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LEGAL OPINION REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF COLLATERAL AGREEMENTS AND OTHER RELATED ISSUES UNDER THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY AND NATURAL GAS

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2 February 2024

European Federation of Energy Traders
Keizersgracht 62-64
1015 CS Amsterdam
The Netherlands

EFET General Agreement Concerning the Delivery and Acceptance of Electricity and Natural Gas

Dear Sir or Madam,

We have been asked to give an opinion on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas ("**EFET General Agreement**") and the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement ("**Credit Support Annex**") as well as other related issues outlined in your instruction letter dated 11 July 2022 ("**Instruction Letter**"). These issues include (i) the validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**"), (ii) the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**"), (iv) the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the Parties ("**Core Provisions**"), (v) the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"), (vi) the existence of specific licencing requirements or currency exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**"), and (vii) the existence of products other than electricity or natural gas if traded on the basis of Appendices to the General Agreement (if green certificates are to be traded under the EFET General Agreement and the consequence of their inclusion on the netting situation in general).

In addition, we have been asked to address the status of the implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 of 20 June 2019 ("**European Restructuring Directive**") and its impact on netting and close-out netting in Polish jurisdiction.

This opinion ("**Opinion**") discusses the issues outlined above in substantially the same order as shown in the Instruction Letter.

The Opinion does not relate to any Individual Contract under the EFET General Agreement and does not give an opinion on any tax, accounting, regulatory or related matters other than to the extent we express an opinion hereunder.

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EXECUTIVE SUMMARY

On the basis of the assumptions and subject to the limitations set out in this Opinion, this is an executive summary of the opinions expressed in this Opinion. This executive summary does not form part of this Opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having any interpretative effect on the opinions in this Opinion.

Types of Counterparties *What types of counterparties are covered by the opinion?*	This Opinion applies to the following types of counterparties: (1) corporations (e.g. a limited liability company or a joint- stock company); (2) partnerships (e.g. a general or limited partnership) (3) banks/credit institutions; (4) investment service providers/investment firms (5) insurance companies; (6) investment fund management companies; (7) other financial institutions; (8) municipalities or counties; (9) associations of local government; (10) publicly owned corporations; or (11) quasi-governmental entities. See colour-coded Appendix A for more information.	*Pages:* *81-82*
Types of Transactions *What types of transactions are eligible for close-out netting?*	For close-out netting are eligible the financial term operations such as: (1) commodity forward operations; (2) commodity options; (3) commodity swaps; (4) other physical commodity transactions; where there is a time delay between the conclusion of the transaction and the delivery of the goods. See Part C.I.1.1 (g) and colour-coded Appendix B for more information. In the case of a mixed portfolio of trades, only transactions that do not fall within the definition of the financial term operations in the meaning of Article 85 Section 2 of the Bankruptcy Law should be excluded from close-out netting. Eligible transactions will remain unaffected.	*Pages:* *25-26, 83-84*
Automatic Early Termination *Does the opinion require or recommend that automatic*	Selection of the Automatic Termination, as indicated in § 10.4 of the EFET General Agreement, would not provide any benefit, and therefore we do not recommend opting for the Automatic Termination for Polish entities.	*Pages:* *33;* *34-36*

early termination applies to a counterparty organised in Poland?	*Reasoning from the Bankruptcy Law perspective* In the bankruptcy regime, parties can benefit from the close-out netting regardless of whether they choose Automatic Termination or Early Termination. However, the difference in the choice of termination method may arise in the classification of a claim for a Termination Amount as a pre-bankruptcy or post-bankruptcy claim. Opting for the Automatic Termination may put the creditor at a disadvantage if the termination occurs automatically **before** declaration of the bankruptcy, e.g., due to a Material Reason indicated in § 10.5 (c)(ii) of the EFET General Agreement (i.e., before the debtor files for bankruptcy). In such a case, it can be argued that the claim under the Termination Amount arose before the bankruptcy declaration and can be satisfied only pursuant to the bankruptcy regime (i.e., it should be submitted to the bankruptcy estate). *Reasoning from the Restructuring Law perspective* In the regime of restructuring law, the choice of Automatic Termination may lead to different consequences compared to Early Termination. In cases where the Automatic Termination results in a claim **before** the opening of restructuring proceedings, creditors could face disadvantages. In the event of such a pre-restructuring claim, the Termination Amount would be included in the arrangement with creditors, and the debtor will only be able to pay it in accordance with the provisions of the arrangement. Alternatively, by choosing Early Termination, the creditor could give notice to the debtor after the opening of the restructuring proceedings. Thus, the claim for the Termination Amount would arise after the opening of the restructuring proceedings (post-restructuring claim) and would not be included in the arrangement with creditors. Instead, the claim would be satisfied on an ongoing basis.	
Early Termination Provision	The early termination rights for **non-insolvency related Material Reasons**, i.e. § 10.3 in connection with §10.5(a), (b), (d), (e) of the EFET General Agreement, create legal, valid and binding obligations on the parties and are enforceable under Polish law.	*Pages:* *30 -36*

Is the early termination provision of the agreement enforceable in Poland?	The early termination rights for **pre-insolvency related Material Reasons,** as provided in § 10.5(c)(ii), (v), (vii), and (ix) of the EFET General Agreement, should be enforceable under Polish law. The early termination rights for **insolvency related Material Reasons** (which relate to the opening of bankruptcy or restructuring proceedings, or the filing for bankruptcy or restructuring petition), i.e., the events specified in § 10.5(c)(iii), (iv) and (vi) of the EFET General Agreement, will be invalid under Polish law. Instead, Polish law provides for a **special statutory right** to terminate the contracts benefiting from safe harbour protection after opening of bankruptcy or restructuring proceedings - see **Close-Out Netting** for more details. Note that these special statutory rights can be exercised by any party to the master agreement, including a solvent counterparty. The above conclusions apply to both Early Termination and the Automatic Termination - for differences see the recommendations for **Automatic Termination.** Note: the situation is different in the case of termination triggered by an EFET insolvency-related event affecting a Credit Support Provider (to the extent the Credit Support Provider is not a party to the EFET General Agreement). EFET insolvency related provisions would be enforceable in such a case, therefore, the EFET General Agreement could be terminated due to an insolvency-related event affecting a Credit Support Provider.	
Close-Out Netting *Is the close-out netting provision of the agreement enforceable in a local insolvency?*	We believe that the close-out netting provisions in relation to the Individual Contracts that are in the scope of "financial term operations" will be enforceable in the event of the commencement of local bankruptcy or restructuring proceedings in Poland. *First,* the Bankruptcy Law provides (Article 83 Item 3) that parties to the master agreement may terminate such agreement after the opening of the bankruptcy and restructuring proceedings and employ the method of settlement provided for in that provision in the event of termination. The effect of this provision is to recognise contractual compensation clauses in bankruptcy proceedings even if a party exercises its statutory right to terminate.	*Pages:* *21;* *27-28;* *30;* *32*

	Thus, both parties (i.e., not only the trustee, but also the solvent party) will be able to exercise the right to the Early Termination of the EFET General Agreement and each of the Individual Contracts even after the opening of bankruptcy and restructuring proceedings. *Second*, pursuant to the Bankruptcy Law, declaration of the debtor's bankruptcy does not affect the netting clause referred to in the Act of 2 April 2004 on certain financial collaterals (the **"Financial Collateral Law"),** if an agreement was concluded: (i) before the date of bankruptcy; (ii) on the date of bankruptcy but prior to the decision declaring the debtor bankrupt; (iii) on the date of bankruptcy but after the decision declaring the debtor bankrupt, if the beneficiary under the collateral can confirm that he was not aware, nor could have been aware, of the declaration of bankruptcy. Although, in our opinion, such a risk is very remote, we cannot fully exclude a situation in which the bankruptcy trustee will attempt, under Article 84 of the Bankruptcy Law, to declare the close-out netting provision to be contrary to the purpose of the bankruptcy proceedings and, therefore, ineffective towards to the bankruptcy estate.	
Characterisation of collateral *Would the laws of Poland characterise transfer of collateral as effecting an unconditional transfer of ownership or is there risk of re-characterising such transfer as creating a security interest?*	As we understand it, this question refers to the Eligible Credit Support (i.e., Cash, Letter of Credit, Parent Company Guarantee), so under the EFET Credit Support Annex, there will be no "transfer of ownership" in the Eligible Credit Support, but a transfer of receivables (claims). In general, the transfer of collateral, to be effective, must be transferred along with the claim that the collateral secures, otherwise the security interest will be extinguished. Polish law does not explicitly provide that a transfer of collateral along with a secured claim will constitute the establishment of new collateral, unless the parties expressly stipulate that they want to replace the collateral (so the previous collateral expires and new collateral is created). While the transfer of certain collateral, such as a financial pledge (which will require a change of notation, e.g., on financial instruments), may pose the risk that such transfer will be considered the creation of new collateral, such risk should not apply to the EFET Credit Support Annex, since § 7.3 provides that the intention of the parties was not to establish a financial pledge.	*Pages:* *40-51*

	In addition, given the lack of specific requirements for the establishment of a financial pledge, it is also conceivable that the bankruptcy administrator and/or a judge-commissioner may consider re-classifying the assignment of rights (without the required form) into a transfer of rights governed by the Financial Collateral Law or financial pledge with a right to use. In practice, however, we have not encountered a situation in which the bankruptcy administrator and/or a judge-commissioner would proceed (upon creditor's motion) with such re-characterisation of collateral, so in our opinion it is more likely that an improperly made assignment of rights will be deemed as ineffective against the bankruptcy estate rather then re-characterised as another security.	
Further action required *Is any action required to ensure that ownership title continues to rest with Party B?*	If Polish law would apply, once Party B has validly obtained a full claim against the relevant third party, no further action or steps are required to ensure that the full entitlement to such claim continues to rest with Party B, unless the transfer of such claim requires perfection of security that secures such claim.	*Page:* 52
Amendments necessary *Are there any recommended amendments to the standard documents?*	**As to the modification of the Material Reasons for the Early Termination or Automatic Termination clause in EFET General Agreement** Both Early Termination and Automatic Termination of the EFET General Agreement as a result of an event set forth in § 10.5 (c) (iii), (iv), (vi) of the EFET General Agreement - to the extent it relates to bankruptcy or restructuring - are to be deemed invalid or ineffective against the bankruptcy estate or the debtor estate, respectively. Therefore, any amendments we recommend to the standard provisions of the EFET General Agreement' relate to amending the invalid or ineffective under Polish law Material Reasons which may form the basis for the Early Termination or Automatic Termination, either by amending them or adding additional ones that could enable creditors to react earlier in the event of liquidity problems of the debtor.	*Pages:* *34-36*
Other remarks *Does the opinion specify issues that you deem to be of specific interest in*	(i) The parent company guarantee is not regulated by Polish law, the parties to the contract are free to adapt its provisions to the needs of a given contractual relationship, with the provisions that its content or purpose does not contradict the	*Page:* *49*

negotiating an agreement with a counterparty in the jurisdiction?	properties (nature) of the relationship, the law or the principles of social coexistence (Article 353[1] of the Civil Code); (ii) Furthermore, each party should carefully scrutinise whether the other party has all the requisite capacity, powers and authorities to enter into and perform the EFET General Agreement and any Individual Contracts thereunder. This holds, in particular, true in case the other party is a Municipality or State where certain limitations apply (see colour-coded Appendix A for more information); (iii) If energy is traded between wholesalers that are parties to the EFET General Agreement, there is no obligation to purchase and redeem renewable energy certificates of origin. In this regard, the Individual Contracts may contain an additional safeguard in the form of a statement by which the parties confirm that they do not have the status of end-user within the meaning of the Energy Law Act.	*Page: 73*

A. DOCUMENTS CONSIDERED

For the purpose of this Opinion the following documents were considered in accordance with the Instruction Letter:

For Electricity:

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

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

(3) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013);

(4) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015);

(5) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 2018);

(6) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1, published 4 November 2021);

(7) EFET French Capacity Certificates Appendix, (Version 1.0, published March 2013);

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

(9) GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007) (Version 1.0, published 11 September 2009);

(10) EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013);

(11) EFET EECS Certificate & National Scheme Certificate Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.1 (b), published 4 November 2021); and

UK ETS Allowances Appendix (Power) (Version 1.0, published 29 July 2021).

For Natural Gas:

(1) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007);

(2) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003);

(3) EFET Sample Amendment Agreement to § 14 (VAT and Taxes), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published July 2007);

(4) EFET Sample Amendment Agreement to § 8 (Remedies for Failure to Deliver and Accept the Contract Quantity) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published October 2005);

(5) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 16 December 2013);

(6) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0 (a)/ 11 May 2007 (Version 5.1, published 4 November 2021);

(7) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0(a)/ 11 May 2007 (Version 4.0 published on 28 February 2018);

(8) EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0/4 December 2017);

(9) EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 27 March 2020);

(10) EFET Italian Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004);

(11) Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version3.0, published 26 September 2022);

(12) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014);

(13) EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 - 29 May 2020);

(14) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018);

(15) EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 14 December 2013);

(16) EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/ 21 June 2021);

(17) EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/May 2021);

(18) EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published February 2020);

(19) EFET Recommended Clauses for use with Ukrainian Counterparties, published February 2020;

(20) EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 4 December 2017);

(21) EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016);

(22) EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 7 September 2015);

(23) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015);

(24) Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, published 26 July 2021; and

UK ETS Allowances Appendix (Gas) (Version 1.0, published 13 December 2021).

For Electricity and Natural Gas:

(1) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/ 6 January 2003 and the EFET General Agreement Concerning the Delivery and Acceptance of Electricity Version 2.1/20 December 2000 (Version 1.0, published 20 November 2005);

(2) Amendment Agreement IBOR Transition wording for General Agreements, CPPNA, PPA and Appendices, published 4 November 2021;

(3) EFET Credit Support Annex to the General Agreement (Version 1.0(a), published September 2005);

(4) EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010);

(5) EFET Credit Support Annex to the General Agreement (Version 3.1, published 4 November 2021);

(6) Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13 October 2020; and

(7) Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13 October 2020.

For the purpose of Part C.V (Confirmation Practices) only:

(1) EFET Electronic Confirmation Agreement (published 20 March 2017).

For the purpose of Part C.VI (Core Provisions) only:

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

(2) EFET Master Netting Agreement (Version 1.0, published June 2010);

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

(4) EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003); and

(5) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011).

B. SCOPE OF REVIEW

B.I ASSUMPTIONS

B.I.1 General Assumptions

The general assumptions on which the Opinion is based in accordance with the Instruction Letter are the following:

(a) Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in Poland ("**Party A**").

(b) Party A is a corporation, financial institution or other entity as further described in Appendix A to the Instruction Letter.

(c) The relevant EFET General Agreement is governed by the laws of Germany or England and Wales. With respect to Part C.I.1 (Close-out Netting), Part C.II (Multibranch) and Part C.VII (Governing Law), the assumption is broader in order to cover also General Agreements governed by foreign law.

(d) Each EFET General Agreement and any of the above Annexes (including the Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of Poland) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into each document.

(e) On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of individual Contracts which include all of the Individual Contracts described in Appendix B to the Instruction Letter.

(f) The Individual Contracts provide for the physical delivery of commodities, green certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement.

(g) In accordance with the Instruction Letter, additional assumptions are set forth in the relevant part of the Opinion in relation to the specific issue analysed.

B.I.2 Further assumptions

In addition to the assumptions given in the Instruction Letter, the opinions in this Opinion are given on the basis of the assumptions and are subject to the limitations set out under this point below in each case in their entirety. The opinions given in this Opinion are strictly limited to the matters expressly stated under point C (*Issues and Additional Assumptions,* page 21) below and do not extend to any other matters.

The opinions set out in this Opinion have been based on the assumptions:

(a) that each of the individuals acting on behalf of each party to the EFET General Agreement has the requisite legal capacity to do so, and that no such person has been banned from representing that party by a court judgment;

(b) that each of the parties to the EFET General Agreement is duly established and existing and that it has all necessary capacity, power and authority to enter into and to exercise its rights and perform its obligations under the EFET General Agreement, and that the execution of the EFET General Agreement and the exercise of its rights and performance of its respective obligations thereunder do not violate its articles of association, other governing documents, any contractual relationship or any law or regulation applicable thereto;

(c) that all necessary corporate actions required to authorise the valid and effective execution of and performance under the EFET General Agreement on behalf of each party thereto has in each case been duly taken in the form prescribed by law for its legality, validity and enforceability, and that each of the EFET General Agreement has been duly executed and delivered by each party thereto in the form prescribed by law for its legality, validity and enforceability;

(d) that the EFET General Agreement and the Individual Contracts are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed, if other than the laws of Poland, and that none of the opinions expressed below will be affected by the laws (including, without limitation, the insolvency laws and the public policy) of any jurisdiction outside Poland.

(e) that no Material Reason for termination as outlined in § 10.5 (Definition of Material Reason) with respect to a party has occurred and is continuing when entering into this EFET General Agreement.

(f) that the EFET General Agreement and any Individual Contracts under it are entered into prior to the formal commencement of any insolvency proceedings against either Party.

(g) that the EFET General Agreement falls within the scope of "master agreement" in the meaning of the Bankruptcy Law and that each of the Individual Contracts falls within the meaning of "financial term operations" or "incurring or selling financial instruments with an obligation to repurchase them" as referred to in Article 85 of the Bankruptcy Law. This assumption is made in view of the lack of case law in Poland in this area, we cannot completely rule out raising dissenting opinions and arguments, although, in our view such a risk is remote.

(h) that both Parties have all licences, authorisations, consents and approvals required by any applicable laws to enter into the EFET General Agreement and any Individual Contracts and that the EFET General Agreement and any Individual Contracts comply with the electricity and/or natural gas and financial sector legislation and regulations in all relevant jurisdictions.

(i) that the EFET General Agreement and Individual Contracts are mutual between the Parties in the sense that each is personally and solely liable for its own account as regards obligations owed by it and is the sole beneficial owner of obligations owed to it.

(j) that the EFET General Agreement and all Individual Contracts under it were entered into, and each delivery and payment made thereunder were made at arm's-length and that neither Party has received a gratuitous benefit or consideration, but that the value of Party A's benefit exceeding to a gross degree the value of the benefit received by Party A or reserved for Party A or a third party.

(k) that no proceedings have been instituted or injunction granted against any of the Parties to the EFET General Agreement to restrain it from performing any of its obligations under the EFET General Agreement and/or Individual Contracts;

(l) that the binding effect of the EFET General Agreement has not been affected by any defect of statement of will (*wada oświadczenia woli*), including resulting from fraud, coercion, bad faith, duress, undue influence or mistake, no statement of will has been made to circumvent the law *(in fraudem legis*) and that no misrepresentation has been made by or on behalf of any of the parties to the EFET General Agreement to any other party to the EFET General Agreement, its employees, agents or advisers;

(m) that the EFET General Agreement and all Individual Contracts have not been entered into by any party in connection with money laundering or any other unlawful activity;

(n) no foreign law affects the conclusions stated in this Opinion;

(o) insofar as any obligations under the EFET General Agreement are to be performed in any jurisdiction outside of Poland, their performance will not be illegal or ineffective by virtue of the law of such other jurisdiction;

(p) if there is any requirement in any jurisdiction (other than Poland) which might affect the legality, binding effect and enforceability of the EFET General Agreement and/or Individual Contracts in such jurisdiction, that such a requirement has been satisfied;

(q) no law of any jurisdiction (other than Poland) would render the execution and delivery of the EFET General Agreement by any party thereto, the performance of any obligations thereunder or the consummation of the transactions contemplated thereby, illegal or ineffective;

(r) no steps have been taken to initiate liquidation, bankruptcy, receivership, reorganisation, restructuring or similar proceedings by Party A to the EFET General Agreement, in any jurisdiction and there are no grounds for the initiation of any such proceedings, that no such party is insolvent or threatened with insolvency at the time it entered into the EFET General Agreement, and that no such party was or will be rendered insolvent by entering into the EFET General Agreement and/or the Individual Contracts.

B.II LIMITATIONS

The opinions set out in this Opinion are subject to the following limitations:

B.II.1 General Limitations

(a) This legal opinion is limited to the laws of Poland and the provisions of European law to the extent that they are directly applicable in Poland as they are in force on the day of this opinion and as currently applied and interpreted by the Polish Supreme Court (*Sąd Najwyższy*), the Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*) and the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*), and no opinion is expressed or implied with regard to any law other than Polish law, even if imported by Polish private international law. Furthermore, under Polish law the courts shall interpret agreements taking into account certain general principles of Polish law, public order or equity, including the so-called principles of social co-existence. Also, under Polish law the courts should interpret agreements rather taking into account the true and joint intentions of the parties, than the exact wording of such agreements.

(b) The phrases "valid, and binding obligations" and "enforceable in accordance with their terms", as used above, mean that the obligations assumed by a Party under EFET General Agreement are of a type which Polish Courts normally treat as valid, legally binding and enforceable. This does not mean that such obligations will necessarily be enforced in accordance with their terms in all circumstances, and we express no opinion regarding the actual outcome of any proceedings to enforce a particular obligation. Whether a particular obligation will be enforced will depend on the facts and circumstances of each case and might be influenced by certain regulations of Polish law which have an *ius cogens* character, which means they will apply irrespective of how the parties regulate their legal relationships (see Part B.II.2 below).

(c) Provisions as to severability may not be effective under Polish law with respect to provisions which are determined to be fundamental to the contract.

(d) Subject to certain exceptions, the charging of interest on interest is not permissible under Polish law.

(e) Under Polish law, a right or remedy may be deemed to be waived impliedly (*per facta concludentia*). Similarly, consent may be deemed to be granted impliedly, and an agreement may be deemed to be amended impliedly.

(f) An agreement may be found ineffective against a third person if the performance of that agreement would make the satisfaction of a claim by that third party impossible in whole or in part and if the parties to the agreement knew about the claim or the agreement was gratuitous.

(g) If the agreement requires one party to perform its obligations first, in the case the other party's financial standing becomes doubtful, the party may refrain its performance until the other party has offered its own performance first or provided a collateral. The above rights do not apply to a party who, at the time of execution of the agreement, knew of the other party's poor financial standing.

(h) In Poland there is no doctrine of precedent, i.e., no rule or case upon which one may rely in reviewing or opining on matters relating to the law, and there is a likelihood of different opinions and interpretations on the same issue by different courts; accordingly, our opinions regarding Polish law in particular if based on the court cases, do not warrant that the court deciding potential disputes will adopt the view expressed herein;

(i) We assume no obligation to update or supplement this Opinion to reflect any facts or circumstances which may after the date hereof come to our attention or any changes in the law which may hereafter occur.

(j) We expressed no opinion on matters of fact, in particular how the state of the epidemic commonly referred to as Covid-19 and any trade restrictions related to it, or the continuation of such administrative measures in the future or the implementation of various sanctions in connection with the war in Ukraine, might affect Party A's financial condition or the prospects for its execution of the EFET General Agreement.

(k) We express no opinion as to price caps, write offs (*odpisy*) charged over the price levels and price control measures imposed by the virtue of the laws adopted in 2022 (as amended at the date of this opinion) on electricity and heat generation and trading companies as well as gas supply prices.

(l) We express no opinion as to tax issues with respect to, or in connection with, any agreement, instrument, document, or any other matter.

B.II.2 Limitations regarding the enforceability of claims

(a) In this Opinion the term "enforceable" means, in relation to a contractual obligation, that such an obligation is of a type and form enforced by the Polish courts. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the relevant agreement. The enforcement of any rights of any party may be limited by, as a matter of the public policy, among others, laws and regulations concerning civil procedure, applicable insolvency laws (*postępowanie upadłościowe*), restructuring proceedings (*postępowanie restrukturyzacyjne*), equitable principles of general applicability and requirements as to the principle of good faith (*bona fides*; *dobra wiara*), the exception of abuse of legal rights (*nadużycie prawa*) fraudulent conveyance rules (*actio Pauliana*), general principles of fairness or social co-existence (*zasady współżycia społecznego*), and economic objectives of law or extraordinary change of circumstances ("*rebus sic stantibus" clause*), and other similar laws affecting creditors' rights and remedies generally. In particular, under the Polish Civil Code of 23 April 1964 (the "**Civil Code**"):

(1) any creditor of a Party may challenge the effectiveness of the EFET General Agreement and/or Individual Contracts if such creditor may prove that the Party, in executing the EFET General Agreement and/or Individual Contract, acted with the intent to violate the rights and remedies of such creditor, and the other Party to the EFET General Agreement and/or Individual Contract knew or should have known that the execution of the EFET General Agreement and/or Individual Contracts violated the rights and remedies of such creditor; and

(2) if a Party, by entering into a EFET General Agreement and/or Individual Contracts, has prevented in whole or in part the satisfaction of a third party's right/claim, the third party may request that the court to declare the EFET General Agreement and/or Individual Contracts ineffective against this Party, provided that the Party to the EFET General Agreement and/or Individual Contracts knew of the third party's right/claim or if the document(s) in question was entered into without consideration;

(3) enforceability may be limited with respect to specific performance, which may not be available where damages are considered by a court to be an adequate remedy;

(4) enforceability of the terms of an agreement may be limited if it violates a material public policy of Poland (although we are not aware of any material public policy of Poland at the time of giving this Opinion which would be violated by the terms of any of the EFET General Agreement and/or Individual Contracts);

(5) validity of a right or obligation or enforcement of a claim may be limited by procedural regulations applicable to court and enforcement proceedings generally, including, but not limited to, ordinary and extraordinary appellate measures in situations prescribed by law;

(6) claims may become barred under statutory limitations, or may be or become subject to set-off or counterclaim; and

(7) if the performance by the Party of one of its obligations under the EFET General Agreement and/or Individual Contacts becomes impossible for reasons for which the Party is not responsible, that obligation expires;

(b) Foreign court judgment issued in the EU Member State will be recognised and enforceable in Poland in accordance with, and subject to, the provisions of the Brussels I Regulation (EC) No. 1215/2012 dated 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Regulation 1215/2012**").

(c) The judgments issued in the UK will be recognised and enforced in Poland through a procedure conducted in accordance with the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "**Hague Convention**") complemented by the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters dated as of 2 July 2019 (provided that the latter actually comes into force)[1] and Polish Civil Procedure Code.

(d) To the extent not regulated otherwise by the Regulation 1215/2012 or Hague Convention, the Polish court will issue a writ of enforcement (*klauzula wykonalności*) with respect to a foreign court judgment only if that judgment is enforceable in the country in which the judgment was issued and none of the following circumstances exist:

(1) such judgment is not final in the country where it was issued;

(2) it was issued in a case which belongs to the exclusive jurisdiction of Polish courts;

(3) the defendant, who has not engaged in dispute as to the substance of the matter, has not been served with a letter initiating the proceedings in a due manner and in a time enabling him to defend his rights;

[1] As of the date of this Opinion, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has not been yet in force.

(4) a party has been deprived of the right to defend its rights before a court;

(5) an action based on the same claim and between the same parties was commenced before the Polish court (or any other competent Polish authority) before being commenced before the foreign court;

(6) judgment, issued in the case based on the same claim and between the same parties, is contrary to a previous final judgment of the Polish court (or any other competent Polish authority) or a previous final judgment, issued in the case judgment of the foreign court (or any other competent foreign authority) provided that such earlier foreign court judgment (or decision of any other competent foreign authority) fulfils the conditions necessary for its recognition by the Polish court; or

(7) the judgment is contrary to the basic principles of the laws of Poland.

(e) For any agreement or other document to be admissible as evidence in the courts of Poland, such agreement or other document must be translated into Polish. Furthermore, the court will not admit the evidence in the commercial court proceedings (*postępowanie gospodarcze*) which the parties agreed to exclude.

(f) Any certificate, calculation, notification or similar statement to be provided under the terms of the EFET General Agreement and/or Individual Contracts as conclusive evidence of the occurrence of an event or circumstances contemplated in such statement may be subject to review by a Polish court applying Polish law, which has the right to determine the conclusiveness and credibility of such statement in accordance with its own belief based on its own evaluation of all the evidence produced in the course of a proceedings.

(g) Pursuant to the EU Insolvency Regulation and in particular EU Member States (in particular, without limitation, pursuant to the Bankruptcy Law), the bankruptcy proceedings may be initiated not only in the country where the entity is registered (incorporated) but also in other EU Member States where the bankrupt entity conducts or has conducted its business activity or has assets. Notwithstanding the attempts to harmonise the bankruptcy regulations in the EU Members States, the regulations in various EU Member States differ and the bankruptcy or similar proceedings conducted in more than one state in parallel or at different times may create additional legal risks and costs for the Party to the EFET General Agreement and/or Individual Contract.

B.II.3 Other limitations

(a) We express no opinion as to the validity and enforceability of any provisions of any master trading agreements other than the EFET General Agreement.

(b) We express no opinion as to whether the method for settling the claims arising from the Individual Contracts under the EFET General Agreement is acceptable and recognised on the market for transactions set out in Appendix B to the Instruction Letter and this Opinion, or whether it is eligible for recognition for risk-reducing or other similar purposes.

(c) We do not express an opinion on the application of the terms of the EFET General Agreement if termination is triggered by insolvency of a party's Credit Support Provider.

(d) If a party to EFET General Agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or Polish sanctions implemented or effective in Poland, or is otherwise the target of any such sanctions, then the obligations of the other party to that party under the EFET General Agreement may be unenforceable or void.

(e) In this Opinion, Polish legal concepts are expressed in English terms and not in their original Polish terms and, therefore, the concepts referred to herein may not be identical to concepts described by the same English terms as they exist under laws of other jurisdictions; however, where a Polish translation of a word or phrase appears in the text of this opinion letter, the Polish translation of such word or phrase shall prevail.

(f) The effectiveness of terms exculpating a party from liability or duty otherwise owed is limited by Polish law.

B.III POTENTIAL PARTIES

In accordance with the Instruction Letter, we were required to give an opinion in respect of the potential party types listed in Appendix A to the Instruction Letter. Without prejudice to the above, the following should be taken into account when assessing potential parties to the EFET General Agreement.

Electricity and natural gas trading are defined in the Polish Energy Law. Pursuant to this Act and related regulations, such activities are in principle subject to a licence granted by the President of the Energy Regulatory Authority (ERA) in Poland, with the exception of certain types of electricity and natural gas trading by specified categories of entities (for more on this topic see Part C.VIII.2).

We note that some potential parties listed in Appendix A are defined on the basis of the specific activities carried out by the corporation (e.g., banks, financial service providers, etc.). These types of potential parties (as well as the types of transactions provided for in Appendix B to the Instruction Letter) apparently go beyond the traditional meaning of conducting physical trade (delivery and off-take) in electricity and natural gas. In the case of the categories of parties described above, if transactions related to electricity/natural gas trading were considered by their nature to be transactions in financial instruments, their qualification as an ancillary activity of the company would be relevant (cf. part C.VIII.7 of the Opinion). Otherwise, such an entity would have to be authorised by the Financial Supervision Commission to operate as a brokerage house.

It should also be emphasised that, according to the general assumptions, it is possible that Party A is not an entity registered under Polish law, but only has its main centre of interest in Poland. As described in section C.VIII.1, foreign entities may engage in electricity and natural gas trading in Poland even without having a permanent establishment in Poland.

C. ISSUES AND ADDITIONAL ASSUMPTIONS

On the basis of the assumption set out in Part B. I above (Assumptions) and subject to the limitations set out in Part B.II above (Limitations), we are of the following opinion.

C.I ENFORCEABILITY OF CLOSE-OUT NETTING

1. General overview of the netting under Polish law

1.1 There is currently no legal regulation of netting in Poland. Netting (interchangeably referred to as clearing) is a type of unnamed contract to which the principles of freedom of contract apply - on the basis of Article 353[1] of the Civil Code - allowing the terms of the contract to be determined in the manner most convenient to the parties (as long as its content or purpose does not contradict the nature of the relationship, the law or the principles of social coexistence).

1.2 As a general concept and with the intention of achieving the same end effect, netting may be viewed as a set-off action from a civil law perspective, by which mutually consenting parties agree on a balancing of their mutual obligations. Under Article 498 of the Civil Code, when two parties are debtors and creditors to each other at the same time, each of them may set off his due and payable claim against the claim of other party, as long as both claims are of the same type, are due and may be enforced before a court or other state authority. Obligations cease to exist up to the value of the set-offs.

1.3 Polish law also specifically deals with the permissibility of close-out netting in an insolvency or restructuring scenario. In Part C.I.1 below, we discuss the provisions of the Bankruptcy Law applicable to financial terms operations or borrowing or sale of financial instruments with a repurchase obligation. The Bankruptcy Law also explicitly permits for netting clauses that comply with the Financial Collateral Law. The Restructuring Law contains a very similar regulation in Article 250 on termination of the close-out netting to the regulation of Article 85 of the Bankruptcy Law.

C.I.1 Winding-up, Insolvency or Attachment

C.I.1.1 Close-out netting under the Bankruptcy Law

(a) Impact of bankruptcy declaration on rights and obligations under the contracts

The Bankruptcy Law provides for the general rule that the mere declaration of bankruptcy will not automatically affect the rights and obligations under the agreement to which that bankrupt is a party. During the bankruptcy proceedings, the trustee (*syndyk*), with the consent of the judge-commissioner, may rescind the said agreement, which has not been performed in whole or in part before the date of the opening of the bankruptcy proceedings. Thus, such a power would be held by the trustee with respect to the agreement, which, according to its terms, would be executed by a bankrupt.

The aforementioned power is a unilateral power of the trustee and is not vested in the other party to the contract, who may only demand that the trustee seeks the approval of the judge-commissioner to rescission of the contract. Lack of information on the part of the trustee, or information that he or she does not intend to seek such consent, means that the trustee will not rescind from the contract.

The Bankruptcy Law does not indicate a maximum time limit within which the trustee may rescind the contract. The trustee should first undergo an economic analysis of all contracts entered into by the bankrupt and not performed and based on this analysis should decide whether to rescind or perform the contract. Therefore, it is in the interest of the counterparty (creditor of the bankrupt) to immediately oblige the trustee to declare the fate of the contract upon the declaration of bankruptcy, and at the same time refrain from executing the contract. If the creditor performs the contract after bankruptcy, he does so at his own risk. If the creditor performed the contract despite the bankruptcy, and the trustee rescinded the contract, then the issue of mutual settlements will arise.

If the trustee rescinds from the reciprocal agreement (*umowa wzajemna*), the other party is entitled to a claim for compensation for losses incurred as a result of the rescission.

(b) Specific regime for the financial term operations under the Bankruptcy Law

Pursuant the Bankruptcy Law[2], any party, including a solvent counterparty, may terminate the master agreement referred to in Article 85 Item 1 of the Bankruptcy Law (for the definition of the financial term operations under the Bankruptcy Law please refer to Part (g) below), subject to the manner of settlement of the parties in the event of termination agreed upon in that agreement.

The above means that any of the parties to the master agreement may terminate it (and all individual contracts concluded under it) after the initiation of bankruptcy proceedings. This right is independent of the contractual clauses in the master agreement and the individual contracts and may not be excluded or modified by the parties.

The exclusion of such contracts from the general rules of bankruptcy proceedings makes it possible to terminate the EFET General Agreement in the manner provided for in that agreement and settle all transactions, both favourable to the bankrupt and unfavourable on an equal basis, including the calculation of losses under the terms specified in §11 of the EFET General Agreement.

Although the Bankruptcy Law does not explicitly address the issue of automatic early termination of the master agreement on the basis of Article 85 Item 3 of the Bankruptcy Law, the possibility of automatic termination of this agreement should be considered permissible unless it is contrary to other regulations in the Bankruptcy Law (please see our discussion on the Early Termination in Section C.I.1.3(a), which also applies to the Automatic Termination).

(c) No risk of cherry picking

Since, pursuant to Article 85 Item 3 of the Bankruptcy Law, the trustee does not have the right to rescind the master agreement (the so-called trustee's option right provided for in Article 98 of the Bankruptcy Law), there is no risk of the occurrence of so-called *cherry picking*, i.e., the situation when, as a result of the bankruptcy of a debtor, transactions unfavourable to the bankruptcy estate but favourable to the solvent party are changed, while transactions favourable to the estate but unfavourable to the bankrupt's counterparty remain in force.

The exclusion of the trustee's power allows the termination of the master agreement in accordance with the procedure provided for in the agreement and the settlement of all transactions, whether favourable to the bankrupt or unfavourable, on an equal basis. The trustee may not rescind Individual Contracts.

(d) Satisfaction of claim for Termination Amount

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[2] Article 85 Item 3 of the Bankruptcy Law.

The above provision of the Bankruptcy Law has been applied in practice. In one of its decisions, dated 19 March 2015 (IV CSK 429/14), the Supreme Court ruled that *a master agreement* [in the discussed case for IRS transactions] *is a reciprocal agreement. Settlement of mutual receivables from financial term operations is carried out between the parties by determining the balance of settlements and offsetting them (...). The declaration of bankruptcy of one of the parties to the master agreement makes it possible for either party to terminate the master agreement with the settlement of the parties in the event of its termination, as established in the agreement. The permissibility of netting after the bankruptcy of one of the parties of mutual receivables from financial term operations contracts is a privilege of the creditor, since its claim is satisfied outside of the distribution of funds of the bankruptcy estate.*

In the above case, the Supreme Court confirmed the applicability of Article 85 Item 2 of the Bankruptcy Law to IRS transactions (which should not raise any doubt), but failed to clarify which transactions (including distinction between spot and forward transactions) should be classified as financial term operations under Article 85 of the Bankruptcy Law.

Further on in the same decision, the Supreme Court ruled that receivables arising from reciprocal contracts (including master agreement) to which the trustee has no right of rescission, arising after the declaration of bankruptcy then fall into the first category of claims.

This would mean that master agreement that remain in effect despite the bankruptcy of one of the parties, for which the trustee has no right of rescission (provided in Article 98 of the Bankruptcy Law), should be treated as obligations of the bankruptcy estate (and not of the bankrupt). The Supreme Court's position has been criticised among scholars and legal practitioners.

In the aforementioned case the Supreme Court resolved a dispute as to the proper route for asserting the bank's claims under the master agreement. In the case that claims under the master agreement would be treated as the liabilities of the bankruptcy estate, the court route is permissible (i.e., the creditor may sue the trustee, who acts in his own name but on behalf of the bankrupt), and in the case of the liabilities of the bankrupt it is only appropriate to file a claim under the provisions of bankruptcy law.

Pursuant to Article 230 Item 2 of the Bankruptcy Law, the liabilities of the bankruptcy estate include obligations of the estate arising after the declaration of bankruptcy, in particular, obligations under contracts entered into by the bankrupt before the declaration of bankruptcy, the performance of which was requested by the trustee, or other obligations arising from the actions of the trustee. Further on, the Bankruptcy Law regulates that the cost of the bankruptcy proceedings should be satisfied at first, if the funds of the bankruptcy estate allow it, and other liabilities of the bankruptcy estate as the relevant sums flow into the bankruptcy estate. If other liabilities of the bankruptcy estate are not fully satisfied from the current proceeds, they should be satisfied relatively to the amount of each of them by distribution of the funds of the bankruptcy estate.

The master agreement was undoubtedly an agreement entered into before the declaration of bankruptcy, but the bank's claim, in the discussed case, arose neither from the contract whose performance was demanded by the trustee, nor from the actions of the trustee within the meaning of the Bankruptcy Law. Therefore, it seems that there were no grounds for applying the provisions on the bankruptcy estate's obligation placing the bank's receivables in the first category of claims.

The trustee, like the bank, had a unilateral, statutory, fully symmetrical formative power to terminate the master agreement. The regulation of the master agreement in the case of bankruptcy of a party is unique in relation to the impact of bankruptcy on other legal relations. However, none of the provisions of the Bankruptcy Law indicates that the receivables from the set-off of the master agreement are to be considered liabilities of the bankruptcy estate. Therefore, many legal commentators state that if the settlement is positive the funds are transferred to the bankruptcy estate, a negative settlement (i.e., favourable to the counterparty) is subject to submission by the counterparty to the list of claims and satisfaction under general rules in the course of bankruptcy proceedings.

It should be noted though that the Supreme Court rulings do not constitute law (with some exceptions) in Poland. However, the position of the Supreme Court influences the formation of a line of jurisprudence and provides certain guidelines for the adjudication by lower courts. It is difficult though to predict whether the above- mentioned controversial ruling pertaining to the preferential treatment of claims arising under the master agreement of the Supreme Court will be widely accepted in the jurisprudence, or whether a contrary position will develop.

(e) Exclusion of claims under the Individual Contracts from the arrangement in the bankruptcy

Pursuant to Article 85 Item 1 Point 1 of the Bankruptcy Law, claims under the Individual Contracts are executed by arrangement in bankruptcy proceedings. This means that only the claim for the Termination Amount due in connection with the Early Termination of the master agreement may be subject to arrangement.

(f) Set-off of the Termination Amount

It is permissible under Polish law to set off the Termination Amount in the bankruptcy proceedings, and the bankruptcy law's restrictions on set-offs[3] do not apply to claims for the Termination Amount. The permissibility of offsetting, after the bankruptcy of one of the parties, mutual receivables from contracts for financial term operations is a privilege of the creditor, since its claim is satisfied outside the distribution of funds of the bankruptcy estate. A solvent creditor may effectively set off its claim so long as it is done in accordance with the provisions of the Civil Code, i.e.,

(i) both parties are both creditors and debtors to each other;

(ii) the subject matter of both claims is any variation of financial matters;

(iii) both claims are due and payable (at the date of the bankruptcy declaration all claims against bankrupt becomes due and payable), and

(iv) both claims must be enforceable before a court or other public authority.

[3] The Bankruptcy Law (Articles 93-96) provides a special regulation for the admissibility of offsetting claims. Offsetting is not permissible, among others, if: (i) the creditor became a debtor of the bankrupt after the date of the bankruptcy declaration; (ii) the debtor of the bankrupt acquired the claim (against the bankrupt) by assignment or endorsement after the bankruptcy declaration, or acquired it within the last year before the bankruptcy declaration date, knowing that there was a basis for the bankruptcy declaration (with certain exceptions), or (iii) a solvent creditor attempted to set off the claims after its claim submission to the bankruptcy estate.

(g) Definition of the financial term operations under Bankruptcy Law

Pursuant to Article 85 Item 2 of the Bankruptcy Law, the term *financial term operations* means operations with an agreed price, exchange rate, interest rate or index - in particular, the purchase of currencies, securities, gold or other precious metals, or commodities or rights, including contracts calculated only for the difference in price, options and derivatives - concluded for an agreed date or agreed term, in market trading.

Although the above definition refers to financial term operations, it also includes commodity transactions. However, not all commodity transactions may be considered financial term operations within the meaning of Article 85 of the Bankruptcy Law. It seems that spot transactions that are settled immediately (i.e., within no more than 48 hours) are not financial term operations within the meaning of Article 85 of the Bankruptcy Law. In contrast, forwards that provide for a deferral of time of conclusion of the transaction and the time of delivery of the goods should be covered by the safe-harbor close provided for in the Article 85 of the Bankruptcy Law.

In our view, the following commodity transactions can be deemed as the financial term operations: (i) commodity forward operations, (ii) commodity options, (iii) commodity swaps, and (iv) other physical commodity transactions where there is a time delay between the conclusion of the transaction and the delivery of the goods.

It should be pointed out however, that the issue whether commodity transactions fall within the scope of the term "financial term operations" under Article 85 Item 2 of the Bankruptcy Law is disputable among academics and legal practitioners. Although the prevailing view is that the commodity transactions should fall within the scope of the term "financial term operations" under Article 85 Item 2 of the Bankruptcy Law, we have not come across any court decision confirming this position.

Nevertheless, in practice, also some spot transactions may provide for a time delay between the time of the transaction and the time of delivery, e.g., a day ahead transactions. Since, Article 85 Item 2 of the Bankruptcy Law does not stipulate any minimum "term" that must be included in a contract in order for it to qualify as a financial term operation, it could be argued that even such an insignificant time difference constitutes a "term" as referred to in the definition of financial term operations. Consequently, it can be argued that spot transactions with at least a few hours' time difference between the conclusion of the contract and delivery of the goods could also be covered by the protection of the safe harbor provision of Article 85 of the Bankruptcy Law. This would mean that in a situation where the master agreement covers both forward and spot intra-day transactions (but with a few hours of difference), which are subject to one close-out netting clause, the risk of the bankruptcy trustee excluding spot transactions from settlement is rather small.

On the other hand, the above described approach could be viewed as contrary to the rationale behind introduction of Article 85 to the Bankruptcy Law, which was intended to protect forward transactions. Therefore, we cannot exclude the risk that the bankruptcy administrator will take a different position regarding the coverage of intra-day spot transactions under Article 85 of the Bankruptcy Law.

However, in the case of a mixed portfolio of trades, each individual transaction should be analyzed separately by the trustee as to whether it falls within the definition of financial term operations under Article 85 Item 2 of the Bankruptcy Law, and only those transactions that the trustee deems ineligible should be excluded from close-out netting. In other words, if it is determined that only certain transactions do not qualify as the financial term operations within the meaning of Article 85 Item 2 of the Bankruptcy Law, the trustee has no grounds to exclude the entire portfolio of individual transactions from clause-out netting.

(h) Specific bankruptcy regulation of netting clause under the Financial Collateral Law

The Bankruptcy Law[4] provides that the declaration of bankruptcy of the debtor does not affect the rights under the netting clause referred to in the Financial Collateral Law, if the contract was concluded:

(i) before the date of bankruptcy declaration;

(ii) on the date of bankruptcy declaration, but before the issuance of a decision declaring the bankruptcy;

(iii) on the date of the bankruptcy declaration, but after the issuance of the decision declaring the bankruptcy, if the beneficiary of collateral may confirm that he or she did not know and could not have known about the bankruptcy declaration.[5] There should be no doubt, however, that any contracts concluded on the day after the date of bankruptcy will not be valid, regardless of the state of knowledge of the other party.

This means that netting clause will be recognised by the Bankruptcy Law so long as it complies with the Financial Collateral Law.

The above regulation was introduced into the Bankruptcy Law in 2011, since the issue of netting clauses was not clearly resolved in the Financial Collateral Law, which aimed to implement Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2022 on financial collateral arrangements. Therefore, the separate regulation in the Bankruptcy Law of the netting clauses referred to in the Financial Collateral Law[6] should not be interpreted as a limitation on the close-out netting clauses included in the master agreements, which are protected separately by Article 85 Item 3 of the Bankruptcy Law.

(i) Trading of products other than electricity or natural gas under Appendices to the EFET General Agreement

There is no statutory limitation to use of the EFET General Agreement and its Appendices to other products than electricity and natural gas such as green certificates and/or allowances. The green certificates and/or allowances transactions would be eligible for close-out netting if Bankruptcy Law or Restructuring laws was to apply (see colour-coded Appendix B for more

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[4] Article 85a.

[5] The declaration of bankruptcy is made public in a special register. However, despite this, a contract can be concluded a few minutes (or hours) after issuing a court decision, but before the bankruptcy was made public and the party could not have known about the declaration of bankruptcy.

[6] Pursuant to Article 3 Item 3 of the Financial Collateral Law, a set-off clause should be understood as *a clause providing for the immediate set-off or offset of claims in the event of the occurrence of a basis for the execution of the collateral, and the manner of their performance and settlement of the parties, contained in the agreement for establishment of financial collateral, the master agreement related to the collateral agreement, or in a specific agreement concluded in the execution of the master agreement.*

information). The transaction must take into account the fact that transfer of ownership of green certificates requires entry into the register run by the Energy and Commodity Exchange.

C.I.1.2 Close-out netting under the Restructuring Law

(a) Termination of the master agreement

The Restructuring Law in Article 250 Item 4 repeats the content of Article 85 Item 3 of the Bankruptcy Law, and stipulates that each party (the debtor and the solvent party) have the right to terminate the master agreement using the method of settlement of the parties in the event of termination agreed upon in this agreement. The effect of termination of the master agreement is that the parties must settle in accordance with the provisions of the agreement.

Article 250 of the Restructuring Law applies to the effects of opening three restructuring proceedings: accelerated arrangement proceedings, arrangement proceedings[7], and deep-reform proceedings[8] except that the provisions on deep-reform proceedings contain their own regulation on the termination of the master agreement. Please see also our remarks in item c) below.

In order to apply Article 250 Item 4 of the Restructuring Law, it is irrelevant whether the master agreement was concluded for a definite or indefinite period. It is also irrelevant whether it provides for the right to terminate and under what conditions. Article 250 Item 4 of the Restructuring Law constitutes an independent basis for termination of the master agreement following the opening of restructuring proceedings.

Our remarks on the termination of the master agreement regulating for the financial term operations, after the declaration of the bankruptcy apply *mutatis mutandis* to restructuring proceedings.

(b) Exclusion of claims under the Individual Contracts from arrangement

The Restructuring Law similar to the Bankruptcy Law stipulates that where a master agreement, one of the parties to which is the debtor, stipulates that individual specific contracts, the subject of which are financial term operations, loans of financial instruments or sales of financial instruments with an obligation to repurchase them, will be entered into in performance of the master agreement, and that termination of the master agreement results in termination of the specific contracts entered into in performance of that agreement, claims under individual contracts entered into in performance of that agreement - are not included in the arrangement.

However, a claim for the Termination Amount should be treated as an ordinary claim before restructuring and therefore it falls under the arrangement in the restructuring proceedings, unless it is secured by a right *in rem* on the debtor's assets.[9] The above approach was confirmed by the restructuring court in Warsaw[10], which stated in one of its decisions that: (i)

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[7] Article 273 of the Restructuring Law.

[8] Article 299 of the Restructuring Law.

[9] Piotr Zimmerman, *Prawo restrukturyzacyjne, Komentarz, 7th Edition, Legalis 2022 (Eng. Commentary to Article 250 of the Restructuring Law).*

[10] Judgement of the District Court in Warsaw, X Commercial Division for Insolvency and Restructuring matters of 26 July 2016, file no. X GR 36/16.

the bank's claim arising in connection with the termination of the currency swap transaction should be qualified as an ordinary pre-restructuring claim falling under the arrangement in a deep-reform restructuring proceedings (*postępowanie sanacyjne*); (ii) the part of the claim that has been pledged as collateral against the debtor's assets may be included in the arrangement only with the bank's prior consent.

We agree with this approach of the court, but it is difficult to speak of uniform legal interpretation or an established line of jurisprudence on classification of a claim for the Termination Amount as a claim created before restructuring and consequently a claim covered by the arrangement. Otherwise, the claim would have to be satisfied by the debtor when it became due, which is not a favorable situation for a debtor who has liquidity problems. Therefore, this issue may be contentious in practice.

In particular, some commentators[11] argue that the classification of Termination Amount as a pre-restructuring debt depends on the legal nature of the netting clause. If the netting clause in the master agreement is based on a contractual set-off, the Termination Amount is a debt arising from one of the Individual Contracts, and is excluded from the arrangement by the express wording of Article 250 Item 1 of the Restructuring Law. If the netting clause is based on novation[12], the date on which the new obligation to pay the Termination Amount arises indicates whether or not this obligation will be included in the arrangement. Since the obligation to pay the Termination Amount arises upon termination of the master agreement, any such termination effective after the opening of restructuring proceedings will have the effect of excluding the Termination Amount from the arrangement.

Undoubtedly, this dispute may concern a situation in which the Termination Amount arises from the termination of the Individual Contracts made after the opening of the restructuring proceedings. However, there should be no doubt (and we are not aware of any dissenting opinion) that the termination of Individual Contracts made prior to the opening of restructuring proceedings should be covered by the arrangement in those proceedings.

(c) Cherry-picking under the Restructuring Law

Although, as a general rule, the administrator in deep-reform restructuring proceedings (*postępowanie sanacyjne*) is entitled to cherry-picking[13], this right is excluded with respect to contracts entered into by the debtor in performance of the master (framework) agreement[14] within the meaning of Article 250 Item 1 of the Restructuring Law, i.e. an agreement, to which one of the parties is the debtor, and which stipulates that individual contracts pertaining to the financial term operations, loans of financial instruments or sales of financial instruments with an obligation to repurchase them, are concluded in the execution of the master agreement, and that the termination of the master agreement should cause the termination of the individual contracts concluded in the execution of the master agreement. Accordingly, either party (solvent and insolvent) should have a right to terminate the EFET General Agreement and the

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[11] B. Jagodziński, M. Chodosz, *Klauzule kompensacyjne oraz zaspokojenie wierzytelności z transakcji pochodnych w postępowaniu restrukturyzacyjnym i upadłościowym*, Monitor Prawa Bankowego 4/2016, s. 86-87.

[12] Under Polish law "novation" occurs when, in order to cancel an obligation, the debtor undertakes, with the consent of the creditor, to provide another service or even the same service, but on a different legal basis, the existing obligation expires (renewal).

[13] Article 298 of the Restructuring Law.

[14] Article 299 of the Restructuring Law.

Individual Contracts under Article 250 of the Restructuring Law, provided that nettings are made between the parties in accordance with this agreement.

As a result, all transactions, whether favourable and unfavourable to the debtor, are subject to netting.

(d) Set off the claim resulting for the netting

The Restructuring Law also permits the setting-off of the claims resulting from the netting. Restrictions provided in the Restructuring[15] Law as to the setting of claims after the opening of the restructuring proceedings do not apply to the claims arising from close-out netting under the master agreement (that falls within the meaning of Article 250 Item 1 of the Restructuring Law).

Our remarks in Item C.I.1.1. (d) above on setting off a claim for Termination Amount, after the declaration of the bankruptcy apply *mutatis mutandis* to restructuring proceedings.

(e) Definition of the financial term operations under the Restructuring Law

A definition of financial term operations in the Restructuring Law echoes the definition in Article 85 Item 1 of the Bankruptcy.

Therefore, our remarks in Item C.I.1.1. (g) above on the definition of the financial term operations under the Bankruptcy Law apply *mutatis mutandis* to restructuring proceedings.

C.I.1.3 Enforceability of Early and Automatic Termination clauses of the EFET General Agreement

(a) Enforceability under the Bankruptcy Law and Restructuring Law

Pursuant to the Bankruptcy Law[16] contractual provisions providing for the right to change or terminate legal relations to which the bankrupt is a party after the filing of a bankruptcy petition, or the declaration of bankruptcy are invalid.

The Restructuring Law provides for the similar regulation pursuant to which contractual provisions providing for the right to change or terminate legal relations to which the debtor is a party, in the event of: (i) filing a motion for approval of the arrangement or making an announcement on the opening of the proceedings for approval of the arrangement[17], (ii) filing of a motion for the opening of the accelerated arrangement procedure or its opening[18], (iii) filing of a motion for the opening of the arrangement procedure or its opening[19], (iv) filing of a motion for the opening of the deep-reform restructuring procedure or its opening[20], are invalid.

In the light of the above regulations, there are serious doubts about the enforceability under Polish law of certain clauses contained in the EFET General Agreement regarding the rights

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[15] Article 253 of the Restructuring Law.

[16] Article 83 of the Bankruptcy Law.

[17] Article 225 of the Restructuring Law.

[18] Article 247 of the Restructuring Law.

[19] Article 273 of the Restructuring Law.

[20] Article 297 of the Restructuring Law.

of termination of this agreement due to events related to the insolvency or restructuring of one of the Parties. Particularly, a right to terminate the EFET General Agreement if a Party:

- makes a general assignment, arrangement or composition with or for the benefit of its creditors (the event specified in § 10.5(c)(iii) of the EFET General Agreement);
- institutes or has instituted proceedings against it seeking a judgment of insolvency or bankruptcy, or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights (the event specified in § 10.5(c)(iv) of the EFET General Agreement); and
- seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all of its assets (the event specified in § 10.5(c)(vi) of the EFET General Agreement).

The right of Early Termination specified in § 10.5(c)(iii) of the EFET General Agreement should be deemed invalid to the extent that it relates to entering into an arrangement or composition in accelerated arrangement proceedings, normal arrangement proceedings and deep-reform restructuring proceedings. The conclusion of an arrangement in one of these proceedings must always be preceded with the filing of a relevant motion and the subsequent opening of restructuring proceedings.

The right of Early Termination specified in § 10.5(c)(iv) of the EFET General Agreement is invalid under Polish law, since it is explicitly contrary to the Bankruptcy Law regulation (Article 83 of the Bankruptcy Law).

The right of Early Termination specified in § 10.5(c)(vi) of the EFET General Agreement should also be deemed invalid under Polish law. This is because this clause covers events that take place after the filing of a bankruptcy petition (e.g. the appointment of a temporary court supervisor), or declaration of the bankruptcy (the appointment of a trustee) or the opening of restructuring proceedings (the appointment of a court supervisor or administrator), carried out by the court.

The above analysis will also apply to Automatic Termination provided for in § 10.4 of the EFET General Agreement. Such Automatic Termination will be invalid in the event of the occurrence of the Material Reasons as set forth in § 10.5 (iii), (iv), (vi) of the EFET General Agreement.

As to the recommendation for amendments to the Material Reasons of the Early Termination or Automatic Termination clause in EFET General Agreement please refer to C.I.1.5 below.

(b) Other regulation of the Bankruptcy Law applicable to the termination

In addition to the regulation described in point C.I.1.3 a) above, the Bankruptcy Law[21] stipulates that any provision of an agreement that makes achieving the purpose of the bankruptcy proceedings (i.e., satisfaction of the creditors to the fullest possible extent) impossible (or anyway making it harder to achieve), is ineffective against a bankruptcy estate. The similar regulation is stipulated in the Restructuring Law.

[21] Article 84 Item 1 of the Bankruptcy Law.

Legal commentators point out that this provision of the Bankruptcy Law is vague and so broad that in practice it is doubtful whether it may be realistically applied. It is a general clause that, on the one hand, it makes it possible to undermine the effectiveness of virtually any contractual provision, since the effect of obstructing bankruptcy proceedings is so vague that almost any factual situation may be subsumed under this definition, while on the other hand, the term is so general that it makes it impossible to apply it at the stage of forming contractual relations and avoid the risk of ineffectiveness by adjusting the provisions of the contract accordingly. In this situation, it is expected that market participants will ignore this statutory provision, while on the other hand, any ruling issued on this basis will be likely to face the charge of unconstitutionality.[22]

However, in our practice, we came across a court's decision applying it broadly to an entire agreement and the underlying security. In that case, a guarantee issued by the debtor securing the debtor's parent debt under a credit agreement was declared ineffective against the bankruptcy estate of the debtor to the extent the debtor has not benefited from the loan agreement entered into by its parent (and secured by the debtor by way of a guaranty).

Therefore, the possibility may not be entirely excluded that the bankruptcy administrator and/or judge-commissioner (and subsequently the bankruptcy court if this approach is be challenged), based on this broad provision, that provisions of EFET General Agreement relating to termination and close-out netting are ineffective against the bankruptcy estate.

However, in our opinion, the risk that the bankruptcy trustee (or others in the bankruptcy proceedings) will claim that the close-out netting clause is ineffective against the bankruptcy estate is very low. This is because that Article 85 Item 3 of the Bankruptcy Law and Article 250 Item 4 of the Restructuring Law explicitly provide that the parties may terminate the master agreement. Thus, it would be difficult to argue that the early termination clause of the EFET General Agreement prevents the purpose of the bankruptcy proceeding, since the Bankruptcy Law explicitly provides for the possibility of early termination of such an agreement. Consequently, if the EFET General Agreement falls within the meaning of the master agreement provided in the Bankruptcy Law (or Restructuring Law) and the Individual Contracts are considered as financial term operations, the Parties' right to Early Termination based on the mechanism provided for in these agreements should not be questioned.

Importantly, even if the contractual right of Early Termination proves ineffective against the bankruptcy estate based on the above provision, either party will still be able to exercise their statutory right of termination provided for in Article 85 Item 3 of the Bankruptcy Law.

As for Automatic Termination clause, although Article 85 Item 3 of the Bankruptcy Law and Article 250 Item 4 of the Restructuring Law explicitly for the right of the parties to terminate the agreement early by notice upon the occurrence of a specified event, we believe that a similar approach should be adopted with regard to the automatic termination of the agreement upon the occurrence of a specified event indicated in the agreement. However, as we indicated earlier, since the Automatic Termination clause is not explicitly stipulated in the above provisions, it cannot be ruled out that the bankruptcy trustee will have a different view on this issue.

[22] P. Zimmerman, Komentarz do Prawa Upadłościowego, Legalis 2022.

Regardless of the above, it should be emphasised that the Automatic Termination clause will certainly be invalid if triggered by the filing of a bankruptcy petition (or motion to open the restructuring proceedings) or the declaration of bankruptcy (or opening of the restructuring proceedings).

Legal commentators mostly agree that special provisions of the Bankruptcy Law on cherry-picking, and termination of contracts due to bankruptcy declaration, do not affect contractual provisions on termination or expiry of contracts due to non-insolvency related reasons. [23]

We believe that the EFET General Agreement for both spot and forward transactions is subject to Article 85 of the Bankruptcy Law. Since, Article 85 Item 2 of the Bankruptcy Law does not stipulate any minimum "term" that must be included in a contract in order for it to qualify as a financial term operation, it could be argued that even such an insignificant time difference constitutes a "term" as referred to in the definition of financial term operations. This would mean that in a situation where the EFET General Agreement covers both forward and spot intra-day transactions (but with a few hours of difference), which are subject to one close-out netting clause, the risk of the bankruptcy trustee excluding spot transactions from settlement is rather small, but not excluded.

However, Article 85 only applies to those Individual Contracts that are financial term operations (e.g. forward transactions). Then only financial term operations would be subject to settlement under the early termination clause. In case the trustee does not include spot transactions as the financial term operations, those spot transactions would be subject to the general provisions of the Bankruptcy Law.

Any termination rights that is permissible will apply to the EFET General Agreement and the Individual Contracts pursuant to § 10.3(a) of the EFET General Agreement. Under the Bankruptcy Law, the Parties do not need the concept of a Single Agreement to preserve the enforceability of the Early Termination rights described above. However, we do not believe that the provisions of the EFET General Agreement relating to the Single Agreement need to be amended or deleted.

C.I.1.4 Conclusions

Polish law provides for the enforceability of close-out netting both in the case of Early Termination and/or Automatic Termination. However, as we indicated above, certain limitations may apply, in particular such a termination may not be contrary to the other provisions of the Bankruptcy Law or Restructuring Law.

A dispute may arise as to whether to classify a claim for the Termination Amount (regardless of whether it arose through Early Termination or Automatic Termination) as: (i) a claim arising prior to bankruptcy, in which case it may only be satisfied under the Bankruptcy Law, or (ii) a claim arising after bankruptcy, in which case it is satisfied from funds flowing into the bankruptcy estate (before other commercial creditors).

As we indicated above, we believe that a claim for the Termination Amount should be satisfied in accordance with the provisions of the Bankruptcy Law, i.e., in the second category of claims,

[23] P. Zimmerman, Prawo upadłościowe. *Prawo restrukturyzacyjne. Commentary to Article 83 of the Bankruptcy Law*; S. Gurgul, Prawo upadłościowe. *Prawo restrukturyzacyjne. Commentary to Article 83 of the Bankruptcy Law.*

provided that such a claim is unsecured (see our comments under C.I.1.1. g) above of the Automatic Termination or Early Termination occurs before the bankruptcy. Thus, in order to satisfy a claim for the Termination Amount under the EFET General Agreement, such a claim will have to be effectively submitted to the bankruptcy estate.

On the other hand, if the Automatic Termination or Early Termination occurred after bankruptcy, and thus the claim for payment of the Termination Amount also arose after bankruptcy, in our opinion, such a claim should be satisfied by the trustee on an ongoing basis under Article 230(2) of the Bankruptcy Law.

A similar issue would arise in restructuring proceedings. As we discussed above, the dispute would be whether a claim for the Termination Amount should be classified as: (i) a claim arising prior to the opening of the restructuring proceedings, in which case it would be covered by the arrangement and satisfied in accordance with its terms, or (ii) a claim arising after the opening of the restructuring, in which case it would not be covered by the arrangement and should be satisfied by the debtor when it becomes due. Please see our remarks under C.I.1.2. b) above.

In the case of Automatic Termination, in most cases such termination probably takes place before the opening of restructuring proceedings. Accordingly, the claim for the Termination Amount would be covered by the arrangement and could be satisfied in accordance with its provisions (provided that the arrangement is accepted by the creditors).

This could not necessarily be the case in Early Termination, where the counterparty would have the right to terminate the EFET General Agreement after the opening of restructuring proceedings. In such a case, a party could choose when to terminate the EFET General Agreement, before or after the opening of the restructuring proceedings. In the latter a creditor could argue that the claim is not covered by the arrangement because it arose after the opening of the restructuring proceedings.

However, as discussed above, such an approach is supported by few commentators, and it is difficult to assess to what extent, in practice, such a claim will be considered by a court as not covered by the arrangement.

C.I.1.5 Recommendations

(a) As to the Election of the Automatic Termination or Early Termination

As discussed above, under Bankruptcy Law there are no material differences in the recognition of close-out netting clauses based on Early Termination and those based on Automatic Termination. However, the choice between Automatic Termination or Early Termination of the EFET General Agreement may be relevant with respect to the assertion of a claim for the Termination Amount. If the Automatic Termination results in the termination of the EFET General Agreement prior to the filing of a bankruptcy petition,[24] in such a case, the claim for the Termination Amount will have to be satisfied in accordance with Bankruptcy Law along with other claims arising before the date of the bankruptcy filing.

[24] For example, due to a Material Reason set forth in § 10.5(c)(ii) of the EFET General Agreement, which provides that termination may occur if Party A or its Credit Support Provider: *becomes insolvent or is unable to pay its debt or fails to pay or admits in writing its inability generally to pay its debt as it becomes due.*

As for the Restructuring Law, the election of the Automatic Termination could be also relevant to the claim for the Termination Amount. As the Automatic Termination in most cases may result in the termination of the EFET General Agreement prior to the opening of the restructuring proceedings and result in the claim for the Termination Amount being covered by the arrangement, its selection would benefit the debtor. Accordingly, we would recommend selecting Automatic Termination if we were acting as legal counsel to Party A (the debtor to be subject of restructuring proceedings). Had we been acting for Party A's counterparty (a creditor), we would not have advised the selection of the Automatic Termination. Regardless of the above, however, given the lack of case law in this regard, we cannot exclude the situation that despite the termination of the EFET General Agreement after the opening of the restructuring law, arguments will be raised that the Termination Amount should be included in the arrangement with creditors.

Given the above, in general, we do not see any advantage in opting for the Automatic Termination in the case of the bankruptcy or restructuring proceedings under Polish law, on the contrary, in practice, there may be a problem in determining the exact date of termination of the EFET General Agreement.

Therefore, for the reasons outlined above we do not recommend opting for the Automatic Early Termination mechanism with respect to the Polish entity.

(b) As to the modification of the Automatic Termination clause in EFET General Agreement if such a clause is elected

As we indicated before, the Automatic Termination will be invalid or ineffective under the Bankruptcy Law and the Restructuring Law (see our comments in Sections C.I.1.3(a) and C.I.1.1.3(b) if triggered due to the insolvency or restructuring events. Therefore, one of the solutions is to add additional or replace the unenforceable Material Reasons specified in § 10.5(c)(iii)(iv)(vi), which could trigger the Automatic Termination, with the following one:

- *has a delay in payment of its due monetary obligations exceeding three months;*
- *has presented arrangement* proposals *to creditors or has prepared or commissioned a professional advisor to prepare a preliminary restructuring plan or a restructuring plan for the purpose of opening any restructuring proceedings within the meaning of the Act of 15 May 2015 - Restructuring Law;*

Another issue is that in practice it may prove difficult to determine the date of termination of the EFET General Agreement using the Automatic Termination clause. Especially if automatic termination were to be triggered by the debtor becoming insolvent. The timing of when the debtor became insolvent may be debatable, and this may raise the issue of what date the EFET General Agreement was early terminated by virtue of operation of the Automatic Termination. Therefore, it is advisable to adopt some mechanism to notify or confirm that the EFET General Agreement has been early terminated on a given date by the operation of the Automatic Termination.

(c) As to the modification of the Automatic Termination clause in the EFET General Agreement if such clause is not elected

Even though some of the clauses provided for in § 10.5(c) may be invalid or ineffective under the Bankruptcy Law and Restructuring Law (please see our comments in C.I.1.3 a) and C.I.1.3 b)), it may seem that there is no need to modify the pre-insolvency Material Reasons provided in this provision. Especially if a party may terminate the EFET General Agreement based on § 10.5(c)(ii), 10.5(c)(v), 10.5(c)(vii), and 10.5(c)(ix) and also other events unrelated to insolvency specified in the EFET General Agreement. We discussed the enforceability of a party's right to terminate the EFET General Agreement upon occurrence of certain Material Reasons in Part C.I.1.3. above.

As we indicated above, some of the clauses provided for in § 10.5(c) may be invalid or ineffective under the Bankruptcy Law and the Restructuring Law (see our comments in paragraphs C.I.1.3(a) and C.I.1.3(b)) regardless of whether they will form the basis of Early Termination or Automatic Termination. In particular, if the debtor files for bankruptcy, the creditor may terminate the EFET General Agreement under § 10(c)(ii). It does not need to invoke § 10(c)(iv), especially since the debtor's mere filing of a bankruptcy petition may serve as evidence that the debtor has become insolvent (i.e., among others lost its ability to pay outstanding pecuniary debts) and the basis for Early Termination of EFET General Agreement indicated § 10(c)(ii) has occurred.

On the other hand, it is advisable to amend certain provisions of § 10.5(c) so that they are fully enforceable under Polish law. For that purpose, we would recommend replacing unenforceable Material Reasons specified in § 10.5(c)(iii)(iv)(vi), with the following one:

- *has a delay in payment of its due monetary obligations exceeding three months;*
- *has presented arrangement proposals to creditors or has prepared or commissioned a professional advisor to prepare a preliminary restructuring plan or a restructuring plan for the purpose of opening any restructuring proceedings within the meaning of the Act of 15 May 2015 - Restructuring Law.*

Another issue is the knowledge of a Party of the occurrence of pre-insolvency related events that entitle such a Party to terminate the EFET General Agreement for this specific Material Reason. To this end, we would recommend the adoption of an early warning mechanism for deciding whether to continue the contractual relationship, such as an obligation to notify all parties of the occurrence of any pre-insolvency related Material Reason for early termination within a specified period of time.

C.I.1.6 Opinion as to whether or not:

- **a trustee, liquidator, or any other third party may challenge the validity of the termination of the EFET General Agreement or (ii) the calculation of the Termination Amount or the payment of such amount;**
- **the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts when determining the Termination Amount are enforceable under the laws of Poland or there is a risk that this determination could be challenged by a liquidator, receiver or third party;**

- **the close-out netting provisions in § 10 to §11 of the EFET General Agreement apply to all Individual Contracts or could be challenged by a liquidator, receiver or third party;**

(a) Avoiding the contract under the Bankruptcy Law

Bankruptcy Law[25] provides that legal acts performed by the bankrupt within a year before the date of filing the bankruptcy petition, by which he disposed of his assets, are ineffective against the bankruptcy estate, if they were performed free of charge or for a consideration, but the value of the bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or for a third party.

While this is highly unlikely, we may not exclude the risk that the court will find that the Termination Amount grossly exceeds the value of the benefit received by the bankrupt or the payment of the Termination Amount is a gratuitous performance on the part of the bankrupt to the benefit of the other Party of the EFET General Agreement.

Further, the Bankruptcy Law[26] states that collateral and payment of an unmatured debt is ineffective against the bankruptcy estate if it takes place within 6 months before the date of filing the bankruptcy petition. However, the one who received the payment or security may, by means of an action or plea, demand that these acts be declared effective, if - at the time they were made - he did not know of the existence of grounds for bankruptcy.

Payment of an unmatured debt is always affected when the due date under the law or contract has not yet occurred, and the debt is paid. In this regard, it does not matter whether the date of payment would have come before or after the date of bankruptcy - the moment of payment is decisive for the ineffectiveness of the action.[27]

Any legal actions that have the effect of accelerating the maturity of a claim (including termination of a contract resulting in the maturity of a claim) will be subject to examination to determine that it is not an action contrary to the law or intended to circumvent it (Article 58 of the Civil Code). The Supreme Court[28] in one of its judgments concluded that this review is *therefore also necessary if the court finds that only as a result of the termination of the contract by the parties in the two months prior to the debtor's filing of the bankruptcy petition, the unmatured debt became due and was paid by the debtor to the selected creditor. In practice, it happens (...) that the creditor and the debtor manipulate the due date of the debt and, by means of the legal acts performed, cause ("bring") the maturity of the unmatured debt, in order to avoid the sanction provided for in Article 127 Part 3 of the Bankruptcy Law.* The Supreme Court stated that accelerating the original maturity date, to avoid the consequences of Article 127 Part 3 of the Bankruptcy Law constitutes an act aimed at circumventing the law.

Assuming, however, that the EFET General Agreement is effectively terminated and on valid grounds, payment of a debt whose maturity has been accelerated by a party as a result of Early Termination of the EFET General Agreement should not be treated as payment of an

[25] Article 127 Item 1.

[26] Article 127 Item 3.

[27] P. Zimmerman, *Komentarz, Prawo Upadłościowe*, 7th Edition, Legalis 2022.

[28] Supreme Court decision dated 27 September 2013, file no.: ICSK 690/12.

unmatured debt. On the other hand, it may not be ruled out that the trustee will claim that the termination of the EFET General Agreement and Individual Contracts to accelerate the payment of debt (the Termination Amount) was an act aimed at circumventing the law and thus be ineffective against the bankruptcy estate.

Nevertheless, we are of the opinion that the mechanism for acceleration of payment in the event of default provided for in § 10-11 of the EFET General Agreement should be recognised by the court when challenged in court proceedings. The risk that a court will declare a payment of the Party A's Termination Amount made within 6 months prior to the filing of the bankruptcy petition, after the earlier termination of the EFET General Agreement and each of the Individual Contracts, as being invalid is remote. We are not aware of any court case law indicating a contrary conclusion.

The above regulations do not apply to the establishment of collateral[29] by the debtor to secure debt arising from financial term operations contracts before the date of filing the bankruptcy petition.[30] This means that the collaterals established for the payment of the Termination Amount under the EFET General Agreement may not be challenged under the provisions of the Bankruptcy Law indicated above.

(b) Avoiding a contract under the Restructuring Law

The Restructuring Law provides for the avoidance of certain contracts only in deep-reform restructuring proceedings.[31] Legal acts performed by the debtor within a year before the date of filing for opening of the restructuring proceedings, by which he disposed of his assets, are ineffective against the debtor's estate, if they were performed free of charge or for a consideration, but the value of the debtor's performance grossly exceeds the value of the performance received by the debtor or reserved for the debtor or for a third party.

Further, the Restructuring Law[32] provides for regulations analogous to those in the Bankruptcy Law with regard to the ineffectiveness of the creation of security interests that were not created directly in connection with the debtor's receipt of a benefit as in the Bankruptcy Law.

Similarly to the Bankruptcy Law, the above regulations do not apply to the establishment of collateral by the debtor to secure debt arising from financial term operations contracts before the date of filing a motion for opening of the deep-reform restructuring proceedings.[33] This means that the collaterals established for the payment of the Termination Amount under the EFET General Agreement may not be challenged under the provisions of the Restructuring Law indicated above.

(c) Avoiding the contract under the Civil Code

In addition to the provisions of the Bankruptcy Law and Restructuring Law, there are certain regulations in the Civil Code that protect creditors against the detrimental acts of a debtor such as *Actio Pauliana.*

[29] Depending on the collateral, a security assignment needs to be executed with the certified date, while a financial pledge does not have to be executed in a specific form.

[30] Article 127 Item 4 of the Bankruptcy Law.

[31] Article 304 Item 1 of the Restructuring Law.

[32] Article 304 Items 3 and 4.

[33] Article 304 Item 6 of the Bankruptcy Law.

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Pursuant to this regulation when, as a result of a legal act of the debtor performed to the detriment of creditors, a third person obtained some material benefit, any creditor may demand that this act be declared ineffective against him, if the debtor acted deliberately to the detriment of creditors and the third person knew about it or with due diligence could have learned about it.[34]

A third party is presumed to have knowledge that the debtor is acting to the detriment of creditors if he or she had a "close relationship" with the debtor[35] or had a "permanent business relationship" with a debtor.[36] The latter means that the debtor and the third party remain (and wish to remain) in a permanent cooperative and economic relationship such as long term commodity trading. The constancy of the relationship is primarily evidenced by its duration, nature, size and repetition of activities. Thus, simply signing the EFET General Agreement without entering into any Individual Contracts, or with a limited number of irregular transactions between the parties, would probably not qualify as a "permanent economic relationship."

Polish law also provides for a presumption that a legal act of a debtor is deemed to be made to the detriment of creditors, if as a result of this act the debtor became insolvent or became insolvent to a higher degree than he was before the act was performed.

The above regulation applies to the debtor's legal actions where a debtor disposes or encumbers its assets. It is applicable when the debtor, by his disloyal behaviour towards the creditor, prevented the enforcement of the claim, because a debtor led himself to insolvency or increased this insolvency, and a third party benefited from the debtor's actions.

This is not the case when the debtor performs an existing obligation, including payment of the Termination Amount in accordance with the EFET General Agreement. This is because the Termination Amount is the sum of all positive and negative Settlement Amounts. Thus, if there were a physical exchange of all Settlement Amounts between the parties, Party A would obtain the funds owed to Party A under the EFET General Agreement, but would also have to pay the other party higher amounts representing the Settlement Amounts owed to the other party. Thus, it is highly unlikely that the creditor would successfully challenge the termination of the EFET General Agreement or Individual Contracts, or implementation of close-out netting mechanism provided in such agreement based on this regulation. Also, in our view mere entering into the EFET General Agreement should not be subject to this regulation.

In practice, however, *Actio Pauliana* is a frequently-used instrument to protect the interests of creditors seeking satisfaction from insolvent debtors. Its popularity, however, is not due to its effectiveness, but to the fact that creditors have no other legal remedies that would allow them to render ineffective the actions performed by the debtor to their detriment. In addition, the filing of a claim under *Actio Pauliana* is limited by a time limit of five years from the date of the act, so this action may also be the only possible legal route for a trustee to challenge a debtor's transaction if the trustee is unable to take advantage of the regulations of the Bankruptcy Law, as the act was done more than one year before the filing of the bankruptcy petition. Therefore, raising claims by creditors (or a trustee) on the basis of this regulation may not be completely ruled out. However, we believe that the risk of successfully challenging the conclusion or

[34] Article 527 of the Civil Code.

[35] Article 527 Item 3 of the Civil Code.

[36] Article 527 Item 4 of the Civil Code.

termination of the EFET General Agreement or the close-out netting clause or payment of the Termination Amount, based on this regulation is remote.

(d) Avoidance of contracts under the Bankruptcy law versus under the Civil Code

The Bankruptcy Law's regulation on the ineffectiveness of the bankrupt's actions is independent of the Civil Code's regulation on the protection of creditors in the event of the debtor's insolvency. There are significant differences between these actions:

(i) under the Civil Code, the ineffectiveness of the debtor's actions does not occur by operation of law, so the court's decision to declare the debtor's actions ineffective is constitutive. Meanwhile, under the Bankruptcy Law, the ineffectiveness of the debtor's actions occurs by operation of law. Any court decision in such a case will be declaratory in nature (i.e., confirming the already- existing legal status);

(ii) the ineffectiveness of the debtor's actions under the Civil Code is based on the construction of acting with the knowledge of harm to creditors, which is examined by the court. Meanwhile, the regulation of the Bankruptcy Law (with the exception of Article 128 of the Bankruptcy Law) does not make the ineffectiveness of a debtor's actions dependent on "awareness of harm to creditors";

(iii) the Civil Code refers the ineffectiveness of the debtor's actions to a "state of insolvency", or to a "state of insolvency to a higher degree" (Article 527 § 2 of the Civil Code), and the Bankruptcy Law to "declaration of bankruptcy";

(iv) on the basis of the Civil Code, an action for declaring an act ineffective may be brought by any of the creditors of the debtor, who acts on his own account. Meanwhile, under the Bankruptcy Law, the action may be brought by the trustee, not the creditor. In turn, the effect of the trustee's actions refers to all bankrupt's creditors.

C.I.1.7 Opinion on whether there is publicly-available information confirming any of the procedural steps or other solvency-related facts (for example financial statements, corporate actions, etc.)

(a) National Register of Debtors (the "NRD")

As of 1st of December 2021, the National Register of Debtors, maintained by the Ministry of Justice, is operational in Poland.[37] The NRD is a public, open and free register that may be viewed electronically at: http://prs.ms.gov.pl or krz.ms.gov.pl.

It discloses, among other things, the following data and information on debtors against whom:

(i) restructuring proceedings (as provided for in the Restructuring Law) have been opened;

(ii) bankruptcy has been declared or secondary bankruptcy proceedings have been opened;

[37] Statute on the national register of debtors of 6 December 2018.

(iii) has been ordered to be banned from doing business;

(iv) a ruling on the opening of foreign insolvency proceedings has been recognised.

The register is a bankruptcy register within the meaning of Article 24(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015 on insolvency proceedings. However, the NDR contains only those case files that were initiated[38] after the relevant law came in this respect into force (i.e., 1st of December 2021).

We believe that a review of the data disclosed in the NRD should be the first step in examining the solvency of the counterparty.

(b) National Court Register

In addition to the information contained in the NDR, there should be the following information and data related to bankruptcy or restructuring disclosed in the National Court Register (also publicly available at: www.ekrs.ms.gov.pl/web/wyszukiwarka-krs/strona-glowna/):

(i) the securing of the debtor's assets in proceedings aimed at the declaration of the bankruptcy through the appointment of a temporary court supervisor or compulsory supervisor;

(ii) appointment of a court supervisor or administrator in the restructuring proceedings;

(iii) suspension of the enforcement proceedings conducted against the debtor;

(iv) dismissal of the bankruptcy petition on the grounds that the assets of the insolvent debtor are insufficient to satisfy the costs of the proceedings or also on the grounds that the debtor's assets are encumbered by collateral to such an extent that the remaining assets of the insolvent debtor are insufficient to cover the costs of the proceedings;

(v) information about the opening of restructuring proceedings and the declaration of bankruptcy, the termination of these proceedings or the revocation of the arrangement, as well as about the person who is a forced administrator, receiver, court supervisor, administrator, foreign trustee, and persons appointed in the course of restructuring or bankruptcy proceedings to represent the debtor.

In addition,

(vi) information about the tax and customs arrears and/or dues collected by the Social Security covered by enforcement, if the claimed receivable has not been paid within 60 days from the date of initiation of enforcement (including the date of initiation of enforcement of these receivables and the amount remaining to be enforced, plus the date and manner of termination of enforcement).

[38] In cases in which a bankruptcy petition, a motion to open proceedings for approval of an arrangement at a meeting of creditors, a motion to open secondary insolvency proceedings, a motion for recognition of a decision to open foreign insolvency proceedings, a restructuring motion, a motion for a declaration of execution, modification or revocation of an arrangement, or a motion for an order prohibiting the conduct of business.

As a general rule, entries made in the National Court Register must also be made in the official gazette: Court and Commercial Journal (*Monitor Sądowy i Gospodarczy*), unless provided otherwise (in particular provided in (i), and (vi) above).

Moreover, the entities that are subject to the registration in the National Court register are obliged to file with the court annual financial statements.[39] Such documents are publicly available and may be analysed by the counterparty.

C.I.1.8 Opinion on whether or not the insolvent counterparty's obligation to pay the amount of any compensation claim in EUR, USD, GBP (as agreed between the parties in the Election Sheet) is enforceable under the Polish Law or calculation in a foreign currency could be challenged by a trustee or third party

Pursuant to the Bankruptcy Law,[40] a claim in foreign currency (regardless of its maturity date) included in the list of claims (drawn up by the trustee in bankruptcy proceedings) will be converted into Polish zlotys according to the average exchange rate of the foreign currency announced by the National Bank of Poland on the date of the bankruptcy declaration, and in the absence of such exchange rate - according to the average market price on that date. Satisfaction of claims in the execution of the distribution plan in bankruptcy proceedings will be made in Polish currency, not in original foreign currency.

However, the conversion occurs only for distribution purposes and does not change the nature of the claim, making it a claim in Polish currency. If the creditor's claim is not fully satisfied in bankruptcy proceedings, it may be further asserted, for example, against the debtor if the bankruptcy proceedings are discontinued or the solvent guarantor is in the original currency.

If the insolvent party is not subject to the bankruptcy regime it may make a payment in the foreign currency, provided that the contract expressly exclude payment in Polish currency.

Pursuant to Polish Law[41] if the payment specified in foreign currency will be made in Poland, the debtor may fulfil the obligation in Polish currency, unless the law, court decision being the source of the obligation or agreement stipulates that the payment must be made only in foreign currency. It means that a debtor who is to fulfil an obligation expressed in foreign currency to his foreign counterparty will not be able to take advantage of the above regulation (i.e. pay, in Polish currency), since the place of performance of the obligation in such a case is considered to be the seat of the creditor (outside Poland).

If the amounts payable under the agreement are expressed in a foreign currency, but are to be paid in Polish currency, the exchange rate of foreign currency will be determined on the basis of the agreement. However, if the agreement does not clearly stipulate this, the average exchange rate will be determined in accordance with the average exchange rate announced by the National Bank of Poland on the date the claim is due. If the debtor is late with the payment, the creditor may demand payment in Polish currency at the average exchange rate announced by the National Bank of Poland published on the date of the payment.

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[39] Article 69 of the Accounting Law

[40] Article 251

[41] Article 358 of the Civil Code.

C.I.2 Preventing restructuring framework

Please refer to our remarks in Parts C.I.1.2. and C.I.1.3.a) above.

C.I.3 Non-insolvency related Material Reasons

In reference to § 10.5 of EFET General Agreement, the non-insolvency related Material Reasons cover:

(a) non-performance,

(b) cross default and acceleration,

(c) failure to deliver/accept,

(d) force majeure and

(e) representation or warranty.

It should be noted, that, in general, the Polish Civil Code allows for wide freedom of contract referring to e.g. termination of the agreement, provided that the agreement will be in conformity with the nature of the legal transaction, the law or the principles of social co-existence. Therefore, in our view, the provisions referring to termination included in above-mentioned paragraph are in accordance with cited rules, thus constitute valid rights binding parties of the agreement.

However, in case of termination due to circumstances as shown in d) – failure to deliver/accept - please familiarise with pt. C.IX.2 of the opinion referring to the possibility of rebutting the presumption of delivery of notice/declaration of offer to purchase/deliver goods in the court. In such a case such presumption potentially could not create valid Material Reason to terminate the agreement.

In reference to enforceability of close-out netting provisions due to early termination of the EFET General Agreement for Material Reasons other than that related to insolvency in view of all the circumstances set out in Part C.I of this Opinion in our view such provisions will be legal and binding on the parties and are enforceable under Polish law.

C.I.4 Multibranch Party

Opinion on whether or not there would be any change in the conclusions reached under C.I. above based upon the fact that Party A conducted business under the EFET General Agreement on a multibranch basis prior to its bankruptcy

The following opinion is based on the additional assumption that Party A has entered into Individual Contracts under the EFET General Agreement through an office in Poland, as well as through one or more branches located abroad. After entering into these Individual Contracts, and prior to their maturity, Party A becomes subject to bankruptcy proceedings under the Bankruptcy Law.

Given this additional assumption, we are of the opinion that our conclusions presented in para. C.I. above will remain unchanged with respect to multi-branch entities that are subject only to Polish bankruptcy proceedings, regardless of the fact that they have assets outside Poland.

This includes banks and insurance companies headquartered in Poland and investment companies having their centres of main interest in Poland.

In the case of other entities (which may be subject to secondary insolvency proceedings in Poland, as well as secondary insolvency proceedings conducted in other countries where they hold assets), close-out netting conducted in accordance with Polish law will only take place with respect to Individual Contracts that relate to assets held in Poland and in other jurisdictions where no secondary insolvency proceedings are pending.

C.I.5 Foreign Multibranch Party

C.I.5.1. Opinion on:

- **whether or not there would be separate proceedings in Poland with respect to the assets and liabilities of the Polish Branch upon the start of the bankruptcy proceedings for Party F in Country H, or**
- **the relevant authorities in Poland would defer to the proceedings in Country H, so that the assets and liabilities of the Polish Branch would be handled as part of the proceedings for Party F in Country H, and**
- **local creditors of the Polish Branch could initiate separate proceedings in Poland even if the relevant authorities in Poland did not do so.**

Our opinion on the above issues will vary depending on the status of Party F, i.e. whether it is

(i) a credit institution (i.e., banks based in the European Union), or foreign investment company,

(ii) a foreign bank (i.e., banks based outside the European Union);

(iii) insurance company;

(iv) investment fund management company;

(v) other entities.

Re. (i) Credit institution or foreign investment company

The Bankruptcy Law[42] excludes the jurisdiction of Polish courts over credit institutions and foreign investment companies that operate or have assets in Poland.

With respect to a branch of a credit institution or a foreign investment company, not only may the main bankruptcy not be declared (because they do not have a centre of their activities in Poland), but also Polish courts may not rule on the initiation of secondary bankruptcy proceedings with respect to a branch of a credit institution and a foreign investment company. A credit institution (or foreign investment company), whether acting directly or through a branch established and operating in Poland, is always subject to bankruptcy proceedings initiated abroad with respect to this institution, which, in accordance with the Bankruptcy Law[43], are effective in Poland by operation of law.

[42] Article 453 of the Bankruptcy Law.

[43] Article 454 of the Bankruptcy Law

Given the above, there will be no separate bankruptcy proceedings in Poland for the assets and liabilities of Party F or its Polish branch if Party F is a credit institution or foreign investment company. As a result, local creditors must pursue their claims in a foreign court, in foreign bankruptcy proceedings.

Re. (ii) Foreign banks

The Bankruptcy Law does not exclude the jurisdiction of Polish courts to declare the bankruptcy of a branch of a foreign bank in Poland. In the case of foreign banks with a branch only in Poland and not in any other EU or EFTA Member State, the general bankruptcy regime for Polish banks applies. However, if a foreign bank operates in Poland as well as in at least one other member state of the European Union or member state of the European Free Trade Agreement (EFTA), the jurisdiction of Polish courts to declare bankruptcy is excluded.

Recognition of the opening of foreign bankruptcy proceedings does not prevent a Polish court from opening bankruptcy proceedings. However, if Polish court recognise the main foreign bankruptcy proceedings, the bankruptcy proceedings opened in Poland are secondary bankruptcy proceedings.

After the recognition of the ruling on the initiation of foreign bankruptcy proceedings, the foreign administrator is entitled to file a bankruptcy petition and participate in bankruptcy proceedings conducted by Polish courts, just like a creditor.

Only the Financial Supervisory Commission or Bank Guarantee Fund may file a bankruptcy petition concerning a bank. Thus, regardless of whether Party F is a credit institution (or foreign investment company) or a foreign bank, local creditors of Polish Branch cannot initiate bankruptcy proceedings against these entities.

Re. (iii) insurance company

Like credit institutions, insurance companies based in EU or EFTA countries are not subject to the jurisdiction of Polish courts. This means that if Party F is an insurance company based in the EU or EFTA, there will be no separate bankruptcy proceedings against Party F's assets in Poland or its Polish branch. As a result, local creditors must pursue their claims in a foreign court, in foreign bankruptcy proceedings.

The Bankruptcy Law does not exclude the jurisdiction of Polish courts to declare the bankruptcy of a foreign insurance company based outside EU and EFTA Member States. In the case of foreign insurance company having branch only in Poland and not in any other EU or EFTA Member State, the general bankruptcy regime for Polish insurance companies applies.[44] However, if a foreign insurance company operates in Poland and in at least one other member state of the European Union or member state of the European Free Trade Agreement (EFTA), the jurisdiction of Polish courts to declare its bankruptcy is excluded.

Re. (iv) investment fund management company

[44] Only the debtor and/or the Financial Supervision Commission may file a bankruptcy petition with respect to an insurance company.

The Bankruptcy Law does not provide a specific regime for the bankruptcy proceedings of foreign investment fund management companies. They are therefore subject to the general regime of the Bankruptcy Law. Thus, a bankruptcy petition may be filed by the debtor as well as any of its personal creditors.

Re. (v) other entities

Other entity[45] may be subject to bankruptcy proceedings in Poland, both main and secondary. If the company is based in another EU member state, the EU Insolvency Regulation will apply. This means that a Polish court will have jurisdiction over a financial institution to initiate main bankruptcy proceedings if this institution has a COMI[46] in Poland. Under the EU Regulation, there is a presumption that the debtor has a COMI in the member states where it is registered for at least three months before filing the bankruptcy petition. Such a presumption is rebuttable and the creditor (or debtor) may claim that, despite being established in another member state, the debtor's COMI is located in Poland.

In addition, pursuant to the EU Regulation, Polish courts have jurisdiction to open secondary bankruptcy proceedings against a debtor having its COMI in another EU member state only if a debtor possesses an establishment in Poland. The effects of secondary bankruptcy proceedings are limited to the debtor's assets located in Poland. A motion for opening the secondary proceedings against the debtor may be filed in Poland by a debtor, local creditors or the bankruptcy administrator appointed in the main bankruptcy proceedings.

If the financial institution does not have a seat in the EU member state then the Bankruptcy Law provisions pertaining to the cross-border bankruptcy will apply, unless otherwise provided by an international agreement between Poland and country in which the main bankruptcy proceedings were open. If bankruptcy is opened against financial institutions (which are not subject to a separate bankruptcy regime in Poland) in a non-EU country, the local creditor[47] has the right to request the Polish court to open the secondary (separate) bankruptcy proceedings.

C.I.6 Separate proceedings in Poland with respect to the assets and liabilities of the Polish Branch and other entities

Opinion on whether if there were separate proceedings in Poland with respect to the assets and liabilities of the Polish Branch, the receiver or liquidator in Poland and the Polish courts, based on the facts above, would include Party F's position under the EFET General Agreement, in whole or in part, among the assets in Poland and, if so, the receiver or liquidator and the Polish courts would recognise the close-out netting provisions of the EFET General Agreement in accordance with those provisions. The most significant problem would arise if a Polish receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Polish Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Polish Branch to the liquidator or receiver of the Polish

[45] Provided that they are not credit institutions, or investment firms or other firms, institutions and undertakings, which are covered by Directive 2001/24/EC or collective investment undertakings.

[46] The centre of main interest is the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties.

[47] Under the Bankruptcy Law, a local creditor means a creditor whose domicile, registered office or COMI in Poland, a creditor whose claims arise from the debtor's business activities conducted in Poland, or a creditor, whose receivables from the debtor are secured on the debtor's assets located in Poland by a mortgage, pledge, fiscal pledge, registered pledge, maritime mortgage or transfer of ownership to secure property, receivables or other property rights.

Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement.

The following opinion is based on the additional assumption that close-out netting under the EFET General Agreement would be enforced in accordance with that EFET General Agreement in the proceedings for Party F in Country H.

As we indicated above, if Party F has a COMI outside of Poland, a Polish court may open the secondary bankruptcy proceedings in accordance with EU Insolvency Regulations, which will only apply to the assets located in Poland. Thus, if the rights under the Individual Contracts entered into by the Polish Branch of Party F are located in Poland, these rights will enter the Polish bankruptcy estate if the secondary bankruptcy proceedings are opened. The rights under the Individual Contracts concluded by Party F and located outside Poland will be excluded from the Polish bankruptcy estate.

Termination of the EFET General Agreement based on the Material Reason will result in the termination of the Individual Contracts entered into thereunder. Thus, it is conceivable that the termination of the EFET General Agreement (to which Party F is a party) will result in the termination of the Individual Contracts entered into by the Polish Branch of Party F under this agreement.

Although there is no explicit regulation in Polish law and EU Insolvency Regulation in this regard, it seems likely that close-out netting upon termination of the entire EFET General Agreement will be made separately for the Individual Contracts entered into by:

(i) the Polish Branch of Party F in Poland, which will be governed by the Bankruptcy Law;

(ii) Party F in Country H (subject to the bankruptcy law of Country H) with respect to the Individual Contracts entered into by Party H in Country H and other EU member states where the secondary bankruptcy proceedings were not open.

In such case, if the Termination Amount is negative for the Polish Branch of Party F, the creditor will be entitled to submit its claim to the bankruptcy estate in the secondary bankruptcy proceedings. If the Termination Amount is positive for the Polish Branch of Party F, a trustee appointed in the secondary bankruptcy proceedings will demand from the counterparty of the Polish Branch of Party F, its payment to the bankruptcy estate.

We have encountered situations where a dispute arises between the bankruptcy administrators appointed in the main and the secondary bankruptcy proceedings as to which asset (especially intangibles) should be included in which bankruptcy estate.

Since the main bankruptcy proceeding is usually opened first, it is conceivable that the Individual Contracts entered into by the Polish Branch of Party F will be terminated prior to the opening of the secondary bankruptcy proceeding. A dispute may therefore arise between the bankruptcy administrators, as to whether the Termination Amount claims due to the bankrupt should then be paid to the secondary bankruptcy estate or to the main bankruptcy estate. This problem does not exist if the close-out netting turns out to be negative for the bankrupt, in which case the local creditors are entitled to submit its claim to both the primary and secondary bankruptcy estate.

An establishment under the EU Insolvency Regulation is defined as any place of operation where a debtor carries out or has carried out in the 3-month period prior to the request to open main bankruptcy proceedings a non-transitory economic activity with human means and assets. Thus, our opinion outlined above will also apply even if Party F does not establish a branch in Poland, but has assets situated (such as financial instruments, cash held in an account with a credit institution, property rights. etc.) and conducts business activities there.

It should be noted, however, that the above will not apply to the financial institutions that are excluded from the EU Insolvency Regulation such as: insurance companies, credit institutions, investment funds and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC or collective investment undertakings.

C.I.7 Implementation of the European Restructuring Directive

Despite taking the opportunity to extend the deadline for implementing the European Restructuring Directive by an additional year for implementation, i.e., until 17 July 2022, Poland has so far failed to do so. The bill amending the Restructuring and Bankruptcy Law, which aims to implement the European Restructuring Directive, has been published on the website of the Government Legislation Centre and it has been subject to public consultation. Following public consultations, the Minister of Finance, Minister for European Union Affairs, and Minister of Family and Social Policy also submitted their comments on the bill. The Government Legislation Centre has not yet responded to these comments.

C.II COLLATERAL UNDER POLISH LAW

The following opinion is based on the additional assumptions that:

- Party A is at all times a **Transferor** under the EFET Credit Support Annex, and that the collateral is owned by Party A or that Party A is authorised and empowered to transfer ownership in the collateral.
- The counterparties **agree** that Eligible Credit Support will include cash, Letters of Credit and Parent Company Guarantee
- Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

C.II.1 General remarks on the Parent Company Guarantee under Polish law

Since the parent company guarantee is not regulated by Polish law, the parties to the contract are free to adapt its provisions to the needs of a given contractual relationship, with the provisions that its content or purpose does not contradict the properties (nature) of the relationship, the law or the principles of social coexistence (Article 353^1 of the Civil Code). Such restrictions on the content of the guarantee may, for example, concern the prohibition of the issuance of a guarantee by an entity that would be both the principal debtor and the guarantor. Depending on the agreed legal basis of the guarantee, its content will contain different provisions, scopes and mechanisms for asserting its rights.

Notwithstanding the above, a corporate guarantee may be structured under Polish law as a suretyship (*poręczenie*), under which the guarantor undertakes to repay the debt of the principal debtor to the creditor if the principal debtor fails to do so when due. In practice, the surety is obligated to pay the debt if the debtor defaults. When the guarantor pays the debt in place of the principal debtor, by operation of law he takes the place of the beneficiary of the surety and has recourse against the principal debtor.

The suretyship of the parent company in this form is accessory in nature, i.e. it is dependent on the validity and content of the principal obligation incurred by the group company (the principal debtor) against the beneficiary. The scope of the surety's obligation is determined according to the current scope of the primary debtor's obligation. A surety under Polish law is established up to a certain amount and for a predetermined period of time. There are no special formal requirements for a surety to be valid and enforceable.

C.II.2 With respect to the collateral we have been asked to address the following issues.

(a) **Under the laws of Poland, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?**

On 25 July 2008 Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I Regulation**") entered into force in the member states of the European Union, including Poland, and became directly applicable on 17 December 2009.

Pursuant to Article 3 of Rome I Regulation parties are free to choose the law governing their contractual obligations without having to establish a connection between the contract and the law chosen by the parties. In the absence of a choice of law, the contract is governed by the law of the country in which the party obligated to perform the characteristic performance under the contract is domiciled, for example, the contract of sale goods will be governed by the law of the country in which the seller is domiciled. However, if it is apparent that the contract is in a much closer relationship with a country other than the one indicated above, the law of that country should apply. If the applicable law cannot be determined in accordance with the principles indicated above, the contract should be governed by the law of the state with which it shows the closest connection.

It should be pointed out, however, that even if the parties have reserved a foreign legal regime for the contract, or the necessity of applying foreign law arises from international agreements or the rules of private international law, according to Article 41 of the PPM, the law of the place where the asset is located is applicable to assess to whom the ownership of the asset serves. Therefore, if at the time of the bankruptcy the disputed asset is located in the territory of Poland, it is necessary to meet the conditions described in the Civil Code or the Bankruptcy Law for the effectiveness of the reservation of ownership or transfer of ownership as collateral, regardless of the fact that under the law applicable to the contractual relationship there are no requirements for the effectiveness of the reservation or transfer of ownership.

In addition, pursuant to the Financial Collateral Law the agreement to create a financial security interest in intangible financial instruments, the rights arising from such interest, the priority of rights, and the satisfaction of such interest should be governed exclusively by the law of the country in which the securities account, omnibus account, other account in which financial instruments that are not securities are recorded, deposit account or other securities records in which the interest is recorded are maintained. This law also applies to the *bona fide* acquisition of intangible financial instruments.

(b) **Would the laws of Poland characterise each transfer of collateral as effecting an unconditional transfer of ownership title to the assets transferred? Is there any risk that any such transfer would be recharacterised as creating a security interest? If so, is there any way to minimise that risk? What would be the consequences of such a re-characterisation?**

Pursuant to the Bankruptcy Law[48] an agreement for the transfer of property, claims or other right concluded for the purpose of securing a claim will be effective against the bankruptcy estate if it is concluded in writing with a certified date.[49] Such requirement does not apply to an agreement for the establishment of financial pledge under the Financial Collateral Law. Under Polish law a financial pledge may be established on cash, credit claims or financial instruments (financial pledge).

Further, the Bankruptcy Law[50] stipulates that claims, receivables, and other property rights transferred by the bankrupt to a creditor to secure the claim are not excluded from the bankruptcy estate. In such a case the provisions regulating the pledged assets should be applied accordingly. Thus, if the transfer of rights (receivables or other property rights) was effective (i.e., with a certain date) the creditor has the same rights in bankruptcy proceedings as a creditor of a claim secured by a pledge. If the transfer of the pledged claim was not concluded with a certain date, then the claim is treated as unsecured.

Concurrently, the Financial Collateral Law does not provide for the specific formal requirements for the establishment of a financial pledge on rights.[51] Therefore, one may argue that an improperly executed transfer of rights (i.e., without certified date) should be qualified as a transfer of rights subject to the Financial Collateral Law. This is because the agreement for establishment of financial pledge may provide for the pledgee's right to use or satisfy its claim by taking possession of the pledged assets (in this case right).

Right of use means that the pledgee may exercise rights to the collateral, including collecting benefits from it and disposing of the collateral, to the extent specified in the financial pledge agreement.

So, if the pledgee exercises of the right of use by disposing of the pledge right, the pledgee is obliged to replace the disposed assets with a suitable equivalent no later than the date of performance of the obligation that is subject of the security, unless the pledgee settles the claim of the parties within the period specified in the financial pledge agreement.

However, such re-characterisation is much less likely if the financial pledge agreement does not provide for a right of use. In addition, clause §7.3 of the Annex to the EFET Credit Support Annex provides that nothing in the Annex to the EFET Credit Support Annex is intended to create or establish a pledge or other security, clearly indicates that the intention of the parties was not to establish a financial pledge. Therefore, the risk of re-characterisation of transfer of rights to a financial pledge under Polish law is remote.

[48] Article 84, Item 2.

[49] Pursuant to Article 81 Section 2 of the Civil Code law a legal act has a certified date (i) if the performance of a legal act is confirmed in an official document - as of the official document date, (ii) if an official note is made on a document relating to a legal act by a state authority, a local government unit or by a notary - as of such note's date, (iii) if the document is stamped with a qualified electronic timestamp of the document in electronic form - from the date of stamping with a qualified electronic timestamp. In practice, the typical way of certifying a date is a certification executed by a notary public. If a qualified electronic signature is additionally accompanied by a qualified electronic time stamp, then the use of only electronic signature will be sufficient to meet the formal requirement. A qualified electronic time stamp is a service separate from the qualified electronic signature, which must be purchased from a trusted service provider listed in the register maintained by the by the National Bank of Poland or an institution maintaining such a register in another member state of the EU

[50] Article 70 Item 1.

[51] Pursuant to the Financial Collateral Law the establishment of a financial pledge does not require an agreement with a certified date or an agreement with notarised signatures.

On the other hand, recharacterisation of a transfer of pledge asset in the form of a financial pledge may be considered as a remedy for transfers made without formal requirements, which would otherwise be ineffective against the bankruptcy estate. In practice, however, we have not encountered a situation where the bankruptcy trustee and/or the bankruptcy judge agreed to re-characterise the collateral.

However, we have not came across situation in practice that a bankruptcy administrator and/or a bankruptcy judge proceeds with re-characterisation of the security.

(c) **Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Poland necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?**

As we indicated above (please see our remarks in Part (b) above) the transfer of ownership title to property, claims or other right concluded for the purpose of securing a claim will be effective against the bankruptcy estate if it is concluded in writing with a certified date. If effective, claims secured by the transference of rights will be satisfied as claims secured by pledge. This means that claims secured by the transfer of rights, claims or receivables will not be excluded from the bankruptcy estate. These rights, claims and receivables will be liquidated by the trustee (along with other bankrupt's assets), and creditors (to whom the rights have been transferred) will enjoy priority in satisfying their claims from the funds obtained from the liquidation of the pledged assets (in this case, the transferred rights, claims or receivables).

Given the above not only EFET Credit Support Annex but also each collateral transfer executed under such Annex should be made in writing with the certified date. Otherwise, they would not be effective against the Polish bankruptcy estate.

As for the financial pledge, the Financial Collateral Law explicitly indicates that the establishment of a financial pledge does not require an agreement with certified date or an agreement with notarised signatures. A financial pledge may be established only if the pledgee or pledgee is, among others, (i) a bank and credit institution; (ii) investment fund management companies (i) investment companies, (ii) brokerage firms; (iii) insurance companies; (iv); (v) municipalities, counties, associations of local governments.

The pledge must be registered, depending on what it is established on and where the pledged asset is located:

(i) if the pledge is established on cash, the pledge is recorded in the bank account that is the subject of the pledge;

(ii) if the pledge is established on credit receivables, the pledge is recorded in the list of receivables submitted to the pledgee;

(iii) if on financial instruments - on a securities account, on an omnibus account, on another account in which financial instruments admitted to organised trading that are not securities are recorded, on a deposit account or in another system for registering persons entitled from financial instruments that are not securities, maintained by authorised entities.

(d) **What is the effect, if any, under the laws of Poland, of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?**

Insofar as the Individual Contracts entered into under the EFET General Agreement are classified as financial term operations or borrowing or sales of financial instruments involving an obligation to repurchase them, the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex should not affect the effectiveness of the collateral established under the EFET Credit Support Annex.

Substituting the collateral of an existing claim may create the risk under the Bankruptcy Law that such collateral will be recognised by the trustee as new collateral. In such a case, there would be the risk that a 6-month hardening period would apply and if the substitutions take place within 6 months prior to the filing for the bankruptcy petition such collateral would be ineffective against the bankruptcy estate, unless at the time of substitution the secured claim was due and payable.

However, the 6 months hardening period does not apply to the establishment of collateral on the bankrupt assets created before the date of bankruptcy in connection with the financial term operations or borrowing or sales of financial instruments involving an obligation to repurchase them.

It should be noted, however, that § 6 of the EFET Credit Support Annex stipulates that the substitution of collateral requires the consent of the Transferee, which may not be unreasonably withheld. Given that there is not absolute certainty as to the status of the Individual Contracts as financial term operations or borrowing or sales of financial instruments involving an obligation to repurchase them within the meaning of the Bankruptcy Law, it would be advisable for the Transferee to consider the risks involved each time it is asked to give consent to replace of collateral.

(e) **Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Poland insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?**

We understand that the above question refers to the Letter of Credit that has been provided by Party A, but no payment has been made by the bank issuing the Letter of Credit.

For a detailed discussion of the possibility of including the amount of collateral in the close-out netting mechanism, see point (f) below. The arguments for and against such an arrangement apply mutatis mutandis to collateral that has been granted but not yet transferred, but there is an additional issue that has to be pointed out.

The receivables of the Transferor on account of withdrawal, modification, cancellation or return of collateral are non-monetary in nature. Non-monetary obligations become monetary on the date of the declaration of bankruptcy. However, since the termination of the EFET General Agreement may not be made for a reason of declaration of bankruptcy (such termination will not be valid), the Transferor's claim does not become a pecuniary claim, and therefore may not be covered by the close-out netting mechanism.

(f) **Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?**

Enforcement of Party B's rights secured by collateral involves use of the close-out netting mechanism under the EFET General Agreement.

The netting collateral risk should not be relevant, if the close-out netting is made prior to the declaration of Party A's bankruptcy. The issue arises, however, when close-out netting is performed after Party A is declared bankrupt.

As we indicated in Part C.I.1.1. above, after the declaration of the bankruptcy of Party A each party may terminate the EFET General Agreement and all Individual Contracts concluded under such master agreement and settle its claims in accordance with the method indicated in this agreement. This right is independent of the contractual clauses in the master agreement and the individual contracts and may not be excluded or modified by the parties.

The above would apply to the EFET General Agreement and/or the Individual Contracts only if they are classified as the "financial term operations" or "borrowing or sale of financial instruments involving an undertaking to repurchase them" in the meaning of the Bankruptcy Law.

However, it seems unlikely that the EFET Credit Support Annex could be classified as the "financial term operations" or "borrowing or sale of financial instruments involving an undertaking to repurchase them." This is because the definition of the financial term operations (in other words derivatives) under Bankruptcy Law does not refer to the transactions entered into to secure claims arising under the financial terms operations (derivatives). In addition, the Bankruptcy Law stipulates that a security transfer (if it meets the formal requirements) may not be excluded from the bankruptcy estate and should be treated as a pledge (i.e. transferred assets will be treated as the part of the bankruptcy estate not the Transferee's assets).

On the other hand, the Bankruptcy Law expressly excludes the application of the provisions providing for the ineffectiveness towards the bankruptcy estate security established during the 6-month hardening period, to collateral established in connection with financial term operations or the borrowing or sale of financial instruments with an

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obligation to repurchase them. Moreover, the Bankruptcy Law[52] allows, in certain situations, for the bankrupt's claim to be set off against the bankrupt's creditor's claim if both claims existed on the date of the bankruptcy filing, even if the date of enforceability of one of them has not yet occurred. While the claim for the return of collateral meets the above criteria (exists from the actual transfer of collateral), the claim for payment of the close-out amount does not (it arises upon termination of the EFET General Agreement).[53]

Although this regulation of the Bankruptcy Law provides some support for the view that collaterals provided under the EFET Credit Support Annex may be set-off, following declaration of bankruptcy, security transfer of title will be regarded as a pledge. The transferred assets become, by virtue of law part of the bankruptcy estate regardless of the fact that such an asset will be deposited on the Transferee's account.

The Bankruptcy law specifically regulate the close-out netting in the case of establishment of the financial pledge pursuant to the Financial Collateral Law. Declaration of Party A bankruptcy would not affect the rights of Party B under the close-out netting clause provided in the agreement for the establishment of the financial pledge, if such agreement was entered into before the bankruptcy declaration or on the date of the bankruptcy declaration. Therefore, the risk of close-out netting with respect to the collateral being ineffective against the bankruptcy estate will not apply if the close-out netting pursuant to the financial pledge agreement entered into based on the Financial Collateral Law.

Given the above, a financial pledge with a right of use provides the safest solution for protecting Party's B interest. As indicated above, following the execution of the right of use, the pledgee may dispose of the assets and is obliged to return a suitable equivalent of the pledge assets.

A financial pledge is not subject to any transformation due to declaration of bankruptcy, thus the receivable in the form of the pledgor's claim for return of the equivalent of the pledged assets which have been transferred to the account of the pledgee in execution of the right of use, will continue to exist following the bankruptcy and the criteria of article 93 section 1 of the Bankruptcy Law shall be met.

(g) **Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?**

The Bankruptcy Law stipulates that the creation of a security interest (which is also the transfer of property as collateral) is ineffective against the bankruptcy estate if it is done

[52] Article 93, Item 1.

[53] Such receivables will be subject to Article 85 Item 4 of the Bankruptcy Law, which provides that the settlement amount arising under the terminated contracts performed under the master agreement may be subject to set-off without any further requirements.

within certain time limits (hardening periods). As discussed in C.I.1.6 (a) above, legal acts performed by a bankrupt within a period of one year prior to the date of filing a bankruptcy petition, by which he disposed of his property, are ineffective against the bankruptcy estate if they were performed without payment or against payment if the value of the bankrupt's benefit exceeds to a gross degree the value of the benefit received by the bankrupt or reserved for the bankrupt or a third party. In addition, payment by the bankrupt of an unmatured claim or the securing of such a claim within six months prior to the filing of the bankruptcy petition is ineffective against the bankruptcy estate. The above hardening periods do not apply to the establishment of collateral on the bankrupt debtor's assets prior to the bankruptcy filing date in connection with financial term operations or the borrowing or sale of financial instruments with an obligation to repurchase them, as referred to in Article 85 of the Bankruptcy Law. Thus, hardening periods will not affect the effectiveness of collateral provided that Individual Contracts executed under the EFET General Agreement are classified as financial terms operations or borrowing or selling financial instruments with an obligation to repurchase them.

In practice, doubts exist as to whether, in the case of replacing the collateral with a new asset, the hardening period will start from the beginning with respect to the security on newly transferred assets. This is due to the fact that the replacement of collateral, in some cases such as the transfer of title or the issuance of a new letter of credit, requires the establishment of a new security over the assets.

It may be argued that a creditor would not be exposed to such a risk in the case of a financial pledge on a bank account, which is created only once and covers all amounts deposited in the account at a given time.

The 6-month hardening period will not apply to the establishment of collateral that secures a newly acquired claim.

The person who received the payment could claim that these actions were effective against the bankruptcy estate, defending that he did not know there were grounds for bankruptcy. Therefore, Party B could be protected from the negative effects of hardening periods in certain situations. However, this will be difficult in the case of those entities that have access to information on the general business and financial situation of their counterparties, i.e. in particular there are publicly available financial statements and in the case of banks that maintain bank accounts or extend credit to their counterparties.

(h) **Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership title to the collateral to Party B? Are there any other requirements to be observed in Poland in order to ensure validity of that transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under point c) above?**

An EFET Credit Support Agreement Annex is an appropriate form to create an unconditional transfer of ownership of the collateral.

In order to ensure the validity of the transfer (in addition to the requirements that must be observed in Poland), under certain circumstances, the parties to the EFET Credit Support Annex will be required to obtain currency revalidation of the settlement of transactions entered into under the EFET Credit Support Annex. This is because the conclusion of transactions specified in the EFET Credit Support Annex between a Polish entity and another entity with its seat outside the EU, EEA or an OECD country, may qualify[54] as transactions that are transfers of receivables made by way of financial settlement, which are permitted after obtaining a foreign exchange permit.

Such a foreign exchange permit to undertake legal actions that may result in financial settlements in foreign currency in the territory of Poland does not have to be obtained by residents in Poland.

(i) **Do you have any other specific recommendations on the subject of collateral that EFET and its members need to be aware of? If so, please provide a detailed answer.**

The parties may consider amending the provisions of the EFET Credit Support Annex, under which a financial pledge with usufruct rights may be established as collateral for the risks to which the parties are exposed under the EFET General Agreement.

C.III GENERAL ENFORCEABILITY

With respect to the general enforceability we have been asked to address the following issues.

C.III.1 Is the EFET General Agreement and any of the Annexes (including the EFET Credit Support Annex) defined in Part A above enforceable under the laws of Poland in accordance with its own terms?

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, the documents listed in Part A above are generally enforceable under the laws of Poland.

(a) Non-performance due to Force Majeure (§ 7 of the EFET General Agreement)

The Civil Code does not define a *force majeure* event. However, it contains regulations applicable to situations similar to *force majeure*, i.e.:

(i) impossibility to perform a contract due to circumstances for which the parties are not liable[55];
(ii) extraordinary changes of circumstances.[56]

The parties may, however, contractually define a *force majeure* event and regulate its legal consequences under the principle of freedom of contracts.

<u>Re. (i) - impossibility of performance</u>

The Civil Code distinguishes between original impossibility of performance[57] and subsequent impossibility of performance.[58]

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[54] Based on the Polish Foreign Exchange Law of 27 July 2002.
[55] Article 387, Article 475, and Article 495 of the Civil Code.
[56] Article 357^1 of the Civil Code.
[57] Article 387 of the Civil Code.
[58] Article 475 and Articles 495 of the Civil Code.

Original impossibility of performance occurs when the performance was objectively impossible at the time of formation of the contract. In such cases the contract is deemed invalid. If a party was aware of the impossibility of the performance and did not notify the other party of it, such party is liable for damages which the other party suffered due to concluding the contract without the knowledge of the impossibility of performance[59].

Subsequent impossibility of performance occurs when, after the formation of the contract, the performance becomes impossible due to circumstances for which neither party is liable. In such a case, the obligation to perform expires. If the object of the performance was transferred, forfeited or damaged, the debtor is required to hand over everything that was obtained in exchange as the redress of the damage[60].

In addition, the Civil Code specifically regulates the impossibility of performance with regards to mutual contracts. Mutual contracts are contracts where both parties are obliged in such a manner that the performance by one of them is to correspond to that of the other[61]. If one of the mutual performances became impossible as a result of circumstances for which neither party is liable, the party who was to provide that performance may not demand the mutual performance, and if it has received it already, it is obliged to return it in accordance with the provisions on unjustified enrichment. If the performance became impossible only partially, that party loses the right to the corresponding part of the mutual performance. However, the other party has a right to rescind the contract if the partial performance would have no significance for them taken into consideration the nature of the obligation or the intended purpose of the contract, known to the party whose performance became partly impossible[62].

<u>Re. (ii) - extraordinary change of circumstances</u>

Under the Civil Code[63] the occurrence of an extraordinary change of circumstances where rendering the performance would be connected with excessive difficulties or threaten one of the parties with a substantial loss, which the parties did not foresee when concluding the contract (*rebus sic stantibus*). If such a situation occurs, the court may, after considering the interests of the parties and in accordance with the principles of social coexistence:

- determine the mode of performance of the obligations under the contract;
- determine the amount of consideration; or
- decide upon termination of the contract – and in such case as far as necessary, decide upon a settlement of the claims of the parties.

[59] Article 387 of the Civil Code.
[60] Article 475 of the Civil Code.
[61] Article 487 § 2 of the Civil Code.
[62] Article 495 of the Civil Code.
[63] Article 357^1 of the Civil Code.

In accordance with the prevailing view of the legal doctrine and jurisprudence the Civil Code regulation (Article 357^1) is of a non-mandatory nature, therefore, the parties may contractually modify it or even exclude the application.

Re. force majeure clauses

Under the Civil Code, the parties are free to agree on the terms of their legal relationship and may depart from the provisions relating to their rights and obligations with mutual consent, provided that the contents and the purpose of the contract are not contrary to the nature of the relationship, with statutory law, and with the principles of social coexistence[64]. Thus, the parties are free to define force majeure and the legal implications of its occurrence within the above limits.

We are of the opinion that § 7 of the EFET General Agreement meets these criteria and therefore is valid and enforceable under Polish law.

(b) Remedies for non-performance (§ 8 of the EFET General Agreement)

The Civil Code allows to provide in a contract for liquidated damages (*kara umowna*) a remedy for non-performance or improper performance of non-monetary obligations[65]. The liquidated damages take the form of payment of a specific amount. The obligation to pay liquidated damages will arise irrespective of the actual value of the damage[66]. In principle, the obligation to pay liquidated damages will arise even if the failure to perform will not result in any damage. Liquidated damages' function is to replace the compensation for non-performance or improper performance of the obligation. The creditor may claim compensation exceeding the amount of liquidated damages only if the parties provided so in the contract[67]. The payment of the liquidated damage from improper performance does not automatically release the debtor from the obligation to perform; however, such effect will take place with the creditor's consent[68].

The amount of liquidated damages may be reduced by the court if:

(i) the debtor performed the obligation in a considerable part;
(ii) the amount of the liquidated damages is grossly excessive[69].

Under the jurisprudence it was confirmed the right to adjust liquidated damages can be excluded if the parties explicitly agree that the liquidated damages have a character of the guarantee (*charakter gwarancyjny*). We are of the opinion that § 8 of the EFET General Agreement is valid and enforceable under Polish law. Please note that if the EFET General Agreement was to be governed by Polish law, the court could reduce the liquidated damages based on the provisions of the Civil Code, unless this is excluded by introduction of the wording that qualifies the liquidated damages as a guarantee.

[64] Article 353^1 of the Civil Code.
[65] Article 483 of the Civil Code.
[66] Article 484 § 1 of the Civil Code.
[67] Article 484 § 1 of the Civil Code.
[68] Article 483 § 2 of the Civil Code.
[69] Article 484 § 2 of the Civil Code.

(c) Limitation of liability (§ 12 of the EFET General Agreement)

Under a general principle provided in the Civil Code a party who fails to perform a contractual obligation should redress the damage resulting from non-performance or improper performance of the obligation, unless that party is not liable for the circumstances, i.e., not at fault[70]. This implies that there is a rebuttable presumption that the non-performance or improper performance occurred due to the circumstances for which the debtor is liable. The debtor bears the burden of proof to establish lack of fault. The liability under this general rule may be contractually extended or limited by the parties[71]. The debtor may accept liability for actions and omissions for which he/she does not bear liability under the statutory law. The debtor's liability under the statutory law may also be limited; however, any contractual exclusion or limitation of liability for damage inflicted intentionally is invalid.

The extent of liability covers the normal consequences of the action or omission causing the damage[72]. Unless provided otherwise in statutory law or contract, the compensation covers the actual losses (*straty*) suffered by the injured party and the profits (*utracone korzyści*) which could be obtained if the damage was not inflicted[73]. Thus, the exclusion of lost profit requires specific provisions of the contract. If the injured party contributed to the occurrence or extent of the damage, the obligation is to compensate the damage

The provisions of the Civil Code do not use the terms "indirect" and "consequential" damages. In order to establish for damages an adequate proximity between the act or omission and the damage (actual loss or lost profit) must be established.

We are of the opinion that § 12 of the EFET General Agreement complies with Polish law.

(d) Public Order in Poland

We are not aware of any decisions of the Polish judiciary with respect to Individual Contracts under the EFET General Agreement which do argue that one of the provisions of the EFET General Agreement infringes public policy.

C.III.2 Is there a risk that a notice, declaration or other communication given in accordance with the E-Notice Agreement may not be recognised as valid? Could the deemed receipt of a notice be challenged? Who bears the burden of proof that the document attached to the e-mail is not falsified?

The Civil Code regulates the formation of contracts and contains provision specifying three procedures for their formation (acceptance of an offer, negotiations and tender)[74]. The provisions of the Civil Code in this regard are not mandatory and parties are free to agree on the procedure of concluding binding contracts between them. The parties to a contract may also mutually agree on the required form of

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[70] Article 471 of the Civil Code.

[71] Article 473 of the Civil Code.

[72] Article 361 § 1 of the Civil Code.

[73] Article 361 § 2 of the Civil Code.

[74] Article 66 et seqq. of the Civil Code.

amendments to that contract as well as on the form of declaration on rescinding or unilateral termination of the contract[75].

In our opinion, in accordance with Polish law, the Amendments made under the procedure laid down in the E-Notice Agreement should be validly entered into between the parties. In our opinion, the mechanism of the deemed receipt of the notices as laid down in the E-Notice Agreement is in compliance with Polish law.

The burden of proof in cases of challenging the documents attached to the email will differ depending on the party challenging the document. The Civil Procedure Code[76] regulates the burden of proof in case of challenging the authenticity of the private document[77] by a party to a dispute. In accordance with this provision:

(i) a party that disputes the authenticity of a private document or alleges that the statements made therein by the person who signed the document are not his/her own, bears the burden of proving it;

(ii) if the dispute concerns a private document issued by a person other than the party challenging the authenticity of the document, the party who intends to make use of the document bears the burden of proving its authenticity.

C.III.3 Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal standpoint, of the EFET General Agreement and its Credit Support Annex.

We do not have any further recommendations in this regard.

C.IV CONFIRMATION PRACTICES

The following opinion is based on the additional assumptions provided in the Instruction Letter:

- As far as the Confirmation practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make verbal 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 or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT, electronic confirmation or posting matching service or other means of electronic transmission).

- Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into EFET Electronic Confirmation Agreement.

C.IV.1 Binding Individual Contract

[75] Article 76 of the Civil Code.

[76] Article 253 of the Civil Procedure Code

[77] A private document is a document executed in a written or electronic form by a private person (as opposed to official documents executed by the public or state authorities). Under the Civil Procedure Code a private document constitutes evidence that a person who signs the document has given a statement specified in the document; Art. 245 of the Civil Procedure Code.

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

As a general rule, Polish law does not require any specific form of communication for entering into a contract, unless a specific form is prescribed for a given type of contract by statutory law. Such statutory requirements are prescribed for the form of e.g. transfer of real estate or enterprise. No specific form is prescribed for sale of electricity, natural gas or emission allowances. Therefore, the contracts may be concluded either verbally, in writing, in document[78] or electronic form[79]. The parties may also contractually agree that conclusion of a contract will require a specific form for its validity (*pactum de forma*)[80]. Moreover, the intent to conclude a contract may also be expressed by conduct that implies such intent. Under the Civil Code, in business relations lack of prompt response may be deemed an acceptance of the offer to conclude a contract (silent acceptance of the offer). Under the Civil Code[81] if an entrepreneur has received an offer to conclude a contract in the course of his business from a person with whom he has a regular business relationship, the failure to respond promptly shall be deemed acceptance of the offer.

Following from the general principle that there are no requirements as to the form of Individual Contracts, a signature is also not necessary. An Individual Contract shall be deemed concluded at the time when the parties reached an agreement on the essential terms, thus a Confirmation is not necessary for conclusion of a valid Individual Contract. This corresponds with § 3.2 of the EFET General Agreement which provides that a written Confirmation shall not constitute a requirement for a legally valid Individual Contract. In order to exclude the effect of a "silent acceptance of an offer" with regards to Individual Contracts, the application of Article 68^2 of the Civil Code should be excluded in § 3.2 of the EFET General Agreement.

Notwithstanding the above, executing the Individual Contract/Confirmation in writing is advisable in order to mitigate later disputes regarding the content of the agreement.

(b) At what point in time does an Individual Contract agreed upon verbally become legally binding or enforceable?

An Individual Contract agreed verbally becomes legally binding and enforceable as from the time when the offeror receives a declaration from the offeree that it accepts the offer.

Please note, that in the lack of exclusion of application of Article 68^2 of the Civil Code in the EFET General Agreement, the lack of prompt response to an offer to conclude an Individual Contract may be deemed as its acceptance, provided that:

(i) the offeree is an entrepreneur;

[78] A document form requires the declaration of will to be given in a form of document which allows to determine the person who has given that declaration. Thereby, a "document" is understood as being a carrier of information that makes it possible to read its contents (Arts. 77^2 and 77^3 of the Civil Code).

[79] An electronic form requires a declaration of will to be executed in electronic form and affixed with a qualified electronic signature. A declaration of will give in an electronic form is held equivalent to a declaration of will made in writing (Art. 78^1 of the Civil Code).

[80] Article 76 of the Civil Code.

[81] Article 68^2 of the Civil Code.

(ii) the offer was made in the course of the offeree's business;
(iii) the offer was made by an offeror with whom the offeree has a regular business relationship.

A declaration of acceptance may be substituted by a payment of the price, dispatch of the goods or other activity that may be deemed to constitute an acceptance of the offer based on customary practices between the parties.

(c) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?

As a rule, it is not possible to unilaterally change the terms and conditions of a binding agreement mutually pre-agreed by the parties. However, the Civil Code provides for an exception for contracts concluded in form other than in writing (in verbal or document form) concluded by entrepreneurs.

Under the Civil Code[82] if a contract entered into between entrepreneurs without written form, is immediately confirmed by one party in a written confirmation addressed to the other party, and that confirmation contains changes or additions to the contract which do not materially alter its terms and conditions, the parties shall be bound by the contract with the terms and conditions specified in the confirmation letter, unless the other party immediately objects in writing.

With a view to the above, we would strongly recommend reviewing the received Confirmations and communicating any discrepancies thereunder to the delivering party immediately on reception.

(d) Is the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the EFET General Agreement?

We are of the opinion that a reference to the EFET General Agreement entered into between the parties, as specified in the additional assumptions, is sufficient for the inclusion of the Individual Contract in the Agreement.

Pursuant to the Civil Code, the contracts are to be interpreted in accordance with the circumstances in which they were concluded, principles of social coexistence and the established customs. Thereby, the mutual intent of the parties and the purpose of the contract should be examined, rather than simply relying on the wording of the contract.

Notwithstanding the above, we would recommend including explicit references to the applicability of the EFET General Agreement in all Individual Contracts and Confirmations, where applicable.

C.IV.2 Means of Evidence

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[82] Article 77^1 of the Civil Code.

Assuming there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in court: (i) taped recording; (ii) witness' statement; (ii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant **to each form of evidence?**

Under the Civil Procedure Code, there is no closed catalogue of evidence, therefore the parties may use any means of evidence to support their statements in case of a court dispute. In particular, Article 309 of the Civil Procedure Code provides that the court applies the means of evidence other than those referred to in the Civil Procedure Code in accordance with the nature of such evidence, applying the provisions regarding evidence accordingly (other means of evidence).

Furthermore, the Polish Civil Procedure does not provide for any formal hierarchy of evidence. The court assesses the credibility and probative value of evidence at its own discretion, based on comprehensive consideration of available evidence[83]. However, certain types of documentary evidence have increased probative value. Official documents issued by the public or state authority within its scope of their competence, constitute evidence of the facts officially certified in them[84]. Private documents constitute evidence that a person who signed the document has given a statement specified in the document[85]. Evidence by testimony of a witness or examination of the parties against the contents of a document evidencing a legal act may be taken only:

- if it does not result in circumvention of a requirement of a specific form for the validity of such act, and
- where the court considers this necessary, considered specific facts of the case[86].

(i) Taped recordings

Taped recordings may be admitted as evidence under Article 308 of the Civil Procedure Code and taken by the court in accordance with the provisions regarding evidence from examination and documents. However, the court may refuse to hear such recording if the recording person did not consent to being recorded (secret recording). In our opinion, § 23.1 of the EFET General Agreement is sufficient to assert that such consent was given.

(ii) Witness statement

Under the general principle, the witness evidence is to be taken verbally. However, since 2019 the Polish civil procedure allows the witness testimony to be collected in the form of written statements.[87] Such statement may be admitted only if the court issues a prior decision on taking the witness testimony in writing. In such cases the witness statement should comprise responses to the questions provided to the witness by the court. A witness statement submitted to the court without a prior court decision of taking the witness evidence in the form

[83] Article 233 of the Civil Procedure Code.
[84] Article 244 of the Civil Procedure Code.
[85] Article 245 of the Civil Procedure Code.
[86] Article 246 of the Civil Procedure Code.
[87] Article 271^1 of the Civil Procedure Code

of written statements may be considered by the court as a private document[88] (Article 245 of the Civil Procedure Code).

(iii) E-Mail or another electronic message

Email or other electronic messages may be admitted as other means of evidence under the Civil Procedure Code.[89]

(iv) Facsimile

Under the Civil Procedure Code, the documents to which the parties refer to in their pleadings should be submitted in the court in the original[90]. Instead of the original document, a party may submit a facsimile certified as being a true copy of the original document by an attorney-at-law representing a party in a dispute[91]. A facsimile not certified as a true copy of the original document may be considered as other means of evidence under Article 309 of the Civil Procedure Code.

C.V CORE PROVISIONS

The following opinion is given based on the assumptions outlined under Part C.I.1., Part C.I.2. and Part C. II.

C.V.1 Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I. or C.II. above). As far as the EFET Credit Support Annex is concerned, you should particularly discuss the effect of electing to allow substitution with or without consent.

We understand that the Election Sheet provides for the alteration of the EFET General Agreement's provisions, which we have analysed and opine in Part C.I. and Part C.II. These are: (i) § 10.4 (*Automatic Termination*), (ii) § 10.5 (b) (*Cross-default and acceleration*), (iii) § 10.5 (c) (*Winding-up/Insolvency/Attachment*), (iv) § 10.5 (d) (*Failure to Deliver or Acceptance*), and (v) § 10.5 (*Other Material Reasons*) of the Election Sheet.

Modification of the above-mentioned EFET General Agreement's provisions will not affect the conclusions reached in this opinion on the Enforceability of Close-out Netting outlined in Part C.I.1.1. above and Multibranch Parties outlined in Parts C.II.1. and C.II.2. above.

C.V.2 Considering your conclusions reached under Part C.I. or Part. C.II. above, what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I. or C. II. (each provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.

We believe that the following provisions in the EFET General Agreement are the Core Provisions:

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[88] Article 245 of the Civil Procedure Code.

[89] Article Art. 309 of the Civil Procedure Code.

[90] Article 129 § 1 of the Civil Procedure Code.

[91] Article 129 § 2 of the Civil Procedure Code.

(i) § 10.3, § 10.4, § 10.5, § 11 with respect to the conclusions reached in Part C.I.1.1. above (Enforceability of Close-out Netting);

(ii) § 10.3, § 10.4, § 10.5 with respect to the conclusions reached in Parts C.II.1. and C.II.2. above (Multibranch Parties).

We are of the opinion that the modifications to any non-substantive provisions of the EFET General Agreement would not affect our conclusions reached in this opinion, provided that modifications of the non-substantive provisions do not materially alter the Core Provisions.

C.V.3 Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under Part C.I. or C.II.?

We are of the opinion that the safe-harbour provisions of the Bankruptcy Law (Article 85) will not apply to the principal agreement terminated pursuant to the Cross-Product Master Agreement and/or Master Netting Agreement.

The Bankruptcy Law does not recognise any netting arrangements other than close-out netting made under the individual contracts that are financial term operations of a financial nature (or the borrowing or sale of financial instruments containing an obligation to repurchase them) and entered into in accordance with the master agreement.

Although the Cross-Product Master Agreement provides for two steps close-out netting, the latter is the settlement amounts arising after the close-out netting performed under each master agreement separately, which is not the financial term operations that are netted. Thus, even if the Cross-Product Master Agreement could possibly qualify as a master agreement, the close-out netting provided for in the Cross-Product Master Agreement could be challenged in Poland. This is because a principal agreement terminated pursuant to the Cross-Product Master Agreement would be unlikely to be classified as an individual contract under Article 85 of the Bankruptcy Law.

C.VI GOVERNING LAW, ARBITRATION AND JURISDICTION

Our opinion is based on the assumptions included in the Instruction Letter and additional assumption that the relevant EFET General Agreement is governed by the laws of a jurisdiction other than Poland (including English or German law).

C.VI.1 Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Poland, and what would be the consequence if it were not?

(i) <u>Governing law</u>

The Polish International Private Law Act of 15 October 2015 ("**PIL Act**") incorporates the provisions of Rome I by reference. In accordance with Article 28 of the PIL Act the law applicable to obligations shall be determined in accordance with Rome I. Thus, Rome I indicates the applicable law in cases of contracts concluded with both EU- and extra-EU entities.

Under Rome I[92] the parties to a contract are free to choose the governing law applicable. Such a choice should be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

It should be noted that a choice of law may not restrict the application of the overriding mandatory provisions of the law of the forum. Overriding mandatory provisions are defined in Rome I[93] as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisations, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.

Furthermore, if at the time of the choice all other elements relevant to the situation are located in a state other than the state whose law has been chosen (e.g. Poland), then under Art. 3 (3) of Rome I, the choice of law by the parties shall not prejudice the application of provisions of the law of that state (Poland) which may not be derogated from by contract.

If the parties do not make a choice of the applicable law, the law applicable to the contract is to be determined in accordance with Art. 4 of Rome I.

(ii) Arbitration

Under the PIL Act the material validity of the arbitration agreement is to be determined in accordance with the law chosen by the parties[94]. As to the formal validity of the arbitration agreement, the required form is to be assessed in accordance with the law of the place of arbitration. However, it suffices that the form prescribed by the law of the state which governs the arbitration agreement is observed[95]. In accordance with the Civil Procedure Code, an arbitration agreement shall:

- specify the matter at issue or the legal relationship from which a dispute arises or may arise;
- be made in writing, an arbitration agreement is deemed to be made in writing if it is contained in a document signed by the parties or in an exchange of letters by means of distance communication which provide a record of the agreement[96].

If litigation before a Polish common court is initiated before the arbitration, the defendant may contest the jurisdiction based on a valid arbitration agreement before the defendant enters the defence on the merits of the case[97].

Foreign arbitration awards are recognised and enforced in Poland in accordance with the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10

[92] Article 3 of Rome I.
[93] Article 9 of Rome I.
[94] Art. 39 of the PIL Act.
[95] Art. 40 of the PIL Act.
[96] Arts. 1161 and 1162 of the Civil Procedure Code.
[97] Art. 1165 of the Civil Procedure Code.

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June 1958 (subject to reciprocity, i.e. provided that the award was issued in another contracting state).

(iii) Jurisdiction

Parties may also contractually submit a matter arising from a contract to the jurisdiction of a specific state.

The choice of jurisdiction of a court of EU Member State is regulated in the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels I recast**").

Under the Brussels I[98] recast the parties, regardless of their seat, may agree on jurisdiction of a court of a chosen EU Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreed jurisdiction might be excluded due to substantive invalidity of the contract. Under the Brussels I recast the agreement conferring jurisdiction shall be either:

- in writing or evidenced in writing;
- in a form which accords with practices which the parties have established between themselves; or
- in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The parties may also agree on jurisdiction of court another than a Member State court in accordance with the general provisions of the Civil Procedure Code. Under Art. 1105 of the Civil Procedure Code, the parties to a specified legal relation may agree in writing that any cases arising out of such relation involving property rights, shall fall under the jurisdiction of the courts of a foreign state, thus excluding the jurisdiction of Polish courts, if such an agreement is effective according to the law of that foreign state. The Civil Procedure Code provides a catalogue of matters which may not fall within the scope of such agreement, e.g. cases falling under the exclusive jurisdiction of Polish courts or consumer and insurance contracts. The agreement is to be made in writing. An agreement on jurisdiction is deemed to be made in writing if it is contained in a document signed by the parties or in an exchange of letters by means of distance communication which provides a record of the agreement[99].

The decisions of the foreign courts are enforced in Poland in accordance with the provisions of the Civil Procedure Code, the Brussels I recast and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007.

[98] Article 25 of the Brussel I.

[99] Article 1105^1 of the Civil Procedure Code.

In our opinion the provisions on choice of law and arbitration made in § 22.1 of the EFET General Agreement should be upheld in Polish courts. The parties may also contractually submit the disputes of the courts of another state provided that requirements under the Brussels I recast, or the Civil Procedure Code are met.

C.VII REGULATORY REGIME

This section contains information on the potential impact on the application of the provisions of the EFET General Agreement and the Individual Contracts by currency control standards or licensing and registration requirements (arising, for example, from Financial Instruments Act, Entrepreneurs Law or Energy Law), to the extent consistent with section VIII of the order.

In terms of registration requirements, the regulation of business activities by Polish law should be addressed first.

C.VII.1 Conducting business activity

In Polish law, the issue of conducting business activity is regulated in significant part by the Entrepreneurs' Law (effective date – 30 April 2018). The undertaking and performance of business activity by foreign entrepreneurs is regulated by the Act of 6 March 2018 on the Principles of Participation of Foreign Entrepreneurs and Other Foreign Persons in Business in the Territory of the Republic of Poland (that entered into force – 30 April 2018).

Foreign entities from EU Member States and EFTA countries that are parties to the Agreement on the European Economic Area (EEA) may undertake activities in the Republic of Poland on the same basis as Polish entities. Such a right is also granted to residents of countries other than Member States after fulfilling additional conditions. Other foreign entities from countries other than EFTA and the EU have the right to undertake and pursue economic activity in the territory of the Republic of Poland exclusively in the form of a limited partnership, limited joint-stock partnership, limited liability company, simple joint-stock company and joint-stock company, as well as to join them and to acquire shares and stocks in them.

As a rule, foreign entrepreneurs from states – parties to the EEA Agreement and on the basis of reciprocity from non-member states may conduct business activity in the territory of the Republic of Poland also in the form of branches, to the extent that they conduct such activity abroad. A branch of a foreign enterprise may operate in the territory of the Republic of Poland provided that it is registered in the relevant register of entrepreneurs and, unlike companies, it does not have a separate legal personality from the foreign enterprise.

Another form of activity of foreign enterprises in the territory of the Republic of Poland are representative offices. This form of activity, unlike companies and branches, is limited to promotional and marketing activities, however, the possibility of establishing representative offices is available to any foreign enterprise provided that it is registered in the relevant register.

According to the definition arising from the Entrepreneurs' Law, business activity is an organised profit-making activity, performed on its own behalf and in a continuous manner. The organised nature of the activity implies the use of specific tangible or intangible components, combined into one ordered complex capable of participating in economic trade. It also implies organisational activities confirming that the economic activity is not of a casual nature. It should be pointed out that registration in any form (be it a company under Polish law or a branch) constitutes a form of organisation of business activity.

C.VII.2 Licence requirements for trading electricity and natural gas

In the event that the conclusion of transactions under the EFET General Agreement were to be classified as a business activity, the company would be obliged to obtain a trading licence in order to carry them out within the territory of Poland. Trading within the meaning of the Energy Law is a business activity involving wholesale or retail trade in fuels or energy. The definition of trading therefore also applies to transactions regulated by the EFET General Agreement. The obligation to obtain a licence excludes, inter alia, transactions regarding electricity and gaseous fuels carried out on a commodity exchange and on a market organised by an entity which operates a regulated market in the territory of the Republic of Poland, done by commodity brokerage houses or brokerage houses conducting brokerage activities in respect of trading in exchange commodities. The licence may also be granted to entities established in the territory of EU Member States, EFTA (including Switzerland) or Turkey. In a situation where an entity has its registered office in a country other than those indicated above, it will be obliged to establish an entity operating under Polish law in the forms indicated above or in EU Member States, EFTA (including Switzerland) or Turkey.

It should be pointed out that also in a situation where the parties to the contract obtain a licence for trading in other countries, it is necessary to obtain a licence issued by the President of the ERA in order to trade in the territory of the Republic of Poland. Thus, in our opinion, whether in the EFET General Agreement or in writing each time an Individual Contract is executed, the parties should indicate in the territory of which country the delivery takes place.

In order to obtain a licence, an applicant with a registered office in the territory of the Republic of Poland or one of the above-mentioned countries is obliged to demonstrate that it has sufficient financial resources to guarantee the performance of its activity, has the technical capacity to guarantee the proper performance of its activity, ensures the employment of persons with appropriate professional qualifications and is not in arrears with tax payments. The grounds for not granting the licence are, inter alia, open liquidation or bankruptcy proceedings against the applicant, withdrawal of the licence within 3 years from the date of filing the application, conviction for a crime/fiscal offence, failure to register as a VAT payer.

Licences are granted for a fixed period of not less than 10 years and not more than 50 years, unless the applicant applies for a shorter period.

In our opinion, the mere conclusion of the EFET General Agreement does not constitute a concessionary act. The EFET General Agreement constitutes a framework agreement regulating the relationship between potential counterparties and the form of contracts, but the conclusion of the agreement does not result in an obligation on the parties to perform those contracts. In this respect, the EFET General Agreement is rather an expression of the parties' intention to regulate future relationships. According to the jurisprudence and doctrine of Polish Energy Law, if the signing of documents constituting letters of intent with customers does not yet lead to the generation of revenue, it does not mean that a party to such an agreement carries out concessionary activities. Such an interpretation is possible provided that such a letter of intent does not establish a requirement to incur liabilities[100]. In this respect, in our opinion, the mere conclusion of a framework agreement regulating relations between counterparties does not trigger the commencement of economic activity by the parties to the agreement and, consequently, the obligation to obtain a licence.

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[100] Verdict of Polish Court of Protection of Competition and Consumers No. XVII Ame 224/06 dated 25 May 2007

The granting of a licence may be made conditional on the applicant's submitting a performance security (insurance/bank guarantee, parent company guarantee etc.) to secure third party claims in connection with the performance of the activity covered by the licence. The amount of the security for the licence shall be set at an amount not lower than 1/12 of the highest planned annual revenue from the activity covered by the licence.

In addition, an entity intending to conduct business in the field of, inter alia, energy and gas trading may apply to the President of the ERA for a promise of a licence.

After obtaining a licence, the energy company is obliged to pay an annual licence fee to the state budget.

Energy enterprises operating under Polish law are also obliged to set tariffs, i.e. sets of prices and fee rates and the conditions for their application for gaseous fuels and energy (excluding electricity storage). According to the position of the Polish courts, a tariff is uniformly qualified in case law as a particular variety of a model contract.

At the same time, the President of the ERA, as of 1 July 2001, exempted companies with a licence to generate or trade in electricity from the obligation to submit electricity tariffs for approval. The exemption did not apply to companies holding at the same time a licence for the transmission and distribution of energy with regard to sales to end users directly from the company's network. This changed as a result of a communication issued by the President of the ERA on 31 October 2007, which exempted all energy enterprises with a licence to trade in electricity from the obligation to submit tariffs, including those with a licence for the distribution of electricity. It must be noted that due to procedural reasons that certain electricity trading companies are still obliged to submit tariffs household customers for approval by the President of the ERA.

The exemption in question was introduced in the form of issuing a written notice to the ERA President, but the Polish Supreme Court ruled on the effectiveness of such an exemption in its judgment of 20 September 2011. According to the thesis of the judgment, the Energy Law does not specify the procedure by which the President of the ERA exempts companies from the obligation to submit tariffs for approval, but the withdrawal of this exemption must take place in the same form. In the reasoning of the judgment, the Supreme Court did not contest the validity of the exemption of 1 July 2001, which indicates acceptance of the form in which the exemption took place. To the best of our knowledge, most of the companies operating in the market have adopted the above-mentioned position and apply prices in the market without tariff approval. We are not aware of any penalties imposed by the ERA for failure to submit tariffs (i.e. those that would be imposed contrary to the position expressed in the communication).

The prices of natural gas were exempted from the obligation to be approved by the President of the ERA partially on the grounds of the four communications of the President of the ERA issued in 2012 and 2013. However, the main scope of this obligation was removed by the judgment of the ECJ of 10 September 2015 (C-36-14) citing that existence of price control mechanisms on gas prices is violating to art 3 s. 1 of 2009/73 Directive. In 2022 Poland restated the duty to approve gas tariffs for certain price sensitive groups of final customers by the amendment to the Energy Law and later via a special Act of parliament introducing caps on the prices of gas for certain groups of final customers combined with the state subsidies covering gas delivery costs above the caps applicable till the end of 2027.

In conclusion, in our view, it should be considered that the obligation to submit electricity and gas trading tariffs for approval applies to prices charged from certain groups of price sensitive final customers.

C.VII.3 Obligation to sell on commodity exchanges

According to the Polish Energy Law, an energy company engaged in the gas trading is obliged to sell 55% of the yearly volume of gas imported to Poland (via interconnectors and/or LNG receiving terminals and/or from mining deposits) on commodity exchanges, on a regulated market, on an organised trading platform.

Amongst others, the volume of gas is exempted from the above obligation:

1. gas kept as a mandatory storage;
2. gas offset against gas exported from Poland;
3. gas sold to gas system operators for satisfaction of theirs statuary duties;
4. gas used for own needs of gas trading companies.

Under a special regulation of December 23, 2022 quota of the obligation to sell via a commodity exchange was lowered to 30% for 2022 and 2023.

The above restrictions would only apply in a situation where the gas trading company was a party to the EFET General Agreement and the transaction would take place outside the listed trading platforms. In such a situation, in our opinion, the gas trading company should include in the Individual Contract a statement of the origin of the gas from one of the sources exempted from the obligation to sell on the aforementioned platforms, indicating the origin of this source.

It should be noted, that the Polish Parliament on 29 September 2022 passed the amendment to the Energy Law lifting the obligation to sell e electricity on commodity exchanges.

C.VII.4 Obligation to purchase certificates of origin for renewable energy

As a rule, energy enterprises selling energy to end users each year are obliged to obtain and submit for redemption to the President of the ERA certificates of origin for electricity or biogas produced in renewable energy source installations. Such a requirement also applies to:

- industrial customers who consumed no less than 100 GWh of electricity in the year preceding the year of fulfilment of the aforementioned obligation – after submitting a declaration to ERA in this regard,
- final consumers who are members of a commodity exchange or a market organised by an entity operating a regulated market in the territory of the Republic of Poland, with respect to transactions concluded on their own behalf.
- brokerage houses for transactions concluded on behalf of end customers (excluding industrial customers).

The required amount of electricity resulting from redeemed certificates of origin confirming the generation of electricity from RES is expressed as a percentage and stated annually on the basis of the executive regulation to the RES Act (for 2023 - 12% of sold energy).

We point out that final consumers within the meaning of the Act are consumers who purchase fuels or energy for their own use. Own use does not include electricity purchased for storage or consumption for the purpose of electricity generation, transmission or distribution.

Therefore, in a situation where energy trading between parties to the EFET General Agreement is carried out between wholesale energy traders rather than end-users, there will be no obligation to purchase and redeem renewable energy certificates of origin. In this respect, the Individual Contracts may contain an additional security in the form of a declaration, on the basis of which the Parties confirm that they do not have the status of final consumer according to the Energy Law.

C.VII.5 Public Procurement Law

As regards the requirements under the Public Procurement Law, as a rule they cover state and local government budget sector entities and apply to contracts and competitions whose value is equal to or exceeds PLN 130,000.00. Other entities are also subject to the requirements of the public procurement law in certain situations. This is the case when they perform one of the sectoral activities on the basis of special or exclusive rights.

Such sector activities within the meaning of the Public Procurement Law include:

- the provision or operation of fixed networks intended to provide public services in connection with the production, transmission or distribution of electricity, gas and heat,
- the supply of electricity, heat or gas to the networks indicated above,
- the extraction of oil or gas and their natural derivatives, as well as lignite, coal and other solid fuels.

Production and wholesale and retail sale of energy to these networks are also included as supply and distribution.

We point out that the activities of subsidised entities that, among other things, carry out civil engineering contracts for works on distribution networks are also specified under the Public Procurement Law. Such contracts are not covered by the EFET General Agreement.

If the Individual Contracts under the EFET General Agreement do not meet the definition of sectoral activities under the Act, i.e., inter alia, their scope does not relate to the supply of energy on networks intended for the provision of public services on the basis of special or exclusive rights and they are not carried out by subsidised activities, they will not be subject to the procurement law regime.

C.VII.6 Foreign Exchange Law

With regard to currency control requirements, as a result of Poland's membership in the EU and the OECD and EEA, in principle there are no restrictions on money transfers between Poland and other countries that are members of the above organisations. Restrictions in this respect may apply to entities originating from other countries (third countries).

In accordance with Polish foreign exchange law, if transactions entered into under the EFET General Agreement are carried out by an entity with a registered office or branch in the Republic of Poland, the following activities, among others, will be restricted by the need to obtain a permit for :

- the export, dispatch and transfer to third countries of means of payment for the purpose of commencing or expanding business activities in those countries;
- the disposal and acquisition of receivables and other rights exercised through cash settlement, certain securities by third country entities.

As a rule, when transactions are concluded by entities from EU/EEA/OECD countries, transactions may be settled in any currency from the catalogue of convertible currencies maintained by the National Bank of Poland. The conclusion of transactions in currencies other than convertible currencies is subject to the obligation to obtain consent. The catalogue of convertible currencies currently has 128 Parts, and the main European currencies (including EUR, CHF, GBP, but also UAH and RUB) and USD are recognised as convertible currencies.

Where a contract is governed by Polish law, but settlements are to be made in EUR, there should be a provision in the contract directly excluding payment in PLN.

C.VII.7 Financial Instruments

With regard to the regulation of the Financial Instruments Act, it should be pointed out that financial instruments within the meaning of the Act are:

1. securities;
2. titles of participation in joint investment institutions;
3. money market instruments;
4. options, futures contracts, swaps, forward rate agreements, other derivatives whose underlying is a security, currency, interest rate, yield index, emission allowance or other derivative instrument, financial index or financial index that are exercised by delivery or cash settlement, excluding derivatives referred to in Article 10 of Regulation 2017/565;
5. options, futures, swaps, forward rate agreements and other derivatives whose underlying is a commodity and which are exercised by cash settlement or may be exercised by cash settlement at the option of one of the parties;
6. options, futures, swaps and other derivatives whose underlying is a commodity and which may be exercised by delivery, provided that they are admitted to trading on a financial instruments trading venue, with the exception of wholesale energy products traded on an OTF, which must be exercised by delivery;
7. options, futures, swaps, forward contracts and other derivatives not admitted to trading on a financial instruments trading venue whose underlying is a commodity and that may be exercised by delivery, and that are not for commercial purposes and have the characteristics of other derivative financial instruments;
8. derivatives concerning the transfer of credit risk;
9. contracts for difference;

10. options, futures, swaps, forward rate agreements and other derivatives relating to climate change, freight rates and inflation rates or other official statistics that are exercised by cash settlement or may be exercised by cash settlement at the option of one of the parties, as well as derivatives referred to in Article 8 of Regulation 2017/565 and others that exhibit characteristics of other derivative financial instruments;

11. emission allowances.

If transactions governed by the EFET General Agreement are executed outside trading venues, do not have the characteristics of financial instruments participating in a trading venue and are physically settled, with the exception of transactions in emission allowances, they will not constitute financial instruments under the aforementioned Regulation 2017/565.

However, in the case of emission allowances especially if the entity executes transactions on financial instruments or provides services regarding those instruments, it is obliged to obtain consent from Financial Supervisory Commission to run a brokerage house. This consent is not required, if such actions are considered ancillary to the entrepreneur's main business activity. In case the entity is willing to participate in such an exclusion, it is obliged to inform the Financial Supervisory Commission in this subject each year.

C.VII.8 Act against delays in commercial transactions

We also point out the requirement to apply the Act on Counteracting Excessive Delays in Commercial Transactions to the EFET General Agreement. The Act in question has introduced into the Polish legal order restrictions on the setting of payment periods when concluding contracts by entities carrying out business activities in Poland. Accordingly, the Act will also apply to electricity or gas trading transactions under the EFET General Agreement. The following are the requirements under the aforementioned Act to be borne in mind when entering into transactions:

1. If the parties to a commercial transaction, with the exception of a public entity that is a healthcare provider, have provided in the contract for a payment period longer than 30 days, a creditor that is not a large trader may claim statutory interest after the expiry of 30 days, calculated from the date of fulfilment of its performance and delivery to the debtor of an invoice or bill confirming the delivery of goods or the performance of a service, until the date of payment, but no longer than the due date of the monetary performance.

2. If the parties to a commercial transaction have not stipulated a time limit for payment in the contract, the creditor shall, without being summoned, be entitled to statutory interest for delay in commercial transactions after the lapse of 30 days, calculated from the date of fulfilment of his performance, until the date of payment.

At present, there is no uniform position in the doctrine confirming or denying the necessity of the Anti-Delay in Commercial Transactions Act in relation to options. Notwithstanding the above, however, the EFET General Agreement and the deadlines indicated therein are in principle in compliance with the Act in question. We additionally point out that § 13(2) of the EFET General Agreement with regard to the payment of the Premium does not contain a specific payment deadline. Such a date is to be agreed by the Parties each time in the Individual Contract. The Parties to the EFET General Agreement should therefore bear in mind the requirements indicated above with regard to payment deadlines when setting the deadlines for the Premium under the Individual Contract.

Pursuant to the above Act, where the rate of interest for delay has not been determined, statutory interest for delay is due in an amount equal to the sum of the reference rate of the National Bank of Poland and 10 percentage points (currently 16.75 %). However, when the debt bears interest at a higher rate, a party to the contract may demand interest for delay at that higher rate.

According to the Civil Code, the maximum value of interest may not exceed twice the statutory interest for delay on an annual basis. If this is the case, the maximum interest for delay is due. Interest in excess of the indicated maximum level is unenforceable.

C.VIII OTHER PROVISIONS

If you have other recommendations that you would like EFET member companies to consider (for example, to fully optimise the EFET General Agreement for a specific purpose, such as to support limited trading between two entities both organised and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex at the end of your final opinion letter.

C.VIII.1 Telephone Call Recording and Data Protection

Pursuant to § 23.1 of the EFET General Agreement, the Parties grant each other permission to record telephone calls made in connection with the performance of the EFET General Agreement and confirm that they have obtained all necessary employee consents for recording. We point out that the above provision may not be sufficient regarding data protection requirements under the EU General Data Protection Regulation (GDPR) 2016/679. Given that a telephone call is made to an individual and personal data may be processed in connection with the call, in our opinion, the EFET General Agreement should include a clause stating that any processing of personal data shall take place on the basis of and in accordance with the General Data Protection Regulation. In addition, all GDPR-related requirements (e.g. information obligation, consent or other legal basis for processing, etc.) should be observed by the parties.

C.VIII.2 Presumption of delivery

As is apparent from § 23(2) of the EFET General Agreement, delivery of documents may take place after certain days have elapsed from the date of its despatch i.e. delivery if delivered by hand, posting if sent by first class mail, and/or transmission if send by facsimile. In this respect, however, the EFET General Agreement does not address the issue of actual receipt by the addressee. However, it should be noted that if the addressee were able to prove that service was effected on a different date, it is highly likely that the Polish courts would recognise the date of actual service of the letter instead of the date on which the fiction of service under the EFET General Agreement occurred.

C.VIII.3 Binding provisions of the EFET General Agreement

Pursuant to § 23.4 of the EFET General Agreement, in the event that any provisions of the agreement would become invalid or void in any way, the validity of the remaining provisions would not be affected. Pursuant to the Polish Civil Code, in a situation where any provisions of a contract become invalid or otherwise unenforceable, the remaining provisions are binding on the parties provided that it does not follow from the circumstances of the case that without the validity of the aforementioned clauses the parties would not have entered into such a contract. Thus, in a situation where any provision of the EFET General Agreement would be deemed to be unenforceable, the relevance of such a provision to the parties should be reviewed on a case-by-case basis. In this regard, we point out the potential inapplicability of § 23.4 of the EFET General Agreement in a situation where it is clear that the absence of provisions in the Agreement that have ceased to bind the parties as originally drafted would result in their unwillingness to conclude the Agreement.

C.VIII.4 EFET General Agreement as General Conditions of Contract

As follows from the Polish Civil Code, general terms and conditions of contracts are binding on the parties if they have been delivered to the parties prior to the conclusion of the contract. Furthermore, if the use of a template is customary, it also binds the parties if the other party could easily learn of its contents. It is also possible for one party to incorporate the EFET General Agreement into an ongoing contract of a continuing nature as general terms and conditions, provided that the other party does not terminate it at the earliest possible date.

It should be noted, however, that the parties to the EFET General Agreement can generally agree to modify or exclude certain provisions of this agreement, including the use of general terms and conditions under Polish law. Any modification or exclusion of provisions must be expressly agreed upon by all parties to the EFET General Agreement and clearly stated in the contract. They should also comply with Polish law and regulations.

We also point out that in the event that provisions contrary to the EFET General Agreement are included in the Individual Contracts, they would take precedence over the Agreement in accordance with the Civil Code.

C.IX ADDRESSEES

This Opinion is addressed exclusively to EFET and is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities, and may not be relied upon by, or disclosed to, any other person or legal entity without the prior written approval of EFET or Wolf Theiss P. Daszkowski sp.k.,and may be made available by EFET members to the appropriate regulatory authorities. Furthermore, this Opinion may be made available by any EFET member to a professional chartered auditor engaged by that EFET member, but exclusively on a non-reliance basis, hence this Opinion may not be relied upon by any such auditor.

C.X EXECUTIVE SUMMARY

Please refer to page 5 of this Opinion.

* * *

Yours faithfully,

Igor Muszyński
Partner

Joanna Gąsowski
Counsel

DEFINED TERMS AND INTERPRETATION

Unless otherwise specified in the Opinion, the terms defined in the General Agreement and in the Instruction Letter have the same meaning in this Opinion and for the purposes of this Opinion.

"**Bankruptcy Law**" means the statute dated 28 February 2003 (as amended) – the Bankruptcy Law.

"**Capital Requirements Directive**" means Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

"**Civil Code**" means the statue dated 23 April 1964 (as amended) – the Civil Code.

"**Civil Procedure Code**" means the statute dated 17 November 1964 (as amended) – the Civil Procedure Code.

"**Collateral Directive**" means Directive 2002/47/EC of the European Parliament and of the Council on financial collateral agreements.

"**Commercial Companies Law**" means the statue dated 15 September 2000 (as amended) - the Commercial Companies Code.

"**ECB**" means the European Central Bank.

"**EEA**" means the European Economic Area.

"**Entrepreneurs Law**" means the statute dated 6 March 2018 (as amended) – Entrepreneurs Law.

"**EMIR**" means Regulation (648EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

"**Energy Law**" means the statute dated 10 April 1997 (as amended) – the Energy Law).

"**EU Insolvency Regulation**" means Regulation EU 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast).

"**European Restructuring Directive**" means Directive EU 2019/1023 of the European Parliament and of the Council of the European Union on preventive restructuring framework, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 of 20 June 2019.

"**Financial Collateral Law**" means the statute dated 2 April 2004 (as amended) on Certain Financial Collaterals.

"**Financial Instruments Act**" means the statute dated 29 July 2005 (as amended) on trading in financial instruments.

"**MiFID**" means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and

Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

"**MiFID II**" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

"**Multibranch Party**" means a party which operates for the purposes of the General Agreement with two or more branches and in two or more jurisdictions.

"**Party**" means a party to the Agreement.

"**Public Procurement Law**" means statute dated 11 September 2019 – Public Procurement Law

"**Restructuring Law**" means the statute dated 15 May 2015 (as amended) – restructuring law.

"**RES Act**" – means the statute dated 20 February 2015 on Renewable Energy Sources.

"**Resolution Directive**" means Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012 of the European Parliament and of the Council.

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

"**Winding-up Directive**" means Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on reorganisation and winding up of credit institutions.

APPENDIX A

Types of Counterparties

The following are limitations on the enforceability of close-out netting depending on the status of Party A.:

- No restrictions
- Some restrictions may apply
- Significant restrictions

Types of counterparties	Definition	Polish law restrictions
Corporations	Legal entities such as: a limited liability company (*Polish*: spółka z ograniczoną odpowiedzialnością, abbrev. sp. z o.o.) or a joint stock company (*Polish*: spółka akcyjna, abbrev.: S.A.) organised under Polish law, except for the corporations subject to certain regulations and established based on the Statute.	
Partnerships (e.g. a general or limited partnership)	Legal entities such as: a general partnership (*Polish*: spółka jawna) and a limited liability partnership (*Polish*: spółka komandytowa) organised under Polish law.	
Domestic Banks	Banks organized under Polish law. They can be established as state-owned banks, cooperative banks or banks in the form of joint stock companies.	***NOTE:** banks are not allowed to engage in activities other than explicitly allowed by law.*
Credit Institutions	Institutions referred to in Article 4 (1) (1) of Regulation No. 575/2013, having their registered office in the territory of a member state other than Poland.	Polish courts do not have jurisdiction over bankruptcy cases involving credit institutions or foreign investment companies doing business or having assets in Poland.

		The netting will be governed by the law applicable to contractual obligations, applicable to the netting agreement.
Investment service providers/ investment firms	As defined in Article 3, point 33) of the Act of 29 July 2005 on trading in financial instruments as a brokerage house, a bank conducting brokerage activities, a foreign investment firm conducting brokerage activities in the territory of Poland, and a foreign legal person with its seat in the territory of a country other than a member state, conducting brokerage activities in the territory of Poland.	The investment funds do not have insolvency or restructuring capacity; therefore, some limitations may apply under the rules governing the liquidation of an investment fund.
Insurance companies	As defined in Article 3, point 39) of the Act of 29 July 2005 on trading in financial instruments in connection with Article 3.1, point 18) of the Act of 11 September 2015 on Insurance and Reinsurance Activity, an insurance undertaking conducting business with a license in the field of personal insurance, property insurance and reinsurance on the basis of a contract, which undertakes to provide adequate benefits in the event of the consequences of random events. An insurance company may conduct insurance business in Poland only in the form of a joint stock company, a mutual insurance company or in the form of a European company (SE).	Some limitations apply due to the obligation to create a separate bankruptcy estate to satisfy claims under reinsurance contracts and the costs of liquidating the bankruptcy estate. *NOTE: insurance companies are not allowed to engage in activities other than insurance and directly related activities (with some exceptions).*
Investment funds management companies	As defined in Articles 38 and 45 of the Law of 27 May 2004 on investment funds and management of alternative investment funds, as a joint-stock company based in the territory of the Republic of Poland that has been authorised by the Financial Supervision Commission to engage in the business of establishing open-ended investment funds or foreign funds, managing them, including intermediating in the sale and repurchase of participation units, representing them to third parties and managing an aggregate securities portfolio.	

Other financial institutions	a) Cooperative savings and credit union (Polish: *Spółdzielcza Kasa Oszczędnościowo-Kredytowa*); b) pension fund, c) brokerage house, d) trust fund	
Municipalities or counties	Means a local government unit is a local or regional self-governing community. Each unit has a statutorily prescribed legislative, controlling and executive body. The Polish system provides for three levels of local government units: municipality (*gmina*), county (*powiat*) and province (*województwo*).	Neither municipalities nor counties has insolvency capacity. *NOTE:* *1) As a rule, municipalities or counties may not carry out economic activities outside the performance of tasks of a public nature only exceptionally subject to detailed requirements;* *2) in practice, municipalities rarely engage in commodity and derivative trading.*
Associations of local governments (*Polish: związku metropolitarne, związku gminne*)	Mean registered associations (legal persons) formed for the purpose of promoting the idea of local self-government and defending the common interests of their members, which may be: a municipality (*gmina*), a county (*powiat*) and a province (*województwo*).	Associations of local governments do not have insolvency capacity; therefore, certain limitations may apply under the rules governing the liquidation of such associations. *NOTE: in practice, associations of local governments rarely engage in commodity and derivative trading,*
Publicly-owned corporations	Mean "municipal" companies in which shares are held exclusively by local government units; companies controlled directly or indirectly by the State Treasury or other state legal entities.	
Quasi-governmental entities		In general, quasi-governmental entities may not have insolvency

	Mean private entities that are financed from public funds due to their activity in the public interest.	capacity at all, so some restrictions may apply due to specific statutory provisions for the liquidation of such entities. *NOTE: in practice, quasi-governmental entities rarely engage in commodity and derivative trading.*

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APPENDIX B

Types of transactions under the EFET General Agreement

- No restrictions;
- Some restrictions;
- Significant restrictions.

For the purpose of the table below, the terms should be understood as follows: "Natural Gas" as defined in Annex 1 to the EFET General Agreement Gas; "Emissions Allowances" as emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC; "Green certificates" as proprietary rights stemming out of the certificates of origin for energy derived from renewable sources.

Types of transaction	Commodity	Eligible for close-out netting if Bankruptcy Law or Restructuring laws was to apply
Commodity Forward A transaction in which one party agrees to purchase from or sell to the other party a specific quantity of a Commodity at a future date in exchange for payment of an agreed price to be set on a specified date in the future. The transaction may be settled by physical delivery of a specified quantity of Commodity in exchange for a specified price or it may provide for cash settlement with payment calculation based on the quantity of the Commodity and settled based on, among other things, the difference between the agreed forward price and the prevailing market price at the time of settlement.	Electricity or Natural Gas Emission Allowances Green certificates	YES
Commodity Option A transaction in which one party grants the other party (in consideration for a premium payment) the right, but not the obligation, to	Electricity or Natural Gas	YES

purchase (in the case of call) or sell (in the case of put) a specified quantity of a Commodity at a specified strike price. An option may be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by settling the option in cash, in which case the seller of the option pays the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.	Emission Allowances	
	Green certificates	
Commodity Swap A transaction in which one party pays periodic amounts in a given currency based on a fixed price and the other party pays periodic amounts in the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity; all calculations are based on a notional quantity of a commodity. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.	Electricity or Natural Gas	**YES**
	Emission Allowances	
	Green certificates	
Other Physical Commodity Transaction A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.	Electricity or Natural Gas	**YES**
	Emission Allowances	
	Green certificates	

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APPENDIX C

BANKRUPTCY PROCEEDINGS OVERVIEW

Unless otherwise specified, this Section describes the relevant bankruptcy proceedings, laws and terminology applicable to Party A, which is incorporated or organised or has its main centre of interest in Poland.

I BANKRUPTCY PROCEEDINGS UNDER THE GENERAL PRINCIPLE

1. Grounds for bankruptcy declaration - bankruptcy tests

Under the Bankruptcy Law dated 28 February 2003 (the "**Bankruptcy Law**"), bankruptcy should be declared with respect to a debtor who has become insolvent. A debtor is deemed to be insolvent when:

(i) it has lost the ability to perform its monetary obligations as they fall due (the "**Liquidity Test**"). A debtor is presumed to be no longer able to pay its liabilities as they fall due if the delay in the payment of liabilities exceeds three months; or

(ii) its liabilities exceed the value of its assets (regardless of whether the debtor is performing its obligations in a timely manner) and this situation continues for more than twenty-four months (the "**Assets Test**").

The Assets Test does not include future liability, liability which is subject to a condition precedent, or liabilities owed to a partner or a shareholder in respect of a loan or any other legal transaction having similar effects. Also, it is presumed that the debtor's liabilities exceed the value of the debtor's assets if pursuant to the debtor's balance sheet, its liabilities, excluding provisions for liabilities and liabilities owed to related entities, exceed the value of its assets, and this situation continues for more than twenty-four months.

2. Entities entitled to file a motion for declaration of bankruptcy to the court

A motion for declaration of bankruptcy may be filed with the court by the debtor itself or by any of its creditors.[101]

Under Polish Law the debtor should file a motion for declaration of bankruptcy within thirty days of meeting the Liquidity Test and/or Asset Test criteria. If the debtor is a legal entity acting through its board of directors[102], each director will be obliged to file a motion for the company's bankruptcy within thirty days from the time he or she becomes aware, or by exercising diligence should have become aware, of the company's insolvency. This obligation applies to both former and current directors of the debtor's management board.

Any member of the Polish debtor's management board who fails to file a motion for declaration of bankruptcy to the court within the required time period may be liable for damages resulting from such failure (in particular, such a member of the management board will be liable towards the creditors), may

[101] The court fee for filing the motion for bankruptcy is PLN 1,000 (approximately EUR 250).

[102] Such as a limited liability company.

in some cases become liable for payment of the debtor's debts, and may also be subject to criminal liability.

3. Consequences of filing the bankruptcy motion

Upon filing of a motion for the declaration of bankruptcy, the court may appoint (upon a request or acting *ex officio*) an interim court supervisor[103]. In principle, the members of the management board retain the right to manage the debtor's affairs until the declaration of bankruptcy. However, the debtor's actions exceeding the scope of the ordinary course of business will require an approval of the interim court supervisor.[104]

The bankruptcy court may also suspend the enforcement proceedings pending against the debtors and/or lift the attachment of a bank account if the objectives of the bankruptcy proceedings so require.

4. Procedure of selling the bankrupt's enterprise

4.1 General remarks

Once the debtor is declared bankrupt, it will be obliged to forfeit the right to administer, use and dispose of its assets. The bankruptcy court appoints a bankruptcy administrator - trustee ("*syndyk*"), who takes possession of the bankruptcy estate, administers it and conducts its liquidation. A court-appointed judge-commissioner supervises the trustee's actions. The creditors' council, if appointed, may also take part in the proceedings.

The trustee may liquidate bankruptcy estate by: (i) the sale of all or an organised part of the bankrupt's enterprise; (ii) the sale of immovable property; (iii) the sale of movable property or the pledgee's takeover of movables encumbered by a registered pledge; (iv) a collection of claims from the bankrupt's debtors and execution or transfer of its other property rights included in the bankruptcy estate.

The amounts obtained from the liquidation of the bankruptcy estate, income earned from running or leasing the bankrupt's enterprise, as well as the interest on those amounts, constitute the funds of the bankruptcy estate. The creditors will be then satisfied by the distribution of the bankruptcy estate funds.

Generally, under the Bankruptcy Law there are two types of enterprise sales: a court auction or tender and a free-hand sale (an unrestricted sale).

While a court auction or tender requires a public announcement of the planned sale and the results are reached at a court hearing in front of judge-commissioner, a free-hand sale is a more flexible way of bankruptcy sale that allows the trustee an unrestricted choice and easy involvement in negotiations with potential buyers.

A bankruptcy administrator may also sell an enterprise in a free-hand sale procedure upon the prior approval of the creditor's council or a judge-commissioner (if there is no creditor's council), under the supervision of the judge-commissioner.

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[103] Not to be confused with the bankruptcy administrator appointed by the court following the declaration of bankruptcy.

[104] The consent may be also granted up to 30 days from the date of the particular action.

Market practice shows that free-hand sales have proved to be a more effective and flexible procedure for the sale of assets than sales in court auctions. However, in our practice we came across the situations where, in the absence of creditor's council, judge-commissioners were unwilling to grant the approval for a free-hand sale and preferred to proceed with a court auction or tender.

4.2 Lease of the enterprise

The sale of bankrupt's business may, upon the consent of a judge-commissioner, be preceded by a lease of the enterprise for a specified period of time and be subject to the right of first refusal for the lessee, if there are business reasons for such a sale.

4.3 Satisfaction of the claims secured by the registered and/or financial pledge

The Bankruptcy Law provides for the possibility of satisfying a creditor secured with a registered pledge by such creditor's takeover of the ownership right to the encumbered assets. Such satisfaction is possible only if the agreement establishing the registered pledge so provides. It should be noted, however, that this manner of satisfaction will not be possible if the trustee sells the bankrupt's business as a going concern, and the asset encumbered with the registered pledge constitutes part of that business.

4.4 The sale agreement

The ownership title to the assets composing the enterprise will be transferred only upon execution of the sale agreement by the bankruptcy administrator. The trustee should enter into the sale agreement within the time limit specified by the judge-commissioner, but not later than within four months after the selection of the winning bidder is approved by the judge-commissioner.

Under Polish law the bankruptcy administrator may only enter into the sale agreement once it receives the full price for the assets. Therefore, there is a potential, albeit extremely remote, risk that after the payment of the sale price (and the disbursement of the loan) the title to these assets would not be transferred to the Investor This would also create a risk to a potential financing bank whose exposure would not be secured with the mortgage and/or other available security on the assets. Please note, however, that the lack of transfer would mean that the bankruptcy administrator does not fulfill its crucial obligation (which seems rather unlikely) and such a risk may be excluded by using an escrow mechanism.

Taking into account the above, the Investor will have to pay up-front and will not be allowed to proceed with any set-offs against its claim (if any) submitted to the bankruptcy estate (a "credit bid"). If the Investor does not enter into the sale agreement due to its fault, the judge-commissioner will issue a decision announcing a new tender or auction. In this case, the Investor would be disqualified from participating in a new tender or auction.

4.5 Valuation report

Before the sale of the debtor's enterprise, the judge-commissioner (upon the trustee's motion) will appoint an expert who prepares the description and valuation of the enterprise and its organised parts, provided that such valuation has not already been done while drafting the inventory list and valuation of the bankruptcy estate.

The description of the enterprise specifies, in particular, the object of the enterprise operation, real property belonging to the enterprise, including its area and the indication of the land and mortgage register or a set of documents, other fixed assets, ascertained rights, as well as encumbrances.

If some parts of the enterprise are encumbered with a mortgage, pledge, registered pledge, tax lien, as well as with personal rights and claims, the appraisal has to indicate separately which of those rights remain in force after the sale. Also, the appraisal has to indicate their value and the value of the encumbered assets, as well as the proportion between the value of these rights and the value of the enterprise.

4.6 Legal effects of selling the bankrupt's enterprise by the bankruptcy trustee

A sale of enterprise conducted by the trustee in the bankruptcy proceedings has the same effect as a sale by the court enforcement officer (bailiff) which means that the purchaser acquires such an enterprise free from any claims and encumbrances (except for any easements established on the real property) and it is not liable for the bankrupt's obligations. Also, the purchaser of the bankrupt's enterprise is not liable for any bankrupt's tax obligations even if such obligations were created after the declaration of bankruptcy.

All licences, permits, approvals and exemptions granted to the bankrupt will be transferred to the purchaser of the enterprise, unless a law or the decision on granting such licence, permit, approval or exemption provides otherwise.

5. Consequences of the bankruptcy declaration under Polish law

(i) Stay of proceedings

On the date of the declaration of the bankruptcy, enforcement proceedings (whether court or administrative) against the bankrupt are suspended by operation of law if they were commenced prior to the declaration. The sums obtained under the suspended enforcement proceedings are transferred to the bankruptcy estate. In the final stage of bankruptcy proceedings, enforcement proceedings are discontinued by operation of law when the ruling concerning the declaration of the bankruptcy becomes non-appealable.

Moreover, during pending bankruptcy proceedings no enforcement proceedings concerning the bankrupt's assets included in the bankruptcy estate may be commenced.

(ii) Further encumbrances of the assets

After declaration of bankruptcy, the debtor's assets forming part of the bankruptcy estate cannot be encumbered with a mortgage, pledge, registered pledge, etc. with the purpose of securing receivables created before the declaration of bankruptcy.

(iii) Credit agreements

On the date of the declaration of bankruptcy, a credit agreement expires if the creditor did not make the funds available to the bankrupt entity prior to that declaration. In this case, the creditor may seek damages (if any) by submitting its claim to the bankruptcy estate. If only a part of the funds was made available to the debtor prior to the date of the declaration of debtor's bankruptcy, the bankrupt forfeits the right to demand the payment of the remaining funds.

The declaration of the bankruptcy will not affect any agreements with the banks to operate the debtor's bank accounts and/or securities accounts.

6. Pursuing the creditors' claims from the bankruptcy estate

(i) Submitting the creditor's claims

Claims in the bankruptcy proceedings are any monetary claims against the debtor that are due as of the date of the bankruptcy declaration. Non-monetary obligations are converted into monetary obligations and become payable as of the date the bankruptcy is declared, even though their performance may not be due yet.

After the declaration of the debtor's bankruptcy, the creditors will be entitled to purse its claims only in the bankruptcy proceedings. Lawsuits initiated against the debtor before the declaration of bankruptcy may be resumed by the creditors against the trustee (and not the bankrupt) only if, after exhausting all legal means available under the Bankruptcy Law, the creditors' claims are still not recorded on the list of claims.

The bankrupt's creditors who wish to participate in the bankruptcy proceedings will be obliged to present their claims to the trustee together with all supporting evidence105 within the time limit specified in a bankruptcy court decision.

The secured creditors[106] such as mortgagee and/or pledgee may also file their claims with the judge-commissioner, but if they fail to do so, their claims will be recorded on the list of claims *ex officio*. This would apply also to the situation when the bankrupt is not personally liable for its debt, but due to establishing the security over its assets to secure someone else's debt.

(ii) Recording the claims on the list of claims

The trustee will verify the claims pursuant to the bankrupt's books and statements. Finally, the trustee will prepare a draft list of claims in which the trustee acknowledges and/or denies particular claims. A claim denominated in a foreign currency, notwithstanding its due date, will be recorded on the list of claims after being converted into the Polish currency at the average foreign exchange rate of the National Bank of Poland in force on the date of the declaration of bankruptcy or, if no such rate is available, at the average market price prevailing on that date.[107]

(iii) Challenging the list of claims

The creditors whose claims were rejected (in part or in total) may file an objection with the judge commissioner within two weeks from the date of the announcement of the list of claims. In addition, the creditors are entitled within the same period of time to file an

[105] The creditor files his or her claims with the judge-commissioner who only examines the formal elements of filing and passes it to the trustee who examines the claim on the merits.

[106] I.e. creditors whose claims are secured by a mortgage, pledge, registered pledge, treasury pledge, maritime mortgage or by any other entry in the land and mortgage register or in the register of vessels.

[107] Recording on the list of claims of a claim converted into the Polish currency should not result in a conversion of a liability denominated in foreign currency into a liability denominated in the Polish currency.

objection with the judge commissioner as to the recognition of the claim of another creditor and recording it on the list of claims. Subsequently, the creditors whose objections were dismissed or rejected have the right to appeal to the bankruptcy court.

If neither the bankrupt nor any of its creditors files an objection to a list of claims or the court issues a final and not binding decision in the appeal proceedings initiated by such filing, the judge-commissioner approves the draft list of claims. The final list of claims specifies the amount (in the Polish currency) of each claim to be satisfied from the bankruptcy estate.

7. Satisfaction of creditors' secured and unsecured claims in the bankruptcy proceedings

7.1 Creditor bias

The bankruptcy regime in Poland has a pro-creditor bias. Pursuant to a general rule of the Bankruptcy Law, bankruptcy proceedings must be conducted in a manner enabling creditors' claims to be satisfied to the greatest possible extent. In general, the Bankruptcy Law governs the principles of joint collection of debts by creditors and provides that the joint interests of the creditors prevail over the interests of the debtor, whose assets have to be used to satisfy creditors to the greatest possible extent.

In case of the declaration of bankruptcy the creditor will be allowed to satisfy its claims only pursuant to the rules provided in the Bankruptcy Law.

7.2 Satisfaction of secured creditors in the bankruptcy proceedings

(i) General remarks

Creditors' claims secured on the bankrupt's assets by a mortgage, pledge, registered pledge, fiscal pledge, as well as other rights and claims secured on real property, will be satisfied from the amount received from the sale of the encumbered assets decreased by the costs related to the liquidation of the assets or other costs of the bankruptcy proceedings in an amount not exceeding one-tenth of the proceeds of the liquidation.[108]

Secured claims will be satisfied from the encumbered assets together with interest, the latter being subject to certain statutory limits. Claims will be satisfied in order depending on their priority. As a general rule, the claims secured earlier on an asset will be satisfied prior to those secured later on the same asset.

If the secured claims have not been satisfied in total from the collateral, their remaining portions will be satisfied according to the satisfaction categories applicable to non-secured claims.

(ii) Satisfaction of the claims secured by the registered and/or financial pledge

The Bankruptcy Law provides for the possibility of satisfying a creditor secured with a registered pledge by such creditor's takeover of the ownership right to the encumbered assets. Such satisfaction is possible only if the agreement establishing the registered pledge so provides. It should be noted, however, that that manner of satisfaction will not

[108] But not more than such portion of the costs of bankruptcy proceedings that results from the proportion in which the value of the encumbered asset remains to the value of the entire bankruptcy estate.

be possible if the trustee sells bankrupt's business as a going concern, and the asset encumbered with the registered pledge constitutes part of that business.

A similar rule will apply to a financial pledge[109] established under the agreement for the establishment of financial collateral under Polish Law. If there is a basis for enforcement of the financial pledge, the pledgee may be allowed to satisfy its claims by selling the collateral, offsetting or netting the funds deposited in the account with the secured claim, or, if the contract for the establishment of financial security so provides, by taking over the collateral. The above methods of satisfaction will be possible only if the agreement establishing the financial pledge so provides.

The secured creditor (pledgee) has a right to acquire the asset encumbered with a registered and/or financial pledge, even if such an asset is in the possession of the trustee. The judge-commissioner should set a time limit (not shorter than one month) for the creditor to exercise such a right. After the expiry of the designated time, the trustee sells the pledged asset and distributes the sale proceeds to the secured creditor. However, as mentioned above, the secured creditor does not have a right to acquire the ownership of the encumbered asset if the trustee sells such an asset as a going concern and the asset encumbered with the registered pledge constitutes part of that business.

If the pledgee or a third party is in possession of an asset encumbered by a registered and/or financial pledge, the pledgee should notify the trustee about the taking over the ownership of such an asset (provided that a secured creditor chooses this way of satisfaction). The judge-commissioner may set a relevant time frame for the pledgee to have its claim satisfied from the pledged asset. If the pledgee fails to do so within the specified time frame, the person who is in possession of the property encumbered with the registered and/or financial pledge will be obliged to release the pledged asset to the trustee. Then the trustee sells the pledged asset as soon as the same is delivered to the trustee and distributes the proceeds from the sale to the secured creditor – the pledgee.

Given the above, takeover of financial instruments by the pledgee (including securities and derivatives) following the bankruptcy of the debtor could be possible in case of the instruments recorded on a securities account or other account (i.e. uncertificated security). The same would apply to cash deposited in a bank account encumbered with a financial pledge. The secured creditor should be allowed to take over such cash, even if the bankruptcy trustee sold the bankrupt's business as a going concern (please see our remark above). What is important, the trustee is not allowed to sell the bankrupt's business along with the cash deposited in the bankrupt's accounts. Such cash is used to cover the costs and obligations incurred after the declaration of bankruptcy and to satisfy creditors' claims.

However, the lack of extensive practice and some inconsistency among the provisions of the Bankruptcy Law may raise certain doubts about the enforcement by a secured creditor of its right to acquire the encumbered assets. Especially, if it involves releasing to the creditor a substantial amount of money deposited in the bankrupt's account and/or there

[109] A pledge available only to the financial institutions and some other listed types entities. The agreement for the establishment of financial security sets out the financial claims to be secured and the method of securing. The financial pledge may be established on the rights to the funds deposited in the bank accounts, loan receivables or on financial instruments.

is dispute whether the creditor submitted a valid statement about the acquisition and/or in a timely manner.

Although such a situation is rather unlikely, the Bankruptcy Law does not address the case in which the trustee being in possession of the encumbered asset refuses to release such collateral to the secured creditors (especially cash sitting in an account). On the other hand, the trustee is entitled to conduct the enforcement proceedings[110] against the secured creditor (or a third party) holding the collateral, if the creditor chooses not to acquire ownership of such asset or submit its statement in this respect after designated deadline.

Moreover, the Bankruptcy Law provision referring to the secured creditors' right to satisfy their claims from the collateral lists: mortgage, pledge, registered pledge, fiscal pledge, and maritime mortgage, without mentioning a financial pledge. Some legal commentators indicate that a pledge refers to both a civil law pledge[111] and the financial pledge. However, despite the lack of any good reason for leaving the financial pledge out of the list, such inconsistency creates a risk that the trustee may not be willing to release the cash collateral to the pledgee. Especially, when he is requested to release a substantial amount of money that is crucial to cover the cost of the bankruptcy proceedings.

On the other hand, the trustee is a licensed bankruptcy and restructuring professional and is liable for the damage caused to the creditor by its actions and the trustee would bear its personal liability in mind in case he/she decided to obstruct the actions of a secured creditor.

Regardless of the above, Polish law also provides for other ways of securing the account on which financial instruments other than security are registered, including blocking the account. The financial pledge provisions are applicable to this type of security. Similarly, the Bankruptcy Law does not list an arrangement for blocked account as a security allowing a creditor to satisfy its claim directly from the funds blocked on the debtor's account. Therefore, we may not exclude a situation when the trustee does not recognise the arrangement as the security and requests that the funds should be returned to the bankruptcy estate.

(iii) Satisfaction of the claim secured by the transfer of the debtor's ownership right

If a creditor's claim is secured by the transfer of the debtor's ownership right to a movable asset, the assignment of a receivable or other right, the creditor's claim may be satisfied from such security, provided that the agreement creating the security was concluded in writing with a certified date. Otherwise, the transferred or assigned assets are a part of the bankruptcy estate and the creditor may only be satisfied according to the categories of satisfaction applicable to non-secured claims.

7.3 Satisfaction of the unsecured creditors

After the liquidation of the bankruptcy estate, the claims indicated in the list of claims will be satisfied according to the following categories:

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[110] Based on the judge-commissioner decision.

[111] Regulated by the Civil Code.

- *first category*: amounts payable under employment contracts (other than claims for remuneration filed by the bankrupt's representative or other persons managing or supervising the bankrupt's business), workers' compensation claims, disability or death benefits and benefits for conversion of a right to lifetime annuity into a lifetime pension, for the period preceding the declaration of bankruptcy, as well as social security for the last three years preceding the declaration of bankruptcy, and amounts resulting from actions performed by the administrator in restructuring proceedings, or amounts resulting from actions performed by the debtor after the opening of restructuring proceedings that did not require the approval of the *creditors'* committee or the court supervisor, amounts under a facility, loan, security, guarantee, letter of credit or any other type of financing provided under an arrangement adopted in restructuring proceedings and granted in relation to the implementation of such arrangement, if the bankruptcy was declared upon hearing of a bankruptcy petition filed not later than three months after the said arrangement was finally set aside;

- *second category*: other *amounts* payable if they are not to be satisfied under the other categories, in particular taxes, other public levies and social security contributions;

- *third category*: interest on the amounts that fall in the categories of higher priority, to be satisfied in the same order in which the *principal* amount is to be satisfied, as well as court and administrative fines and amounts resulting from donations;

- *fourth category*: amounts due *to* partners or shareholders under a loan or any other legal transaction having similar effects, in particular the supply of goods with a deferred payment date, granted to, or performed with, the bankrupt being a commercial company within five years prior to the declaration of bankruptcy, plus interest.

  The claims included in a higher category must be fully satisfied before the claims in a lower category may be satisfied. If the financial means in the bankruptcy estate are not sufficient to fully satisfy all the claims included in the same category, they must be satisfied proportionally.

  It should be noted that liquidation of the bankruptcy estate and submission of creditor's claims are two separate procedures. Often the list of claims is prepared by the trustee long before the liquidation of the bankruptcy estate. Especially, if the judge-commissioner (upon the trustee's motion) appoints an expert in order to prepare the description and valuation of the enterprise and its organised parts before its sale.

7.4 Set-off

Once the court declares bankruptcy, the set-offs by creditors with the debtor's liabilities may only be made on the terms and conditions specified in the Bankruptcy Law. Claims of the bankrupt may be set-off against a claim of the creditor if both claims existed on the day of declaration of bankruptcy, even if one of them is not yet enforceable. The bankrupt's claim is presented in the full amount and that of the creditor only in the amount equal to the principal amount of claim and interest accrued till the date of the declaration of bankruptcy.

A set-off of mutual claims between the bankrupt and the creditor is not allowed if the creditor becomes a debtor of the bankrupt subsequent to the declaration of bankruptcy or, being a debtor of the bankrupt, became his creditor after the declaration of bankruptcy through the acquisition of claims by transfer or endorsement which arose prior to the declaration of bankruptcy.

A creditor desiring to exercise the right of set-off will have to make a statement to that effect no later than at the time of filing the claim.

7.5 Hardening periods under the Bankruptcy Law

The security instruments and legal transactions performed by the bankrupt may in certain circumstances be considered ineffective against the bankruptcy estate, if the motion for bankruptcy of the debtor is filed within a term specified in the Bankruptcy Law, counted from the date of the legal transaction in question.

In particular, legal transactions performed by the bankruptcy within one year before the filing for the bankruptcy performed gratuitously or for inadequate consideration (e.g., in case the value of the bankrupt's performance greatly exceeds the value of its or a third party's compensation) will be ineffective against the bankruptcy estate.

Also, any security or payment of undue debt made by the bankrupt within six months before the filing for the bankruptcy will be ineffective against the bankruptcy estate, provided, however, that the creditor who received the security interest may file a claim to confirm that such establishment of security interest was valid, if at the time of security establishment such a creditor was unaware of the grounds for bankruptcy.

The above hardening periods would not apply if the security was established before the declaration of bankruptcy, in connection with future and forwards transactions, loans of financial instruments or sale of financial instruments with an obligation to repurchase.

Moreover, the judge-commissioner acting upon trustee's motion will declare a mortgage and/or registered pledge over a bankrupt's assets as ineffective against the bankruptcy estate if the bankrupt was not personally liable for the debts secured with such a registered pledge or mortgage (for example, when the debtor established a registered pledge to secure a creditor's claim towards a third party), provided that the registered pledge was established within a year before the filing of the petition for a declaration of bankruptcy and the bankrupt did not receive any consideration in connection with the establishment of such a registered pledge or the value of such consideration was not commensurate with the value of the registered pledge.

Further, regardless of the value of the consideration received by the bankrupt, the judge-commissioner should declare the above referred encumbrances as ineffective if they secure the debts of the parent company, unless the other party demonstrates that the creditors incurred no loss.

7.6 Contractual clauses invalid or ineffective under the Bankruptcy Law

Under the Bankruptcy Law, any provisions of an agreement stipulating that a solvent party may terminate, modify, or rescind the agreement if the counterparty files for bankruptcy or the court declares its bankruptcy, are invalid.

In addition, under the Bankruptcy Law, any provision of an agreement that makes achieving the purpose of the bankruptcy proceedings (i.e. satisfaction of the creditors to the fullest possible extent) impossible (or making it harder to achieve), is ineffective against bankruptcy estate. Legal commentators point out that this provision of the Bankruptcy Law could potentially apply, in particular, to any contractual restrictions regarding sale of the debtor's assets (such as receivables or shares in other companies) or to agreements on the basis of which third parties receive consideration from the debtor's counterparty instead of from the debtor. In our practice, we came across a court's decision applying it extremely broadly to an entire agreement and the underlying security. In that case, a guarantee issued by the debtor securing the debtor's parent debt under a credit agreement was declared ineffective against the bankruptcy estate of the debtor to the extent the debtor did not benefit from the loan agreement entered into by its parent (and secured by the debtor by way of a guaranty).

It is debatable whether the application of this provision by the court could be mitigated in any way (and, if so, by providing some kind of compensation to the mortgagor and/or pledgor for securing a third party's debt at the time of establishment of the security).

II OVERVIEW OF PRE-PACKED BANKRUPTCY

1. General remarks

A pre-packaged sale of an enterprise is a type of a partially expedited bankruptcy procedure introduced to the Bankruptcy Law in 2016 as a new legal option for investing in distressed assets. Within the pre-packaged sale the disposal of all or part of company's business or assets is negotiated with a purchaser before filing for the bankruptcy declaration and appointing of a bankruptcy administrator. The terms of a pre-pack are approved by the court simultaneously with the declaration of bankruptcy. Shortly after the declaration of a company's bankruptcy, an administrator effects the sale of debtor's business.

Although the sale in the pre-packed bankruptcy has not been much tested under Polish law, such a sale should allow an investor to purchase the distressed assets free of any encumbrances in a fairly short period of time without engaging into the lengthy bankruptcy proceedings.

2. Filing for the pre-packed bankruptcy

In order to proceed with the pre-packed bankruptcy, a debtor or its creditor has to file, along with a motion to declare bankruptcy, a motion to approve the terms and conditions of sale of debtor's business. The investor alone (that is, not a creditor of a debtor) does not have a legal standing for filing such a motion. In practice, a motion for pre-packaged sale is usually filed by the debtor.

A motion to approve the conditions of sale has to be accompanied by the valuation report prepared by a licensed appraiser whose name is entered onto the list of appraisers maintained by the court and proof of deposit payment by the buyer in the amount of one-tenth of the offered price. The appraiser may be chosen by the petitioner. There are two essential elements that need to be indicated in a motion to approve the terms and conditions of sale: (i) the sale price; and, (ii) the name of the potential purchaser. It is also admissible (as long as these two elements are indicated) to attach to the motion a draft sale agreement to be entered into by the purchaser with the bankruptcy administrator.

Additionally, the motion to approve the conditions of sale may include a request for releasing the debtor's business on the same date when the bankruptcy is declared, provided that the offered price will be placed in a court deposit. It should be noted, however, that releasing the business on the date of bankruptcy will mean that only the possession of business will pass to the purchaser at that point in time. The ownership title to the assets composing the business will be transferred only upon execution of the sale agreement by the bankruptcy administrator. Until such time, the purchaser manages the business on its own risk.

3. Auction

If there are more parties interested in buying the debtor's enterprise and at least two applications for approval of the terms of sale have been filed, the temporary court supervisor (or forced administrator), under the supervision of the court, shall conduct an auction between the buyers to select the most favourable terms of sale.

4. Sale of the debtor's business in pre-pack

The bankruptcy court will grant the motion to approve the terms and conditions of sale if the offered price is greater than the price that could likely be achieved in the course of regular (liquidating) bankruptcy proceedings after deducting the costs of proceedings that would be incurred in such a sale.[112] It seems that, when making a decision, the court will have to consider such costs as: the preparation of a valuation report with respect to the debtor's enterprise, scheduling the auctions by the bankruptcy administrator and also a loss of business value over time. The law is not clear who should calculate these costs, whether they should be included in the valuation report or just estimated by the bankruptcy court when reviewing the motion to approve the sale of debtor's business. If a debtor and purchaser are affiliated entities, then the sale price of debtor's business in a prepacked bankruptcy may not be lower than the value estimated by the appraiser appointed by the court.

5. Executing the sale agreement

Like in the bankruptcy proceedings under the general principal, in pre-packaged sale the ownership title to a debtor's business will pass only upon the execution of the sale agreement between the purchaser and bankruptcy administrator. The bankruptcy administrator will enter into the sale agreement based on the conditions provided in the court's decision not later than 30 days from the date the court decision has become final and non-appealable.[113] The administrator may execute the sale agreement only after the purchaser (approved by the court) has paid the full purchase price. It means that neither a "credit bid" nor deferred payment is allowed in the pre-packed bankruptcy.

6. Distribution of pre-packaged sale proceeds

The distribution of pre-packaged sale proceeds is conducted the same way as the sale of bankrupt enterprise in the bankruptcy proceedings under the general principles. Creditors' claims secured on debtor's assets will be satisfied from the amount received from the sale of the encumbered assets decreased by the costs of the sale. Secured claims, such as mortgagee's claims are to be satisfied from the encumbered assets together with interest, the latter being subject to certain statutory limits. Claims are satisfied in order depending on their priority. As a general rule, the claims secured earlier on an asset are to be satisfied prior to those secured later on the same asset. In principle, unsecured creditors are satisfied only after a full satisfaction of secured creditors although it is conceivable that the administrator will apportion certain proceeds of pre-packed sale (corresponding to the sold non-collateralised assets) to the unsecured pool.

7. Challenging the motion to approve the terms and conditions of sale

A court decision dismissing the motion for approval of the terms of sale may be challenged by the party that filed such a motion. The court decision approving the sale of debtor's business may be challenged by any of its creditors. It means that either of the bankrupt's creditors will be allowed to file a complaint against such a decision and potentially delay the execution of the sale agreement between the Investor and bankruptcy administrator (the trustee).

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[112] If the pre-packaged sale generates the proceeds in a value close to the proceeds that could likely be obtained in the regular bankruptcy proceedings the court may but does not have to approve the motion for approval of the sale.

[113] Unless the terms of sale approved by the court provided for a different date for executing the sale agreement.

8. Changing or setting aside the court's approval

Within the timeframe set for the execution of the sale agreement, the bankruptcy administrator is entitled to file a motion to change or set aside the court's decision approving the terms and conditions of sale, provided that after the date of such a decision certain circumstances have occurred or changed that could substantially influence the value of the assets that are subject to the sale in pre-packed bankruptcy. The court decision issued as a result of the bankruptcy administrator's motion to change or set aside the court's decision approving the conditions of sale may also be challenged which may also delay the execution of the sale agreement.

9. No transfer of assets before the payment (executing the sale agreement)

The ownership title to the debtor's business will pass only upon the execution of the sale agreement between the buyer and bankruptcy administrator. The trustee will enter into the sale agreement based on the conditions provided in the court's decision not later than 30 days from the date the court decision has become final and non-appealable.[114] The administrator may execute the sale agreement only after the purchaser (approved by the court) has paid the full purchase price. It means that neither a credit bid, nor deferred payment is allowed in the pre-packed bankruptcy.

10. Procedure associated with the list of claims, distribution plan, and remuneration of the bankruptcy administrator

After the execution of the sale agreement with respect to the debtor's business, a bankruptcy administrator will be obliged to prepare a list of claims[115] and then a distribution plan with respect to the proceeds of sale. Each of those may be challenged by the debtor and its creditors the same way as it could be done in the bankruptcy under the general principles.

At this stage, the bankruptcy procedure will not affect the buyer's right to take over the debtor's business, but its timeframe would be crucial for the bankrupt's creditors to get money back paid to the bankruptcy estate for the enterprise.

III. OVERVIEW OF THE POLISH RESTRUCTURING LAW

The Restructuring Law regulates four proceedings aimed at restructuring a debtor: (i) proceedings for approval of an arrangement, (ii) accelerated arrangement proceedings, (iii) arrangement proceedings, or (iv) deep reform restructuring proceedings.

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[114] Unless the terms of sale approved by the court provide for a different date for execution the sale agreement.

[115] The creditors are obliged to present the bankruptcy administrator with their claims together with all supporting evidence. The bankruptcy administrator verifies the claims pursuant to the debtor's books and statements. Based on this information and documents the bankruptcy administrator drafts the list of claims.

Restructuring proceedings may be requested by the debtor and, in the case of deep-restructuring proceedings, also by a creditor. The prerequisite for initiating such proceedings is the insolvency of the debtor (understood in the same way as described above for bankruptcy) or the mere threat of insolvency.

The structure of the restructuring proceedings is designed to reflect the rule of so-called "gradation", where the scope of protection given to the debtor and restructuring instruments available in the relevant proceedings correspond with the scope of managerial powers that the debtor needs to give up.

1. Proceedings for approval of an arrangement

This is the least formalized restructuring proceedings, allowing for restructuring activities to be carried out minimizing court involvement to the greatest extent possible. The debtor remains in possession, prepares arrangement proposals, sets the arrangement day and collects creditors' votes on the arrangement without the involvement of the court. Claims arising after the arrangement day are not included in the arrangement.

The arrangement supervisor prepares arrangement proposals for creditors and also gathers the necessary votes of creditors who are in favor of the arrangement proposed by the debtor and the supervisor. Once the required number of votes has been collected, the debtor submits to the court an application for approval of the arrangement, which should also include, among other things, the contents of the complete arrangement proposals and the restructuring plan prepared by the arrangement supervisor. From the date of the decision to approve the arrangement until the date it becomes final, the arrangement supervisor should exercise the powers of a court supervisor. This means that the debtor will be able to perform ordinary management activities. In order to perform actions exceeding the scope of ordinary management, the debtor will be required to obtain the approval of the court supervisor, unless the law provides for the approval of the board of creditors.

This type of proceedings is available for debtors whose contested liabilities do not exceed 15% of their total debt and who are capable of obtaining on their own (i.e. without court participation) approvals for the arrangement terms from creditors whose votes constitute at least two thirds of all creditors.

Only a limited stay of enforcement is introduced in the period between the court's approval and the ruling becoming final and non-appealable. However, after the preparation of the inventory of claims, the inventory of disputed claims and the preliminary restructuring plan, the supervisor of the arrangement may make a public announcement of the appointment of the arrangement day. In such a case, enforcement proceedings relating to claims covered by the arrangement initiated before the date of the opening of the proceedings for approval of the arrangement and the announcement are suspended by operation of law. It is also impermissible to initiate enforcement proceedings after the announcement has been made.

From the date of publication of the announcement about the arrangement date, the debtor has exactly four months to collect the ballots and file with the court an application for approval of the arrangement. The ballot may be conducted using electronic means of communication or in the form of a traditional meeting.

If, within four months from the date of the announcement, the debtor does not apply to the court for approval of the arrangement, the effects of the announcement (i.e. among others stay of the enforcement) expires by operation of law.

Proceedings for approval of the arrangement are recommended primarily for debtors at risk of insolvency.

2. Accelerated (fast-track) arrangement proceedings

It is a simplified and accelerated form of an arrangement proceedings. The course of accelerated arrangement proceedings and arrangement proceedings is supervised by the restructuring court. The difference between these proceedings is primarily that the accelerated arrangement procedure can only be conducted if the sum of disputed claims does not exceed 15% of the sum of claims entitled to vote on the arrangement. If the sum of disputed claims exceeds 15%, then restructuring can only be carried out in arrangement or sanitation proceedings.

In fast-track arrangement restructuring proceedings creditors will deliver their votes directly to the court. The entire proceedings are intended to be fairly informal. As a general rule, the debtor remains in possession but under certain conditions the court may revoke their right to administer their property and appoint an administrator. In the accelerated arrangement procedure the debtor may conduct matters not exceeding the scope of ordinary course of business. In other cases, i.e. in matters exceeding ordinary management or in cases of undertaking restructuring activities, the debtor is required to obtain the approval of a court supervisor.

Enforcement proceedings concerning receivables covered by the arrangement are suspended by virtue of law.

In the proceedings for the opening of accelerated arrangement proceedings, it is not possible to secure assets under the provisions of the Restructuring Law. However, this does not preclude the debtor from filing an application with the restructuring court to secure the debtor's assets under the provisions of the Code of Civil Procedure.

3. Arrangement proceedings

For debtors who are unable to meet the above criterion, the Restructuring Law provides for a possibility to initiate arrangement proceedings carried out pursuant to the current rules applicable to bankruptcy proceedings with the possibility of arrangement. However, the debtor's right to manage its enterprise will be limited (i.e. supervised by a court supervisor).

Unlike in accelerated arrangement proceedings, the court may decide to secure the debtor's assets by appointing a temporary court supervisor before the arrangement proceedings are opened. In addition, the court may, at the request of the debtor or the temporary court supervisor, suspend enforcement proceedings conducted for the purpose of enforcing receivables covered by the arrangement by law, and revoke the seizure of a bank account, if this is necessary for the restructuring proceedings.

During the arrangement proceedings the debtor remains in possession. The debtor may conduct matters not exceeding the scope of ordinary administration. In other cases, i.e. in matters exceeding ordinary management or in cases of undertaking restructuring activities, the debtor is required to obtain the approval of a court supervisor.

The court may revoke the debtor's self-administration and appoint an administrator if the debtor intentionally violated the law in the exercise of management, resulting in harm to creditors or the possibility of such harm, his method of performing management does not guarantee the implementation of the arrangement, or if the debtor does not comply with the instructions of the judge-commissioner or court supervisor, in particular, does not submit arrangement proposals in accordance with the law in a timely manner.

Enforcement proceedings concerning receivables covered by the arrangement are suspended by virtue of law.

4. Deep-reform restructuring proceedings

Deep reform restructuring proceedings (*postępowanie sanacyjne*) is the most creditor-driven restructuring proceeding in Poland under the Restructuring Law. It is available to debtors regardless of the percentage of contentious claims.

These proceedings are intended to enable deep economic restructuring of the debtor's assets and obligations. A motion for opening the deep reform proceedings may be filed with the court by the debtor or any of its creditors. Those proceedings will provide for the best protection for the debtor's assets from its creditors. However, on the other side the debtor will in principle have to forfeit the management to the administrator, subject to certain debtor in possession exceptions.

Upon opening of the deep reform proceedings, the restructuring, court will immediately appoint an administrator of the Company's estate and the Company will be obliged to forfeit the management to the administrator. The administrator will take the possession of the Company's estate.

The administrator in those proceedings will be equipped with business improvement tools similar to those of a trustee in bankruptcy proceedings. These include the avoidance of contracts unfavorable to the debtor, adjustment of level of employment and sale of redundant assets free and clear or encumbrances.

Within 30 days form the opening of the deep reform proceedings, the administrator in the cooperation with the Company will have to submit the restructuring plan to the judge-commissioner. The judge-commissioner will approve the restructuring plan after the opinion of the creditor's council. The voting on the scheme of arrangement will only take place if the restructuring plan is fully implemented within 12 months from the date of opening of the deep reform proceedings.

With the consent of the judge-commissioner, the administrator may rescind a reciprocal agreement that has not been executed in whole or in part before the date of the opening of proceedings. The administrator may also dispose of the components of the debtor's estate with the consent of the judge-commissioner.

During the deep-reform restructuring proceedings, a creditor may not carry out enforcement against the debtor, and initiated enforcement proceedings against the debtor will be suspended by law. However, the opening of the deep-reform restructuring proceedings does not exclude the possibility of the creditor to initiate judicial, administrative, administrative court and arbitration court proceedings in order to assert the claims subject to inclusion in the list of claims.

Within the framework of such proceedings it will also be possible for instance to adjust the employment level to the needs of the reorganised undertaking (the rules so far reserved for bankruptcy proceedings will apply) or to rescind disadvantageous reciprocal contracts ("cherry picking right") which so far has been the privilege of a receiver in liquidation bankruptcy proceedings.

As a general rule, the debtor loses the right to administer their property, however the Restructuring Law provides for the possibility of the debtor to manage its assets (under certain conditions) within the scope of the debtor's ordinary management activities. The court appoints an administrator who takes over the administration of the debtor's enterprise and has broader powers than in other types of restructuring proceedings. At the same time, the debtor gains the widest scope of protection against creditors.

It should be pointed out that the restructuring court will deny opening the deep reform proceedings if the company is not able to pay its current debt. So, it seems that in a situation when the company will not have any fast liquidating assets and/or any cash funds, the chances that the court will open the deep reform proceedings are fairly remote.

The court will also refuse to open restructuring proceedings if the effect of the proceedings would be to harm creditors. The above-mentioned negative prerequisite for opening restructuring proceedings is quite general and gives the restructuring court a lot of room for interpretation. In each case, however, the court should keep in mind the purpose of restructuring, which is to avoid bankruptcy of the debtor while securing the legitimate interests of creditors, whose participation is a condition for achieving the purpose of restructuring. Bearing in mind the interpretation of the concept of "creditor harm" adopted by the case law as a factual state of the debtor's assets that results in the impossibility or hindrance or delay of creditor satisfaction, it could be argued that an arrangement inherently involves harm to creditors. Nevertheless, if the alternative to an arrangement would be little creditor satisfaction in bankruptcy, then an arrangement is a phenomenon that is beneficial to the creditor.

At the same time, it seems that it would be detrimental to creditors to restructure a debtor who is fully solvent and not at risk of insolvency (or seemingly at risk of insolvency). It could also be detrimental to creditors to open restructuring proceedings of an insolvent debtor if it is clear that the debtor has no prospects of concluding or executing an arrangement.

5. Scheme of the arrangement

The restructuring law lists various ways of restructuring the debtor's business such as: (i) deferring performance of obligations, (ii) dividing the payments into instalments, (iii) reducing the total amount of debts, (iv) debt-for-equity swaps, (v) changing, replacing or waiving a security interest that secures the specific claims. However, the reorganisation can be conducted in any manner permissible by law. The scheme of the arrangement may also provide for satisfying the creditors through liquidation of the debtor's business.

Arrangement proposals may also provide for the satisfaction of creditors through the liquidation of the debtor's assets. However, the asset sold in performance of an arrangement which provides for the satisfaction of creditors by liquidation of the debtor's assets is not free of any claims and encumbrances. Therefore, such a sale does not have the same effect as a pre-package sale.

In general, the scheme of arrangement is adopted if it is supported by a majority of the voting creditors from those holding together not less than two thirds of the total amount of claims allowed to participate in the meeting. For the purpose of voting on the arrangement the creditors may be divided into groups based on the categories of their claims. The concluded scheme of arrangement is subject to a court approval.

6. Protection against creditors

In all proceedings, with the exception of proceedings for the approval of an arrangement, if there is no announcement on the determination of the arrangement day, a debtor may be granted protection against its creditors. All enforcement proceedings concerning claims covered by the arrangement will be stayed by operation of law upon the commencement of fast-track or ordinary restructuring proceedings. Such protection against enforcement goes even further in deep-reform proceedings, where a stay of all pending enforcement proceedings and a prohibition on commencing any new proceedings may also encompass creditors holding in rem security interests on the assets of the distressed undertaking (which, as a rule, are not covered by the arrangement).

Furthermore, the bank must not terminate a credit agreement entered into with a company under restructuring in reference to the events arising prior to the commencement of restructuring proceedings. The Restructuring Law also provides for an express prohibition with regard to the termination of tenancy and lease agreements concerning real property where the entity under restructuring conducts its business operations (debtor's premises). The above prohibitions are applicable respectively to lease and insurance agreements, bank account agreements, sureties, guarantees and letters of credit issued before the institution of restructuring proceedings.

7. Stricter rules for hardening security interests

Furthermore, the scope of current sanctions regarding the ineffectiveness of a debtor establishing security interests at the "pre-bankruptcy" stage has been extended to cover "pre-deep-reform restructuring". The Restructuring Law provides for the possibility of declaring the ineffectiveness of "overcollateralised" security interests, i.e. part of the collateral which on the date it is established exceeds the value of consideration received by the debtor by more than half and was established within a year before the motion for the institution of deep-reform restructuring proceedings was filed.

The abovementioned hardening periods will not apply to financial pledges and some other types of securities specified in the Financial Collateral Act.