a summary, to have a full picture of exactly what the results were, including specific percentages and vote distribution, kindly refer to the slides from the meeting.

The meeting participants were divided into smaller discussion groups to further brainstorm matters of interest for 2024. In addition to the ideas reflected in the survey, members expressed interest in the following matters:

EECS alignment /compatibility with REGS; update guidance notes for UK REGO; update of the Emissions Allowances Appendix (in particular to cover shipping and aviation, supported by all discussion groups); development of Code of Conduct (at least basis wording and structure), development of EFET netting platform/database (summary of legal opinions by EFET, "meta-review" for sanity check, build knowledge within EFET – additional staff).

13. Update reports from the Legal Committee Working Groups:

Hydrogen Working Group (Michaela Duve, EFET): Briefly noted a delay in the workshop for the ship-delivered hydrogen contract template due to organisational changes at the Hydrogen Council. The planned workshop will most likely take place at the end of January. The draft contract will be sent out before the workshop, in the second half of January, to provide an opportunity for members to review it.

Digitalisation Working Group (Michaela Duve, EFET): Reported on the ongoing progress of the Faster Settlement initiative. There are ongoing discussions with the EFET Operations Committee, and members of the Credit & Collateral Working Group, about the frequency of payments, emphasizing the challenges of implementing a daily payment cycle (non-payment is a material reason giving the right to terminate the agreement). Drafting work on the Faster Settlement Annex draft will most likely begin in 2024.

LNG & Natural Gas Working Group (Aygul Adamson, EFET): Highlighted that the EFET AVB Appendix (Version 1.0, 8 November 2023) had received electronic endorsement from the Legal Committee members. This document is now publicly accessible on the EFET website, alongside the Guidance Notes, offering trading terms for title transfers of natural gas at the Spanish Virtual Balancing Underground Storage ("Almacenamiento Virtual de Balance" or "AVB").

Note: these documents are now available for execution through the following links: EFET AVB Appendix & Guidance Notes and EDRS Ratification Letter.

Aygul provided an update on potential issues related to market access in France in 2024, specifically concerning the recognition of licenses for non-EU registered companies. Initially raised in the context of UK-based companies, questions have emerged regarding potential implications for members based in Switzerland.

Legal Opinions Review Working Group (Sonia Auguscik, EFET): Reported on the proposed EU Directive Harmonising Insolvency Law and the associated discussions with Market Supervision Committee – work is underway to prepare the EFET position paper, expected to be finalised in January 2024. Further legislative work on the proposed directive are scheduled for April 2024 at the earliest. EFET focus is on advocating for amendments to the proposed directive to explicitly protect close-out netting provisions and to safeguard contractual clauses and obligations in pre-pack proceedings.

Note: at the request of the Legal Committee members, the impact assessment memo – previously distributed only to members of the Legal Opinions Review Working Group – has been added to the meeting materials, and is published on the EFET meeting page.

Sonia provided an update on the ongoing review of the netting instruction letter. The working group had two drafting sessions, and the process is currently in the finalisation stage for the revised instruction letter. Key changes include: reviewed transaction types (tailored to EFET traded products), traffic light system for counterparty and transaction types, separate annex for recommended wording, more precise instruction for green certificates, emphasis on energy traders (not regulated financial institutions).

PPA & Electricity (Sonia Auguscik, EFET): Provided an update on the outcomes of the brainstorming session held in late September 2023. Members who actively participated in the meeting demonstrated limited interest in developing a standard PPA version 2.0. It was collectively decided to initiate a market survey to obtain a broader perspective. However, the survey was momentarily put on hold due to ongoing developments surrounding the Electricity Market Design reform. This pause was particularly influenced by EU proposals for PPA standardisation, acknowledging that these developments would significantly impact the strategy for EFET further standardisation efforts.

Reminder: earlier in 2023, the Legal Committee underwent a reorganisation aimed at streamlining operations and achieving greater efficiency. Consequently, the following legal Working Groups were established: EFET Templates Development & Maintenance WG; PPA and Electricity WG; Biogas WG; Hydrogen WG; LNG and Natural Gas WG; Contract Digitalisation WG; Legal Opinions WG; and Support and Cross-Committee Cooperation. Members can sign up for the workstream(s) of their interests via the registration link.

14. Update on the electricity market design with particular focus on PPA market – Lorenzo Biglia, EFET Electricity Committee

Lorenzo provided an update on the Electricity Market Design reform, noting that news of the deal agreed broke on the night of December 14/15, and that there was still no time to digest it all. He shared positive developments regarding Power Purchase Agreements, notably (1) ACER is set to publish an annual assessment on the PPA market at both the EU and Member State levels; ACER will also assess, in collaboration with stakeholders, the need for developing and issuing PPA standards for voluntary use; (2) the voluntary trading platform is EU only and subject to an impact assessment, however, specific details are currently unavailable; (3) the EU database for PPA reporting disappears. In light of these changes, Lorenzo recommended initiating internal discussions and engaging with ACER on the expected PPA market assessment, emphasizing the importance of establishing EFET approach to PPA standardisation. Revenue caps on inframarginal generation can be extended and continue to apply by June 30, 2024, but will not become a permanent feature of the new electricity market design.

15. General update on the current issues with particular focus on MCM and AggregateEU – Doug Wood, EFET Gas Committee

Doug provided a report from the EFET Gas Committee, providing updates on four key areas: the extension of emergency measures, the gas package, discussions on the union database, and ongoing work on hydrogen market design. Additionally, an update from Bulgaria, on the proposed tax on Russian gas was addressed. Here is a detailed overview:

- Extension of emergency measures. Two regulations (2576 and 2578) were discussed, focusing on the AggregateEU joint purchasing mechanism, and the market correction mechanism. The European Commission expressed a strong inclination to extend emergency conditions until the end of 2024. Decision is expected on December 19, 2023, at the Council meeting.

- Gas package (hydrogen and decarbonised gas market). A provisional agreement has been reached on both the regulation and directive, although consolidated texts have not been seen yet. The latest disputes seem to have been around formational of a separate new entity in the hydrogen sector (European Network of Network Operators for Hydrogen, ENNOH), and the zeroisation of tariffs at interconnection points as a means of providing some cross-utilisation for renewable carbon gases.

- Union database (UDB) to ensure the traceability of liquid and gaseous biofuels. Confusion within the Commission regarding processes for managing registration of Proof of Sustainability (PoS), the relationship between Guarantees of Origin and PoS, and communication with national schemes. Concerns were raised about the interpretation of legislation and the project management timeline, with a fully functioning union database expected by November 21, 2024.

- Hydrogen market design. EFET has produced a draft discussion paper on what the gas day could look like in a hydrogen network, addressing question of alignment with electricity calendar day vs gas day from 6:00 AM to 6:00 AM. EFET Deutschland has been looking into the same topic in the context of electrolyser operation. Paper in in progress, with contributions sought from members by Christmas and a revised version expected in the new year.

- Bulgarian Tax on Russian Gas. Positive developments regarding the Bulgarian tax imposed on any gas that cannot be shown to have non-Russian production source. It appears that a decision was taken by the Bulgarian authorities to suspend the tax on gas imports and transit.

16. AOB & scheduling next Legal Committee meetings

Sonia indicated that two member companies had asked questions regarding the extension of the EU ETS to shipping industry, more precisely, regarding compliance with the extended EU ETS scheme from the perspective of shipping emissions. These questions seem to be more of an operational reporting angle, not within the mandate of the Legal Committee. In case of great interest from members, and depending on the nature of the questions and concerns, it will be discussed in EFET on how best to take this forward.

Action: In case of interest in this topic, please get in touch with Sonia Auguscik (s.auguscik@efet.org, with a copy to LCsecretariat@efet.org).

Michaela informed members that this was Aygul's last meeting as representative of the Legal Committee secretariat and thanked her for many years of work at EFET. In light of this change, members are asked to send their concerns and questions to the email LCsecretariat@efet.org. During the transition period until the secretariat is fully staffed again, there may be longer response times, for which we would like to apologise in advance.

Save-the-dates: here is the schedule of the next Legal Committee meetings. Members are invited to share their agenda suggestions.

- March 7 & 8, 2024, Paris, hosted by Engie (maximum of 35 in-person participants);
- June 25 & 26, 2024, Amsterdam, accompanied by a gala dinner on the occasion of the 25th anniversary of EFET (maximum of 40 in-person participants).