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11 OCTOBER 2018

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# LEGAL OPINION

# ON THE

# EFET GENERAL AGREEMENT

# CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

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EFET
European Federation of Energy Traders
Amstelveenseweg 998
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11 October 2018

Dear Sirs,

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

## 1. SCOPE OF ROLE/DOCUMENTS EXAMINED

### 1.1 Introduction

We have been requested, as legal advisers to the European Federation of Energy Traders (**"EFET"**) in their instruction letter (the "**Instruction Letter**") sent to us by mail of 13 July 2018 to render an opinion in respect of the laws of The Netherlands (**"this jurisdiction"**) on certain specific issues relating to the validity of the EFET Power Contract and the relevant Annexes and Appendices (all as defined below) pertaining thereto.

### 1.2 Documents examined

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

(a) as if Clause 22.1 of the EFET Power Contract were adjusted to provide for the law of this jurisdiction to govern the EFET Power Contract;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For purposes of paragraphs 4.39 and 4.40 only:

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

For purposes of paragraphs 4.41, 4.42 and 4.43 only:

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

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

1.3 **Interpretation**

In this Opinion, unless otherwise specified:

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

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

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

1.3.4 "**Automatic Stay**" has the meaning set out in paragraph 5.7;

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

1.3.6 "**BRRD**" means the EU Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (as amended).

1.3.7 "**BRRD Entity**" means a type of entity that is within the scope of the resolution regime under the Implementation Act and/or the SRMR and

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

includes (provided they qualify as a Counterparty under paragraph 2.1.1 above):

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

(ii) a Dutch Investment Firm which is subject to the initial capital requirement of article 28(2) CRD IV (a "BRRD Investment Firm");

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

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

(v) a Third Country Credit Institution or Third Country Investment Firm where DNB has refused to recognise the actions of a third country resolution authority in accordance with article 96 BRRD in which case the Dutch branch of that Third Country Credit Institution or Third Country Investment Firm is subject to the Implementation Act.

A "**BRRD Entity**" may include Dutch Companies and Dutch Insurance Companies if they qualify under (iii) or (iv) above.

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

1.3.9 "**COMI**" means the centre of main interests, as defined in article 3(1) of the EU Insolvency Regulation;[2]

1.3.10 "**Commencement Time**" means that in Insolvency Proceedings, a judgment of bankruptcy, moratorium or Emergency Measures and in

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

Preservation Proceedings, a judgment approving Transfer Measures has retroactive effect as from 00.00 hours of the day of the judgment;

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

1.3.12 **"CRD IV"** means EU Directive 2013/36/EU of the European Parliament and 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;

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

1.3.14 **"Custodian"** means a legal owner entity (*bewaarentiteit*)[3] represented by the Manager where both are acting for the account of an FGR Investment Fund;

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

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

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

1.3.18 **"Dutch Companies"** means entities which are a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and which have their COMI in The Netherlands at all relevant times (not being a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, an Investment Fund, a BRRD Entity, DNB or an entity that is a parent company of or affiliated with a Dutch Insurance Company[4] and not otherwise subject to any type of regulation that might affect our Opinion);

1.3.19 **"Dutch Credit Institution"** means a company that is (i) validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*), a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or a cooperative

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

[4] Transfer Measures can be applied to Dutch Insurance Companies ***and their Dutch parent companies*** (see paragraph 4.1 and Appendix A). In addition, the preparation, application and implementation of certain crisis management measures (or their foreign equivalents) in respect of a Dutch Insurance Company will stay the rights of a Party in respect of its transactions with that Dutch Insurance Company (***or with any entity incorporated under Dutch law which is part of the same group as the insurance company***). See the analysis in paragraph 5.7 below.

*(cooperatie)* and (ii) has a license to engage in the business of a Credit Institution pursuant to article 2:12 of the FMSA;

1.3.20 **"Dutch Insurance Company"** means a company that (i) is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and (ii) has a license to engage in the business of an insurance company pursuant to article 2:31 of the FMSA (not being a BRRD Entity);

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

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

1.3.23 **"EEA Credit Institution"** means an EEA undertaking duly incorporated or organised under the laws of another EEA member state and which qualifies as a credit institution under EU Banking Co-ordination Directive (2006/48) (recast), but which is not a Dutch Credit Institution and which has obtained a banking license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

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

1.3.25 **"EEA Investment Firm"** means an undertaking duly incorporated or organised under the laws of another EEA member state, not being a Dutch Investment Firm and which qualifies as an investment firm under article 4(1) of Directive 2004/39/EU on markets in financial instruments and which has obtained an investment firm license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

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

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

1.3.28 **"Emergency Measures"** means the administration procedures (*noodregeling*) imposed by a Dutch Court pursuant to the FMSA in respect of certain Regulated Entities which are a substitute procedure to the BA's moratorium of payments (*surseance van betaling*);

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

1.3.30 **"EU Insolvency Regulation"** means the EU Council Regulation No. 2015/848 on insolvency proceedings, an EU Council Regulation which applies to all EU member states other than Denmark;

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

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

1.3.33 **"financial collateral arrangement"** means an arrangement defined as such in the FCA Law where the parties thereto are qualifying parties for the purposes of such rules and the charged or transferred assets are "financial collateral" as defined by such FCA Law;

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

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

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

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

1.3.38 **"Implementation Act"** means the provisions incorporated into the FMSA and the BA that implemented the BRRD into Dutch law.

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

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

1.3.41 **"Intervention Measures"** means (i) transfer measures within the meaning of Chapter 3.5.4A of the FMSA in respect of a Dutch Insurance Company or its parent company if established in this jurisdiction (*overdrachtsregeling*, **"Transfer Measures"**) and (ii) nationalisation measures within the meaning of Chapter 6 of the FMSA (*bijzondere maatregelen*, **"Nationalisation Measures"**) in respect of a Dutch Credit Institution, a Dutch Insurance Company, a Third Country Credit Institution, a Third Country Insurance Company, a Dutch Investment Firm and an Investment Fund;

1.3.42 **"Investment Fund"** means either (i) a Cusodian[5] represented by the Manager, where both are acting for the account of a mutual investment fund (*fonds voor gemene rekening*; an **"FGR Investment Fund"**), or (ii) an investment company (*beleggingsmaatschappij*) represented by a Manager (hereinafter an **"Investment Company"**), where (a) each such Custodian, Manager or Investment Company, as the case may be, is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*, or N.V.; which will always be the case for Investment Companies), a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, or B.V.) or a foundation (*stichting*, which will normally be the case for Custodians) and (b) has a license to engage in such business under the FMSA (or is exempt from the requirement to have such a licence) or otherwise meets the requirements imposed by the FMSA (or is exempt from such requirements). These Investment Companies and FGR Investment Funds may qualify as a UCITS (under Directive 2009/65/EC on the Coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended) or an Alternative Investment Fund (under Directive 2011/61/EC on Alternative Investment Fund Managers, as amended; hereinafter an **"AIF"** and together with a UCITS **"Regulated Funds"**), but may also be unregulated (**"Unregulated Funds"**);

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

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

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

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

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

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

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

1.3.49 **"Partnership"** means either a Dutch general partnership (*vennootschap onder firma*) or a Dutch limited partnership (*commanditaire vennootschap*) in each case having its COMI in this jurisdiction;

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

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

1.3.52 **"Recovery and Resolution (Insurers) Act"** means bill no 34.842 providing a new regime for the recovery and resolution of Dutch Insurance Companies (expected to come into force on 1st January 2019);

1.3.53 **"Regulated Entity"** means:

a) Dutch Credit Institutions and Dutch Insurance Companies; and

b) Dutch Branches of Third Country Credit Institutions and of Third Country Insurance Companies.

1.3.54 **"Regulation State"** means The Netherlands and the other member states of the European Union (save for Denmark);

1.3.55 **"Resolution Powers"** means: (a) the sale of business powers (article 3A:28 FMSA/article 24 SRMR); (b) the bail-in powers (article 3A:44 FMSA/article 26 SRMR) by means of which liabilities owed by a BRRD Entity may be wholly or partially written down, cancelled or modified; (c) the bridge institution powers (article 3A:37 FMSA/article 25 SRMR): (d) the asset separation powers (article 3A:41 FMSA/article 25 SRMR); (e) the pre-resolution mandatory write-down or conversion powers (article 3A:17 FMSA/article 21(1) SRMR) pursuant to which DNB may write down or convert certain of the BRRD Entity's Tier 1 and Tier 2 capital instruments prior to or at the same time as exercising any other Resolution Power; and (f) the third country powers (including powers exercisable under article 3A:5 FMSA that recognise the effect of similar special resolution action taken under the laws of a country outside the EEA);

1.3.56 **"Resolution Proceedings"** refers to the procedures listed in paragraph 4.1(iv)-(v).

1.3.57 **"Retroactive Effect Rule"** means the rule that any dispositions of property made or agreements entered into by the Party subject to Insolvency Proceedings or Resolution Proceedings after the

Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) are void;

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

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

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

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

1.3.62 **"SRMR"** means Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/20.

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

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

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

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

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

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

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

## 1.4 Individual Contracts

We opine only on the following types of individual contracts:

1.4.1 Commodity Transaction:

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

1.4.2 Commodity Option:

meaning a transaction in which one Party grants to the other Party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option will be settled by physically delivering the quantity of the Commodity in exchange for payment of the strike price.

1.4.3 Commodity Swap:

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

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

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

## 1.5 Spot Commodity Transactions

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

## 1.6 Scope

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

## 2. ASSUMPTIONS

### 2.1 Assumptions set out in the Instruction Letter

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

**Assumptions as to Counterparties and Governing Law**

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

(a) a Dutch Company

(b) an SE;

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

(d) a Partnership;

(e) a Dutch, EEA or Third Country Credit Institution;

(f) a Dutch, EEA or Third Country Insurance Company;

(g) a Dutch, EEA or Third Country Investment Firm;

(h) an Electricity Company;

(i) an Investment Fund;

(j) a Municipality;

(k) a Local Government Entity; and

(l) any of the parties referred to in (a) to (e) and (h) above to the extent that they are publicly-owned entities;

such parties hereafter together referred to as the "**Counterparties**" and each a "**Counterparty**". For the avoidance of doubt, this Opinion does not extend to:

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

(ii) any international organisations;

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

(iv) any pension funds;

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

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

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

(viii) any trusts.

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

2.1.3 For the purpose of any opinions regarding the EFET Power Contract (including the Annexes and Appendices) and Individual Contracts thereunder where the governing law is not that of this jurisdiction (such foreign laws hereinafter: the "**Governing Law**"): that such EFET Power Contract (including the Annexes and Appendices) and such Individual Contracts create valid, legally binding and enforceable obligations for both Parties under all relevant laws and that they, as a matter of their Governing Law, are valid and legally binding between the Parties thereto under all relevant laws.

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

**Enforceability of Close-out Netting**

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

**Multibranch Parties**

2.1.6 For the purposes of addressing certain of the multi-branch issues in Part B, a Counterparty is incorporated in this jurisdiction, but may have one or more EFET Power Contracts (including the Appendices and Annexes) or

Individual Contracts that have been entered into by branches or other duly registered offices in other jurisdictions.

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

**Collateral**

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

**Confirmation Practices**

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

For the purposes of addressing certain of the issues in Part E below concerning confirmation practices, Parties may or may not (i) use the

EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement.

## 2.2 General Assumptions Necessary for Opinion

Furthermore, we have with your permission assumed:

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

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

2.2.3 that each Party (excluding any Partnership but including each partner of a Partnership) is duly incorporated as a legal entity and validly existing and in good standing (where such concept is legally relevant to its capacity) under the laws of its jurisdiction of incorporation and of the jurisdiction of its place of business;

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

2.2.5 that the execution and performance of the EFET Power Contract (including the Annexes and Appendices) and of the Individual Contracts contemplated thereby are in each Party's best corporate interest;

2.2.6 that the execution of the EFET Power Contract and the performance of the Individual Contracts thereunder are in each Counterparty's best corporate interest (*vennootschappelijk belang*) and not prejudicial to its (present and future) creditors;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2.3 Specific Assumptions for Investment Funds

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

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

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

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

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

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

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

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

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

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

2.3.6 that pursuant to the Fund Contract:

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

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

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

## 2.4 Specific Assumptions for Partnerships

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

2.4.1 that each Partnership is duly formed either as a *commanditaire vennootschap* or as a *vennootschap onder firma* under Dutch law, that the partnership agreement between the General/Managing Partner(s) and any Limited Partners is legal, valid, binding and enforceable under Netherlands law and that no event causing automatic dissolution of such Partnership as described in article 7A:1683 of the Dutch Civil Code has occurred;[6]

[6] In translation article 7A:1683 reads as follows: A partnership shall be dissolved: 1. by the expiration of the time for which it was contracted; 2. by the destruction of an asset, or the completion of the transaction, which constitutes the

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

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

2.4.4 the power, capacity (corporate, regulatory and other), and authority of each Partnership and the General Partner(s) or Managing Partner(s) thereof to enter into the EFET Power Contract and any Individual Contracts contemplated thereby and to perform the relevant obligations thereunder;

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

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

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

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

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

object of the partnership; 3. by notice of termination given by a partner to the other partners; 4. by the death of or guardianship over one of the partners, or if he has been declared bankrupt or is the subject of the declaration of a personal debt relief arrangement.

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

2.4.7 that neither the Partnership nor any of its General or Managing Partners is a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, an Investment Fund, or an entity that (i) is affiliated with a Dutch Insurance Company[7] or (ii) may be subject to the exercise of crisis prevention or crisis management powers by a resolution authority, in accordance with the Implementation Act May 2014;[8]

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

## 3. SCOPE OF OUR REVIEW / MATTERS EXCLUDED

### 3.1 Scope of review

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

[7] The preparation, application and implementation of certain crisis management measures (or their foreign equivalents) in respect of a Dutch insurance company will stay the rights of a Party in respect of its Transactions with that insurance company (or with any entity incorporated under Dutch law which is part of the same group as the insurance company).

[8] This means that the Partnership and its General/Managing Partner(s) should not be: (i) a financial institution (*financiële instelling*), as defined in Article 1:1 FMSA (cf. Article 4(1)(26) CRR), that is established in this jurisdiction, when such financial institution is a subsidiary of a Dutch Credit Institution (not being an opt-in bank) or a BRRD Investment Firm, or of a company referred to in (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 CRR or (ii) a financial holding company (*financiële holdings*), a mixed financial holding company (*gemengde financiële holdings*) or a mixed-activity holding company (*gemengde holdings*), each as defined in Article 1:1 FMSA (cf. Articles 4(1)(20), (21) and (22 CRR), respectively) established in this jurisdiction.

3.2 **No investigation into assumptions**

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

3.3 **No opinion on Individual Contracts**

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

3.4 **Scope of Opinion**

We opine only as to the validity and effectiveness of certain specific provisions of the EFET Power Contract (excluding the Election Sheet thereto), in particular the Termination Clause and the Netting Clause. With regard to the CSA our Opinion is limited to the issues discussed in Part (C) below. With regard to the Appendices our Opinion is limited to the issues discussed in paragraph 4.37 below. We express no opinion and no opinion is given (or may be inferred or implied):

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

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

3.4.3 with regard to the effect of any systems of law (other than the laws of The Netherlands) even in cases where, under Dutch law, any foreign law falls to be applied and we assume that no such foreign law would affect or qualify our Opinion as set out below;

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

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

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

3.4.7 as to any matters of fact;

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

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

### 3.5 Further limitations of scope

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

3.5.2 There is no case law dealing with the EFET Power Contract's Termination Clause or the Netting Clause, but there is case law on these types of clauses and whether these can be validly invoked against an Insolvency Representative in Insolvency Proceedings. We understand, however, that your fundamental requirement is for the validity of those provisions of the EFET Power Contract, including its Appendices and the CSA, to be substantiated by a written and reasoned opinion.

## 4. OPINION

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

### PART A

### ENFORCEABILITY OF CLOSE-OUT NETTING

### I. WINDING UP / INSOLVENCY

### 4.1 Dutch Insolvency & Resolution Proceedings

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

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

(ii) moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA;

(iii) solely in respect of Regulated Entities: Emergency Measures as referred to in and governed by title 3.5.5. of the FMSA;

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

(iv) solely in respect of Dutch Insurance Companies (and their parent companies if established in this jurisdiction, including a Dutch Company), Transfer Measures;[9] and

(v) solely in respect of BRRD Entities, the exercise of any Resolution Power by DNB as the national resolution authority for The Netherlands acting either (i) independently or (ii) upon the instructions of the SRB in respect of those BRRD Entities which fall within the scope of the SRMR. [10]

[9] Once the Recovery and Resolution (Insurers) Act takes effect Transfer Measures will be abolished.

[10] The SRMR applies to:

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

Together the procedures referred to under paragraphs (i) to (iii) shall be referred to as "**Insolvency Proceedings**" and those under paragraphs (iv) and (v) shall be referred to as "**Resolution Proceedings**". A short overview of these proceedings is provided in Appendix A.

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

## 4.2 Commodity Transactions in Insolvency Proceedings

### 4.2.1 Commodity Forwards in Insolvency Proceedings

There are two provisions in the BA, articles 38 and 237 BA, which may cause the mandatory *automatic* termination of all outstanding Commodity Transactions (which is not a Spot Commodity Transaction) as of the date of the Insolvency judgment in respect of an insolvent Party.[11] Articles 38 and 237 deal with forward contracts for the future delivery of commodities (which should include securities), which commodities (or securities) are traded on a public exchange (*i.e.* the forward contract itself could be OTC) where such contracts have a settlement date falling after the Insolvency judgment. With effect from the Commencement Time *all* outstanding forward transactions that are within the scope of articles 38 or 237 BA are terminated by operation of law. The Parties' mutual and unperformed settlement and delivery obligations are extinguished automatically with effect from the Commencement Time. The rationale of these articles is to create certainty with respect to executory contracts containing speculative elements but relating to commodities or securities having a readily ascertainable market price. Therefore, it may not be required that the

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

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

[11] Article 237 BA applies equally in the event Emergency Measures are imposed on a Regulated Entity (article 3:177 of the FMSA).

commodities or securities having such a market price are actually traded on an exchange.

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

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

We note that only those Commodity Transactions which are actually outstanding as of the Commencement Time and have unperformed obligations for both Parties could be affected by articles 38 and 237 BA.

4.2.2 Certain Physically Settled Commodity Transactions in Insolvency Proceedings

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

(a) Electricity Companies are subject to certain restrictions in relation to purchase agreements (*inkoopcontracten*) where they act as buyer and that relate to their delivery of electricity to low-volume users (*i.e.*: consumers) (such agreements: **"Purchase Agreements"**). Such Electricity Companies are not permitted to include in such Purchase Agreements any clauses providing for automatic or optional termination or for the deferral of the supplier's obligations if their Insolvency is petitioned or

Insolvency Proceedings are opened against them. Therefore, with regard to such Electricity Companies and insofar as an Individual Contract regarding the *physical delivery of electricity* would qualify as a Purchase Agreement, the early termination provisions of Clause 10 will not be enforceable. The risk this poses is not significant - in our view - because if an Electricity Company becomes subject to Insolvency Procedures, its license will typically be withdrawn within a period of approximately 10 days (the "**freeze period**") after which the early termination under the EFET Power Contract will be permitted and in any event all unpaid amounts owing by the Electricity Company in respect of electricity deliveries during the freeze period are automatically guaranteed by the transmission system operator (presently 'TenneT N.V.') as programme responsible party (*programma verantwoordelijkheid*) under the relevant legislation. After early termination becomes effective the netting may also include amounts due during the freeze period.

(b) furthermore, article 37b (for bankruptcy) and article 237b (for moratorium of payments) BA stipulate that in agreements for the continuous physical delivery of gas, water, electricity or heating needed for a customer's primary living needs or for the continuity of its business (each a "**Delivery Agreement**"), early termination clauses triggered by (a petition being filed for) Insolvency Proceedings or the levying of an attachment may only be invoked against customers who or which are subject to Insolvency Proceedings with the consent of the Insolvency Representative.[12] Therefore, insofar as any Commodity Transactions can be treated as Delivery Agreements, early termination clauses triggered by (a request petitioning) Insolvency Proceedings or attachment may only be invoked with the consent of the Insolvency Representative[13].

[12] Article 237b BA applies equally in the event that Emergency Measures are imposed (article 3:177(1) FMSA).

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

### 4.3 Effectiveness of Termination Clause and Netting Clause during Insolvency Proceedings

4.3.1 Early Termination by notice

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

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

4.3.2 Automatic early termination

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

There is case-law confirming the effectiveness of automatic close out clauses, which operate immediately prior to or upon the Insolvency of one of the Parties. We are also not aware of any basis upon which such automatic close out clauses could violate any mandatory statutory provisions of Dutch law (except as mentioned in 4.2 above) or Dutch public policy. Furthermore, Dutch contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. In addition thereto, with respect to certain futures contracts, Dutch insolvency law itself provides for automatic termination in the event of bankruptcy (see *inter alia* article 38/237 BA) of one of the Parties (see paragraph 4.2 above).

On this basis, it is our Opinion that the Termination Clause as referred in Clause 10.4 of the EFET Power Contract automatically terminating the

EFET Power Contract, including all Individual Contracts entered into thereunder, upon the Insolvency of a Counterparty should be upheld by the Dutch courts, and that the Insolvency Representative will not have the opportunity to disclaim or accept Individual Contracts depending on their profitability, since no Individual Contracts will be outstanding at the time he is appointed.[14]

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

4.3.3 Calculation and payment of a Termination Amount

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

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

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

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

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

overriding mandatory provisions render the performance of the contract unlawful (article 9(3) Rome I);[15]

(ii) they will apply the overriding mandatory provisions of the law of The Netherlands (article 9(2) Rome I);[16]

(iii) they may refuse to apply the Governing Law if such application is manifestly incompatible with the public policy of the Netherlands (article 21 Rome I);[17] and

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

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

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

However, the Governing Law will not govern every aspect of the EFET Power Contract and the relations of the Parties thereunder. For example, the EU Insolvency Regulation or Dutch insolvency law (including the rules implementing Solvency II and the WUDCI), as the case may be, will govern the question whether the Netting Clause and the Termination Clause (assuming their validity and effectiveness under the Governing

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

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

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

Law) will be enforceable against the Insolvency Representative in the event of Insolvency Proceedings being declared in this jurisdiction. Also, in such Insolvency Proceedings, the contractual calculation of damages arrangements under the EFET Power Contract may only be recognised within the limits of Dutch Insolvency set-off. Please see section (c) below in this respect

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

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

(i) as an agreed procedure – not involving the legal device of set-off – for arriving at a single net amount representing a Party's damages on close out of certain or all transactions under the EFET Power Contract; or

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

For an analysis of the determination of the Termination Amount under the laws of this jurisdiction (pre-Insolvency) please see paragraph 4.17.

*As to (i):*

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

*As to (ii):*

The Netting Clause does not appear to lead to a result contrary to mandatory Dutch Insolvency set-off provisions. In the event that a creditor of an insolvent debtor is also the latter's debtor, the BA (article 53 for bankruptcy and article 234 for moratorium[18]) allows this creditor/debtor to

[18] Art. 234 BA also applies to Emergency Measures.

plead a set-off provided that his claim(s) and his obligations (expressed in the same currency or "generic consideration"):

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

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

Insolvency set-off is therefore allowed and contractual set-off arrangements can be enforced in Insolvency Proceedings, provided that (a) claim and counterclaim have "pre-insolvency roots" and (b) there is "mutuality", (as explained in paragraph 2.2.10) and (c) the claim and counterclaim are expressed in the same currency or "generic consideration". To the extent that either the claim or the counterclaim does not result from pre-insolvency transactions or there is no such mutuality or single currency, a contractual set-off will not be effective in Insolvency Proceedings. For the purpose of this Opinion, we have assumed that there will be mutuality between the Parties.[19] Equally, we have assumed that none of the Individual Contracts will have been entered into between the Parties, and none of the counterclaims shall have arisen under legal relationships originated, after the Commencement Time in relation to the Insolvent Party. We also understand that the EFET Power Contract provides for conversion by the Terminating Party of all amounts due and payable into a single currency in accordance with a pre-agreed conversion rate of exchange which will satisfy requirement (c).

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

In the event that the EU Insolvency Regulation applies to Insolvency Proceedings in this jurisdiction[20] ***and*** the Netting Clause would be treated as a contractual set-off arrangement by the courts in this jurisdiction, a set-off is permitted in each of the two following situations:

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

[20] I.e. where the Insolvent Party is a Dutch Company or an Unregulated Fund. One minor category of Dutch Credit Institutions are also subject to the EU Insolvency Regulation, namely "opt-in" banks as referred to in article 3:4 FMSA. At present only one bank is listed as having that status. To check the current position, we refer to the following DNB website: See: https://www.dnb.nl/toezichtprofessioneel/openbaar-register/WFTKF/index.jsp?filter_value=3%3A4+eerste+lid+onderdeel+a+Wft&naam=Statutaire+naam+%2F+Handelsnaam#overzicht.

(i) if it is permitted under Dutch insolvency law (article 4.2(d) of the EU Insolvency Regulation); or

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

Consequently, in principle the Insolvency law of this jurisdiction would determine whether a set-off is permitted, and if not, such a set-off may still be valid if permitted under the insolvency rules of the Governing Law. Thus, a set-off which is not possible due the restrictions mentioned in subparagraph (c) above or subparagraphs (g), (h) and paragraph 4.15 below, may still be accepted by the courts of this jurisdiction if it is permitted under the insolvency rules of the Governing Law.[21] However, we express no views as to the validity of the close-out netting and/or set-off provisions under the Governing Law.

The courts of this jurisdiction may not apply articles 4.2(d) and 9(1) of the EU Insolvency Regulation to the Netting Clause, particularly if they take the view that such Netting Clause includes features other than set-off[22], *i.e.* a method of valuation of Individual Contracts as well as the termination of Individual Contracts (see paragraph 4.3.3(c)(i) above). If this interpretation is followed, articles 4.2(d) and 9(1) EU Insolvency Regulation will not be applicable to the Netting Clause and the general rule of article 7 EU Insolvency Regulation will apply, which means that Dutch Insolvency law shall determine the effectiveness of the Netting Clause. Please refer to paragraph (c) above and the restrictions mentioned under paragraphs 4.15, 5.4 and 5.5 below.

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

(e) ***Conclusion***

The general principles of insolvency set-off as outlined above lead to the conclusion that (subject to our observations in (c), (g), (h) above and in

[21] This is sustained by analogy by the interpretation of article 13 EU Insolvency Regulation given in Dutch (Supreme Court and lower) case law and by the Virgós/Schmit Report. Article 13 EU Insolvency Regulation protects the rights of counterparties to transactions that could be challenged on the basis of "voidable preference" in the same manner as article 6.1 Insolvency Regulation does, i.e. by giving the *lex contractus* overriding effect if the *lex concursus* would permit such a challenge. Pursuant to unwritten Dutch international private law, article 13 EU Insolvency Regulation also applies if the Governing Law is non-EU law.

[22] This interpretation is supported by the fact that other EU legislation contains specific rules with respect to netting provisions (*e.g.* article 9 EU Insolvency Regulation and provisions in the WUDCI).

paragraph 4.15 below) the Netting Clause will be recognised and is enforceable in Insolvency Proceedings, provided that the obligations to pay the Settlement and Termination Amount(s) have "pre-insolvency roots".

(f) ***Perfection requirements***

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

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

In accordance with the WUDCI, the insolvency laws of The Netherlands determine the effects of Insolvency Proceedings on the EFET Power Contract and the Netting Clause with Counterparties that are Dutch Credit Institutions, Dutch Investment Firms[23] or Third Country Credit Institutions.

***Treatment as Set-Off***

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

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

(b) if it is permitted by the law that is applicable to the entity's claim (article 23 WUDCI, article 3:243 of the FMSA and article 212w BA).[24]

[23] The WUDCI was amended by article 117 BRRD to cover investment firms as defined in article 4(1) of CRR (which refers to entities as defined in article 4(1) of MiFID1, therefore the same as Dutch Investment Firms and EEA Investment Firms).

[24] In our view, the right to demand set-off is not limited to situations where the Dutch Credit Institution's claim is governed by the law of an EU member state (other than Denmark), but should also be allowed when this claim is governed by the law of a non-member state. Neither article 23 WUDCI, nor article 6 of the EU Insolvency Regulation, nor article 3:243 FMSA, nor article 212w BA require that this right of set-off is restricted to the law of an EU member

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

***Treatment as Netting***

However, if the Netting Clause, together with the Termination Clause, is regarded as a "netting agreement" within the meaning of article 25 WUDCI, then in the event Insolvency Proceedings are commenced in respect of a Dutch Credit Institution, a Dutch Investment Firm or a Third Country Credit Institution, the effectiveness of the Netting Clause will be determined solely by the Governing Law.[25]

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

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

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

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

state. However, it has been argued in legal writing that the restriction to the law of an EU member state must be implied in these provisions, because other provisions of the WUDCI and the EU Insolvency Regulation do expressly confine the applicability of a law other than the lex concursus (article 4) to situations where that other law is the law of an EU member state. Even if this interpretation is correct (which we dispute), the Dutch courts may still apply article 23 WUDCI by way of analogy (i.e. to the situation where the governing law is that of a non-member state), so that set-off may still be possible if permitted under the law of a non-member state.

[25] Article 25 WUDCI has been implemented in article 212ff BA (for bankruptcy) and article 3:252 FMSA (for Emergency Measures regarding Credit Institutions). Unfortunately, in both articles a "netting agreement" is defined by reference to netting of payment or transfer orders in the context of payment or clearing systems designated in accordance with the EU Directive on the Limitations of Systems Risk in Payment and Securities Settlement Systems (the "**EU Settlement Finality Directive**") and it can therefore be argued that The Netherlands has incorrectly implemented the WUDCI in this respect. As the Dutch courts are required generally to interpret Netherlands law in accordance with the EU directives implemented by that law, we expect such courts to interpret Article 212ff BA and Article 3:252 FMSA in accordance with the WUDCI and accordingly to determine the effectiveness of the Netting Clause solely by the Governing Law.

Therefore, the laws of this jurisdiction will be applied by the Dutch courts in the event of an Insolvency of a Dutch Insurance Company or a Third Country Insurance Company.

The same rules with regard to insolvency set-off as are applicable to Dutch Credit Institutions, also apply to Dutch Insurance Companies and Third Country Insurance Companies. This follows from Article 3:243 FMSA for Emergency Measures and Article 213r BA for bankruptcy. There is no separate rule of law in Solvency II and in this jurisdiction with regard to "netting arrangements" entered into by Dutch Insurance Companies that is equivalent to Article 25 WUDCI.

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

There are no rules under Dutch Insolvency law that would lead to a splitting-up or segregation of the portfolio of Individual Contracts under an EFET Power Contract into two or more "netting pools". It is possible, however, that certain Individual Contracts are subject to mandatory automatic termination (see paragraph 4.2.1 above), while others can still be terminated by notice after the judgment declaring the commencement of Insolvency Proceedings. Equally, in the special situations outlined in 4.2.2 above, termination of certain Individual Contracts may not be possible, while other Individual Contracts can be terminated (automatically or by notice).

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

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

(i) an online search can be performed with the Central Insolvency Register (*Centraal Insolventieregister*) referred to in articles 19a and 222b of the BA[26] which can show that a Counterparty has been declared bankrupt or granted a moratorium of payments. There is

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

normally a delay of several days between the bankruptcy or moratorium judgment and its registration in the online register, but this will be remedied by a pending change of law;[27]

(ii) the office of the Civil Law Sector (*Sector Civiel Recht*) of the competent court of first instance (*rechtbank*) can confirm by telephone whether in respect of a Counterparty any Emergency Measures have been imposed.

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

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

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

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

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

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

(iv) an online search can be performed with the EU Insolvency Register[28] (*EU Insolventieregister*) to verify that in respect of a Counterparty which is subject to the EU Insolvency Regulation none of the EU Insolvency Procedures have been registered in other EU Member States (other than Denmark).

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

The same analysis as set out in paragraph 4.3.3 with regard to the calculation and payment of a Termination Amount also applies in the event of an automatic termination scenario. With respect to a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, or an

[27] Bill no. 34 740 on the Modernisation of the Bankruptcy Act.

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

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

## 4.4 Validity Challenges pre and post Insolvency: Voidable Preference

### 4.4.1 General Voidable Preference Regime

Under Dutch law every creditor, but in bankruptcy (*faillissement*) only the Liquidator (*curator*), has the right (the so-called *Actio Pauliana*) to nullify (by simple declaration) a transaction entered into by the debtor (in this case the Counterparty) with a third party (in this case the other Party to the EFET Power Contract) provided that:

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

(ii) the transaction was prejudicial to the recourse possibilities of some or all of the Counterparty's creditors (*i.e.* if the transaction leads to a reduction in the assets available for recourse by its creditors[29]); and

(iii) at the time of the transaction both Parties knew or ought to have known of the fact that the transaction would have such prejudicial effect; or

(iv) in the event that the transaction is for nil consideration (*i.e.* gifts and other gratuitous dispositions), at the time of the transaction, the Counterparty knew (or ought to have known) of the prejudicial effect, regardless of whether the other Party shared such knowledge; as presumably the EFET Power Contract and any Individual Contracts are entered into on commercially acceptable terms, this should not be relevant.

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

As regards (iii): the mere fact that the parties knew that there was a possibility that the transaction could be prejudicial to the recourse possibilities of the company's other creditors is not sufficient.

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

4.4.2 Burden of proof

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

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

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

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

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

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

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

Apart from the reversal of the burden of proof for suspect transactions entered into one year prior to invoking the *Actio Pauliana* or - as the case may be - one year prior to the start of the Insolvency Proceedings, there are no "suspect periods" in relation to the *Actio Pauliana* or otherwise under Dutch law. However, the courts have discretionary powers to reverse the burden of proof on the basis of general provisions of Dutch procedural law.

4.4.3 Limitation period

Voidable preference has a limitation period of three years from the date on which a prejudiced creditor or - as the case may be - the Insolvency Representative discovered the detrimental effect of the transaction.

4.4.4 Analysis

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

It is likely that the assumption of contractual obligations by entering into the EFET Power Contract and/or an Individual Contract by the Counterparty could be considered as a voluntary act (unless the Governing Law analysis is different). If the EFET Power Contract or an Individual Contract was entered into within one year before the relevant creditor invokes the *Actio Pauliana*, it should be assessed whether the EFET Power

Contract and/or the Individual Contract may be considered a "suspect" transaction as described above. It is unlikely that the entering into of the EFET Power Contract and/or an Individual Contract would be considered as a 'transaction for nil consideration' (see 4.4.1(iv) above), and therefore only issues 4.4.1(ii) and 4.4.1(iii) above should be considered.

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

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

4.4.5 Additional claw back risk

In addition to the *Actio Pauliana* described above, in bankruptcy (*faillissement*) the liquidator (*curator*) has the power (under article 47 BA) to invoke the nullity any of the Counterparty's contractually required payments or transactions effected before the Commencement Time in the event that:

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

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

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

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

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

such Obligation Performance could be nullified.

4.4.6 Impact of the Governing Law

Under the EU Insolvency Regulation, the WUDCI (implemented in articles 3:240 and 3:244 of the FMSA (as regards Emergency Measures) and in article 212t and 212x BA (as regards bankruptcy)) and Solvency II (implemented in articles 3:240 and 3:244 of the FMSA (as regards Emergency Measures) and articles 213o and 213s BA (as regards bankruptcy)), the law applicable to Insolvency Proceedings shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors. Accordingly, the Dutch rules with regard to voidable preference shall apply in the event of Insolvency Proceedings in this jurisdiction including the Insolvency Representative's authority to nullify legal acts entered into prior to Insolvency on the basis of *Actio Pauliana*.

However, under the EU Insolvency Regulation,[30] the WUDCI[31] and Solvency II,[32] in order to protect the Insolvent Counterparty's counterparty, a claim by the Insolvency Representative for nullification on the basis of voidable preference will only be successful if it is *also* possible under the insolvency rules of the law of another Member State governing the preferential transaction itself. In this case that would mean the Governing Law assuming this is the law of a Member State. The relevant articles of law provide the Insolvent Counterparty's counterparty the opportunity to prove that under such Governing Law (applicable to the

[30] Article 13.

[31] Article 30(1), implemented as article 3:251 of the FMSA (as regards Emergency Measures) and article 212ee BA (as regards bankruptcy of a Regulated Entity).

[32] Article 290 implemented as article 3:251 of the FMSA (as regards Emergency Measures) and article 213z BA (as regards bankruptcy of a Dutch Insurance Company).

relevant claim) no such nullification is allowed or that the conditions for nullification are not met.[33]

This means that the requirements for nullification of both the BA and of the Governing Law and each Individual Contract should be satisfied. If it is not possible, for example, under German law for a German insolvency representative to set aside the EFET Power Contract, then the Insolvency Representative cannot do so either and all contractual obligations will be treated as involuntary transactions. This is subject to the additional claw back risk set out in the previous paragraph, however, only if the Obligation Performance will also be subject to such risk under the Governing Law.

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

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

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

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

4.5.2 Recognition of the filing of Insolvency Proceedings by a court

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

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

Please see our analysis in paragraph 4.3, qualification paragraph 5.4 below and the general description of Insolvency Proceedings and Resolution Proceedings in Appendix A.

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

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

In addition to our analysis in paragraphs 4.1 - 4.5 above and the discussion of the Automatic Stay and the Resolution Powers in paragraphs 5.7 and 5.8 below, there are no other issues that should be brought to your attention in relation to the creditor's rights with regard to the Termination Clause and the Netting Clause. Note that in order to exercise the "bail-in" Resolution Power in respect of Counterparties that are BRRD Entities (and with effect from the date that the Recover & Resolution (Insurers) Act takes effect, also Dutch Insurance Companies), DNB will be empowered to terminate derivatives contracts.[34]

## 4.6 Treatment of physically settled Commodity Options

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

Furthermore, it is generally held that an option qualifies under the laws of this jurisdiction as an irrevocable offer to enter into an agreement, *i.e.* in the case of a Commodity Option the irrevocable offer to buy a certain quantity of Commodities against a certain pre-agreed price, the strike price. The acceptance of such offer is considered to be the exercise of the option. As a result of the fixation principle (as referred to in paragraphs 4.12 and 5.4), the rights of creditors are unalterably fixed as of the date of the Insolvency judgement. This implies *inter alia* that in the event of Insolvency of a Counterparty that is an option seller, the acceptance of the offer to enter into an agreement is not binding the Insolvent Party's estate after the Commencement Time.[35] For such binding effect of the exercise of an option such as a Commodity Option after the Commencement Time the cooperation of the Insolvency Representative is required.

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

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

### 4.7 Safe harbour for derivatives

Dutch Insolvency law does not provide for "safe harbour" provisions for certain types of derivatives from which the Commodity Transactions would benefit. If a BRRD Entity becomes subject to Resolution Proceedings[36], the BRRD and the Implementation Act do have such provisions (also more generic provisions helpful for derivatives such as those safeguarding close-out netting, set-off etc), which we discuss in paragraph 5.8 below.

### 4.8 Pre-Insolvency Set off

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

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

(a) Applicable law

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

Therefore, the law by which the EFET Power Contract is expressed to be governed should properly determine whether, the Netting Clause is valid and effective and whether the Settlement Amounts determined under the Netting Clause may be set-off in accordance with the provisions of the Netting Clause.

Also, outside Insolvency Proceedings, the question whether the Parties are entitled to exercise the contractual rights of set-off under the Netting Clause in respect of the Settlement Amounts is determined exclusively by the Governing Law as the proper law of the EFET Power Contract. This

[36] With effect from the date that the Recover & Resolution (Insurers) Act takes effect,these safe harbours will also Dutch Insurance Companies.

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

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

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

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

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

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

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

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

Despite the requirement set out in paragraph (a) above, set-off by a debtor is allowed of (i) claims that are assigned under Clause 19.2 of the EFET Power Contract by the debtor's creditor to a third party with (ii) counterclaims such debtor may have on the original creditor, provided such counterclaims arise under the same legal relationship as the transferred claim or such counterclaims were already due and payable before the transfer. Therefore, if a Party were to transfer its rights under the EFET Power Contract to another party, the other Party could still invoke set-off of counterclaims that have risen under the EFET Power Contract, regardless of the transfer.[37]

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

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

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

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

Under the laws of this jurisdiction, the mutuality requirement for both pre- and post-Insolvency set-off requires that debtor and creditor under the cross-claims must be the same persons or entities. This requirement will not be met as generally the relevant affiliate (*i.e.* a subsidiary or likewise with legal personality) or Credit Support Provider will not be a debtor under the EFET Power Contract. Only if this mutuality requirement is met or has been contractually disapplied for pre-Insolvency situations (see paragraph 4.8.1(b)), as well as the other requirements for pre- and post Insolvency set-off as described in paragraph 4.3.3(c) through (h) and 4.8.1, will set-off be enforceable under the laws of this jurisdiction.

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

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

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

The treatment of set-off in this jurisdiction pre- and post-Insolvency is described in paragraphs 4.8 and 4.3.3(c) through (h) respectively. For a description of close-out netting in the form of the Termination Clause and the Netting Clause please see paragraphs 4.3.1, 4.3.2 and 4.3.3.

## II. DISCUSSION OF SPECIFIC ISSUES RAISED IN INSTRUCTION LETTER

### 4.10 Termination for a Material Reason

*Issue (a) on page 6 of the Instruction Letter*

Assuming the Parties have not specified that Automatic Termination (as defined in Clause 10.4 of the EFET Power Contract) applies, the provisions of the EFET Power Contract permitting the Terminating Party to terminate the EFET Power Contract (including all Individual Contracts) upon the occurrence of a Material Reason are in principle valid and enforceable under the laws of this jurisdiction and Dutch Insolvency rules will not in principle affect these provisions. Please refer to paragraph 4.3.1 for a more detailed and extensive description.

### 4.11 Enforceability of Automatic Termination clause

*Issue (b) on page 6 of the Instruction Letter*

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

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

### 4.12 Election of Automatic Termination clause

*Issue (a) and (b) on pages 5 and 6 of the Instruction Letter*

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

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

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

(b) Secondly, for all outstanding Individual Contracts at the Commencement Time – irrespective of whether they are within the scope of article 38/237 BA – the 'fixation principle' enshrined in case law on the BA (see paragraph 5.4 below) could entail that the enforceability of the Netting Clause may be subject to the limitation that all calculations must be made by reference to a date not later than the date of the insolvency judgment. This means, inter alia, that the computation of the Termination Amount in accordance with the Netting Clause will have to be made on the basis of the rates prevailing on the date of the insolvency judgment. The result would be that the amount by which the net amount owing to the Solvent Party increased between the judgment date and the later date by reference to which the calculation was made becomes irrecoverable. When Automatic Termination is applied, all calculations in respect of an Individual Contract will by virtue of the EFET Power Contract have to be made by reference to the day of the default, while not electing Automatic Termination: (a) would give a Solvent Party the freedom to terminate outstanding Individual Contracts by notice on or after the date of the insolvency judgment, but (b) could also give rise to the mistaken belief that by having the option of giving notice against a later date, the Solvent Party would be entitled to calculate the Termination Amount by reference to rates and values applicable at such later date (e.g. at the time it concludes a replacement transaction).

There are two main risks involved in using Automatic Termination:

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

(b) Secondly, the defaults triggering Automatic Termination are so widely drafted that they may well (depending on the interpretation under the Governing Law) include "silent administration" (*stille curatele*), which is a form of emergency administratorship applicable to Dutch Credit

Institutions, Dutch Insurance Companies, Dutch Investment Firms, and Investment Funds (or their Managers or Custodians), and of which the other Party would not normally be apprised (see paragraph 4.3.4). This would entail the risk that the Non-Defaulting Party might be approached by the administrator with the claim that all Individual Contracts had terminated long ago, without having had an opportunity to mitigate its damages or to unwind related transactions such as hedges.

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

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

4.13 **Netting Clause**
*Issues (c) and (d) on pages 6/7 of the Instruction Letter*

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

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

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

4.14 **Single agreement principle**
*Issue (d) on page 7 of the Instruction Letter*

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

### 4.15 Currency

*Issue (e) on page 7 in the Instruction Letter*

In the Insolvency Proceedings of a Counterparty in this jurisdiction, any amount payable to the Solvent Party must be filed by it with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the date of the Insolvency judgment). This is a result of the application of Articles 133/260 BA. It is not possible to obtain a payment from the Insolvency Representative in a currency other than Euro. The BA is unclear as to whether an official exchange rate is to be used, or a rate determined for example by the Solvent Party. However, it is commonly accepted that the only consequence of Articles 133/260 BA is that the net amount resulting from the Netting Clause, if any such amount is owed to the Solvent Party, must be converted in Euro at the market rate of exchange prevailing on the date of Insolvency judgment, in order to be admitted in the Insolvency Proceedings.[38]

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

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

*Issue (f) on page 7 of the Instruction Letter*

#### 4.16.1 Corporations (Dutch Companies and SE's)

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

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

#### 4.16.2 Partnerships

(a) Overview of partnership concept

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

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

A limited partnership (*commaditaire vennootschap*) is a partnership created for engaging in business and in which one or more of the partners agree to manage the business (the "**Managing Partners**") while one or more other partners, whose identity must remain undisclosed, agree to abstain from involvement in the management and to contribute money or property on the condition that their liability for the Limited Partnership's losses is limited to the value of their contribution (the "**Limited Partners**"). Such agreements are generally set out in writing in a limited partnership agreement. Managing Partners are jointly and severally liable for all the Limited Partnership's obligations towards third parties. The "public" Limited Partnership makes itself known as such to the public (e.g. by using the letters "*c.v.*" or "*& Co.*") whereas the "silent" Limited Partnership only trades under the name of the Managing Partner(s).

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

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

Although general partnerships and limited partnerships are not separate legal entities under Netherlands law, they may be subject to Insolvency Proceedings and such Insolvency Proceedings do not automatically result in the insolvency of the General or Managing Partners. The court must be petitioned separately to declare Insolvency Proceedings in respect of such partners. Moreover, although the partnership's assets are not owned by the partnership as such (as it not a separate legal entity), to the extent that they are owned by the partners jointly, they do constitute a so-called 'segregated asset pool' (*afgescheiden vermogen*) in respect of which the partnership's creditors have rights of recourse ranking prior to the partners' personal creditors.[39] In the event of Insolvency Proceedings of a Partnership, its assets shall be distributed among the Partnership's creditors (taking into account insolvency costs) in priority over any creditors which any of the General/Managing Partners may have in any capacity other than that of General/Managing Partner.

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

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

The Insolvency of a General Partner, Managing Partner or Limited Partner will not by operation of law result in the Insolvency of the Partnership itself.[40] Nevertheless, as the Insolvency of a General/Managing Partner may affect its ability to effectively manage the Partnership, it would generally be prudent to provide in the EFET Power Contract that where a General/Managing Partner is declared bankrupt or granted a moratorium of payments, automatic termination shall take place in the event that that General/Managing Partner is the sole general/managing partner of the Partnership or in the event that the other General/Managing Partner(s) is/are also declared bankrupt or granted a moratorium of payments, while termination by notice can take place in the event there are one or more remaining General/Managing Partners which have not been declared bankrupt or granted a moratorium of payments. The Insolvency of such a

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

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

General or Managing Partner will, in principle, result in the dissolution (*ontbinding*) of the relevant Partnership. However, partnership agreements often contain a continuation arrangement (*voortzettingsregeling*) to avoid automatic dissolution of the Partnership as a whole in the Insolvency of a General or a Managing Partner. If this is the case, the enforceability of the Termination Clause and the Netting Clause vis-à-vis the relevant Partnership will in principle remain unaffected in the event of Insolvency of such a partner.

However, as set out in paragraph 4.3.3(c), a Dutch court may test whether mandatory Insolvency set-off provisions are compatible with the Netting Clause. One of the requirements of Dutch Insolvency set-off under articles 53/234 BA is the requirement of "mutuality". Insolvency set-off will be allowed even where new partners are admitted to the Partnership or existing partners withdraw from that Partnership. This is because the Supreme Court has ruled[41] that new partners will also be jointly and severally liable for obligations already existing when they joined the partnership, so that Claims arising under Individual Contracts entered into before the appointment of a new partner can be set off with claims accruing under Individual Contracts entered into after such appointment.

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

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

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

### 4.16.3 Credit Institutions and Insurance Companies

As Regulated Entities, special Dutch Insolvency provisions apply to credit institutions and insurance companies. Please refer to paragraph 4.1 and Appendix A.

### 4.16.4 Dutch Investment Firms

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

### 4.16.5 Investment Funds

FGR Investment Funds are non-incorporated pools of cash, securities or other assets raised or obtained for collective investment for the purpose of allowing the participants to share in the proceeds of such investments. An FGR Investment Fund is not a legal entity, but a multiparty contractual arrangement. The Fund Contract (which contains this contractual arrangement) will typically be entered into between the participants, the Manager (which may be licensed as a manager under the FMSA) and a separate Custodian[42], and will contain the applicable terms and conditions for management and custody (*voorwaarden voor beheer en bewaring*) of the pool of investments.

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

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

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

Custodian acting in its capacity as legal title holder (*bewaarentiteit*) of a specific FGR Investment Fund.

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

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

Apart from the ranking of debts mentioned below, the following should be noted. The EU Insolvency Regulation does not apply to "collective investment undertakings", which refer to collective investment undertakings qualifying as UCITS or AIFS[43]. Consequently:

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

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

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

To the extent a Dutch court would apply Dutch Insolvency rules in the event of Insolvency of an Investment Company or an FGR Investment Fund's Manager and/or Custodian, the analysis set out in paragraphs 4.3 above is applicable. As set out therein, under Sections 53/234 BA it is required for Insolvency set-off to be effective that there are mutual claims for payment of money between an Insolvent Party and its creditor.[44]

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

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

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

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

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

(ii) participations issued by the Investment Fund.

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

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

### 4.16.6 Municipalities

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

With regard to municipalities and other non-central governmental authorities we note that such governmental authorities can only act as a Counterparty if the Individual Contracts (i) are of a "prudent" nature (*i.e.* for hedging purposes and never for speculative purposes), (ii) coincide with the risk exposure and duration of the underlying financing transaction and (iii) will not result in excessive risks.[45] The Counterparties should *inter alia* qualify as EU licensed financial institutions with certain financial ratings (at least single A-rating granted by two rating agencies) and from a country with at least an AA rating granted by two rating agencies.

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[45] Municipal bodies may only use interest rate caps, payer swaps, forward start payer swaps or swaptions. Margin duties must be mutual or at least imposed on the financial institution.

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

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

Dutch Insolvency law does not explicitly rule out the possibility that a Municipality can be made subject to Insolvency Proceedings (see our comments in paragraph 4,1 above). However, as a result of the Financial-Ratio Act (*Financiële-verhoudingswet*), the risk of a Municipality becoming subject to Insolvency Proceedings is only theoretical.

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

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

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

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

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

4.16.7 **Electricity Companies**

No special Dutch insolvency provisions apply to Electricity Companies.

4.16.8 **Local Government Entities**

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

4.16.9 **Publicly-owned Corporations**

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

## III. TERMINATION FOR MATERIAL REASONS OTHER THAN INSOLVENCY

4.17 **Early Termination outside Insolvency**
*Issue (g) on page 7 of the Instruction Letter*

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

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

## PART B

## MULTIBRANCH PARTIES

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

We do not consider that the use of the EFET Power Contract with a Counterparty incorporated under the laws of this jurisdiction but with branch offices in a number of different jurisdictions, including some where netting may not be effective (e.g. where an insolvency official in those jurisdictions may be entitled to "cherry-pick" obligations), would jeopardise the effectiveness of the Termination Clause or the Netting Clause (as explained in paragraph 4.3) in the event that such Counterparty became subject to Insolvency Proceedings. In particular, there is no danger that an Insolvency Representative of such an Insolvent Party could treat the obligations in respect of Individual Contracts entered into in this jurisdiction separately from other obligations arising under the EFET Power Contract or other Individual Contracts entered into through branch offices outside this jruisdiction. Where a Counterparty is incorporated under the laws of - and has its COMI in - this jurisdiction and has branch offices in a number of other jurisdictions, an Insolvency Representative is required under the laws of this jurisdiction to include obligations arising from all transactions (regardless of the office from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would (subject to our observations under Part (A) above) be bound by the provisions of the EFET Power Contract in accordance with its terms.

For Counterparties that are:

(a) subject to the EU Insolvency Regulation,[46] this rule follows from article 3 of the EU Insolvency Regulation; insolvency proceedings may be opened by the courts of the Regulation State where a debtor has its COMI and such proceedings shall have universal effect throughout the other Regulation States, *i.e.* (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located, unless a "secondary insolvency proceeding" is opened in another Regulation State (except as otherwise provided in the EU Insolvency Regulation);

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

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

### 4.19 Foreign Company with only assets in The Netherlands

*Issue (l) on page 7 of the Instruction Letter*

In the absence of a Dutch Branch, the mere fact that certain assets and liabilities of a Foreign Company are located in this jurisdiction, does not give the courts of The Netherlands jurisdiction to declare Insolvency Proceedings with regard to that

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

Foreign Company, whether or not initiated by local creditors. Netherlands courts only have jurisdiction to open Insolvency Proceedings against legal entities having their COMI in The Netherlands and against any legal entity (other than an EEA Credit Institution or an EEA Insurance Company) that carries on business or professional activities *through a branch office in The Netherlands*.

4.20 **Foreign Company with COMI in a Regulation State**
*Issues (j) and (k) on page 8 of the Instruction Letter*

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

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

(ii) may open "territorial proceedings" or, after the commencement of main proceedings "secondary proceedings" in the event that such a Foreign Company possesses an "establishment" in the territory of such other Regulation State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Regulation State[47].

Thus, if a Foreign Company:

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

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

(ii) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the EU Insolvency Regulation in respect of the assets of that Dutch Branch. The applicable law with respect to such Insolvency Proceedings will be Dutch law and such Insolvency Proceedings will be territorial in scope, meaning that the effect of such proceedings will be restricted to the Foreign Company's assets situated in this jurisdiction.

4.21 **EEA Credit Institution / EEA Insurance Company**
*Issues (j) and (k) on page 8 of the Instruction Letter*

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

Reorganisation or liquidation measures with regard to such institutions should be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution or EEA Insurance Company and must be recognised in The Netherlands[48] and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution or EEA Insurance Company. Where any EEA Credit Institution or EEA Insurance Company is subject to insolvency proceedings in another Member State in accordance with (the rules implementing) the WUDCI or Solvency II, the enforceability of the Netting Provisions in insolvency situations must in our view be determined in accordance with the paragraphs 4.3.3(g) and (h).

4.22 **EEA Investment Firm**
*Issues (j) and (k) on page 8 of the Instruction Letter*

In relation to an EEA Investment Firm, Insolvency Proceedings can be imposed by the courts of this jurisdiction upon DNB's request. Reorganisation or liquidation measures with regard to such institutions can also be taken by the authorities of their home member state and will in that case include all assets and EU branches of that EEA Investment Firm and must be recognised in The Netherlands[49] and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Investment Firm. Where any EEA Investment Firm is subject to insolvency proceedings in another Member

[48] However, in order to implement Article 5 of the WUDCI, Emergency Measures may still be imposed by the courts (subject to notification of the home member state of the EEA Credit Institution), presumably if no reorganisation or liquidation measures were already taken by the authorities of that home member state in respect of that EEA Credit Institution. However, this provision is likely to remain inoperative as DNB has no powers under the FMSA to petition the Dutch courts to do so. We will therefore ignore this provision in this opinion (Article 3:205 FMSA).

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

State, the issue of enforceability of the Netting Provisions in insolvency situations must in our view be determined in accordance with paragraph 4.3.3(g).

4.23 **Foreign Company with COMI outside a Regulation State**
*Issues (j) and (k) on page 8 of the Instruction Letter*

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

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

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

To what extent foreign insolvency proceedings of foreign companies whose COMI is situated outside the Regulation States are recognised in The Netherlands, is unclear. It appears from Supreme Court case law that, absent international treaty provisions to the contrary, such foreign insolvency proceedings in principle have no extra-territorial effect in this jurisdiction.[50]

This means:

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

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

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

Although Netherlands international insolvency law is based on the territorial effect of foreign insolvency proceedings, this does not mean that these proceedings do not receive any recognition at all. The foreign receiver generally has *locus standi* in The Netherlands. The powers granted to a liquidator by the foreign *lex concursus* should therefore in principle be recognised in The Netherlands. Also in other respects foreign insolvencies can have legal

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

consequences in The Netherlands. It could be argued that the legal consequences created by the foreign insolvency law can be recognised in The Netherlands, as long as (i) they are not closely connected with the fact that the foreign insolvency must be regarded as a general attachment on the insolvent company's assets for the benefit of all his creditors, and (ii) this does not lead to unsatisfied creditors no longer having recourse in respect of assets of the insolvent company that are situated in The Netherlands.

4.24 **Foreign Company with Dutch Branch**
*Issue (k) on page 8 of the Instruction Letter*

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

Under Dutch law, a branch is not considered to have legal personality. Hence, the Foreign Company and <u>not</u> its Dutch Branch will at all times remain the counterparty under the EFET Power Contract. Because the mutuality requirement as set out in paragraph 4.8 is fulfilled in this scenario, set off can take place, however, in respect of the claims between the Solvent Party and the Foreign Company only. This remains true even in case the Dutch Branch qualifies as an "establishment" under the EU Insolvency Regulation and on the basis thereof territorial insolvency proceedings have been initiated in The Netherlands. In the latter case it is uncertain whether the EFET Power Contract and all Individual Contracts will be comprised in a Dutch Insolvency, save that the analysis of set-off under the EU Insolvency Regulation (paragraph 4.19 above) does not appear to be any different, such that if the Solvent Party has a net claim against the Insolvent Party it can file proof of such claim both in the main insolvency proceedings and in the secondary Dutch proceedings. The opening of territorial proceedings is only relevant because at first instance the *lex concursus* (*i.e.* Dutch set-off provisions) determines whether set-off is allowed or not. As explained in paragraph 4.8 above, Dutch set-off provisions, are in general, however, creditor-friendly and should thus in such situation not give rise to any problems, in particular where mutuality exists.

## PART C

## COLLATERAL

### 4.25 Choice of law

The CSA supplements, amends, forms part of and is subject to the EFET Power Contract. Therefore, the same opinion as set out in paragraph 4.40 below applies also to the CSA.

### 4.26 Recharacterisation of transfer of Cash Collateral

*Issues (m) and (n) on page 9 of the Instruction Letter*

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

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

If Dutch law would be the Governing Law, the result would be the same. Under the laws of this jurisdiction the transfer of Cash Collateral will be characterised as the payment of a bail sum (*waarborgsom*).[51] Therefore, a transfer of Cash Collateral under a CSA (where the cash is paid to the Transferee and not to any third party)

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

constitutes an unconditional transfer of "ownership" of such Cash, which will not be recharacterised as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in such Cash Collateral.

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

For the sake of completeness, we note that:

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

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

### 4.27 Pre-insolvency: perfection requirements

*Issue (o) on page 9 of the Instruction Letter*

Assuming the Transferee receives an outright transfer of a cash amount on a bank account in its own name and subject to the observations in paragraph 4.26 above, there will be no need to take any subsequent action to ensure that the Transferee's rights in the Cash Collateral are safeguarded. There are no requirements in this jurisdiction necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval or any procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce or continue such "ownership" interest.

### 4.28 Pre-insolvency: Substitution of Eligible Credit Support

*Issue (p) on page 9 of the Instruction Letter*

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

### 4.29 Substitution of Collateral

*Issue (p) on page 9 and issue (s) on page 10 of the Instruction Letter*

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

### 4.30 Transfer of additional Eligible Credit Support and voidable preference risk

*Issue (s) on page 10 of the Instruction Letter*

In case of transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the CSA, the same analysis as set out in relation to the substitution of Eligible Collateral in paragraph 4.29 above will apply. Under Clause 3 of the CSA, the Counterparty will be obliged to transfer additional Eligible Credit Support upon demand of the Transferee. This constitutes a prior legal and contractual obligation to effect such a transfer and, therefore, the transfer of additional Eligible Credit Support will not be voluntary as described in paragraph 4.4.1(i).

### 4.31 Enforceability of the CSA in the event of Insolvency Proceedings in this jurisdiction

*Issues (q) and (r) on pages 9-10 of the Instruction Letter*

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

4.32 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferee**
*Issues (q) and (r) on pages 9-10 of the Instruction Letter*

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

If, under the Governing Law, the CSA's title transfer provisions qualify as a financial collateral arrangement,[52] the requirements for a valid set-off in insolvency (as stated in paragraph 4.3.3 above) are partly disapplied. Netting and set-off will be allowed in respect of claims that have arisen *after* the Commencement Time **provided that** Terminating Party was not aware of the insolvency judgment at the relevant time. Equally, Cash Collateral may be transferred in respect of a debt that has arisen on the date of the Insolvency judgment, **provided that** the Transferee was not aware of such judgment at the relevant time.

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

4.33 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferor**
*Issues (q) and (r) on pages 9-10 of the Instruction Letter*

The same analysis as set out in paragraph 4.26 with regard to recharacterisation of an outright transfer of Cash Collateral applies in the event of the Counterparty (acting as Transferor) becoming subject to Insolvency Proceedings. The latter's

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

Insolvency Representative will have a claim for repayment of such Cash Collateral against the Transferee subject to the limitations arising from Netherlands insolvency law (as outlined in Part (A) above and in our qualifications below) with the same exception as mentioned in 4.28 above.

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

4.34 **Other local law considerations**
*Issue (u) on page 10 of the Instruction Letter*

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

## PART D

## GENERAL ENFORCEABILITY

*Issue (v) on page 10 of the Instruction Letter*

4.35 **Enforceability of the EFET Power Contract**

If the EFET Power Contract were to be governed by the laws of this jurisdiction, it is valid and legally binding and enforceable against the Parties in accordance with its terms save as set out in paragraph 4.32.1 and elsewhere in this Opinion. We are not aware of any Clauses in the EFET Power Contract, the Annexes or the Appendices that may infringe upon the *ordre public* (public policy) in this jurisdiction, irrespective of the Governing Law.

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

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

4.36.1 **Force majeure or similar legal concept**

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

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

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

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

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

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

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

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

Clause 8 of the EFET Power Contract on remedies for Failure to deliver and accept is valid and enforceable under the laws of this jurisdiction subject to the to the overriding principle of "fairness and reasonableness" as set out under 4.32 above.

## 4.38 Enforceability of Clause 12: Limitation of Liability

### 4.38.1 Clause 12.2

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

### 4.38.2 Clause 12.3

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

### 4.38.3 Clause 12.4

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

### 4.38.4 Clause 12.5

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

# PART E

# CONFIRMATION PRACTICES

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

### 4.39.1 Taped oral agreements

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

4.39.2 **Electronically transmitted confirmation**

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

4.39.3 **Is there a signature requirement?**

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

4.39.4 **Timing**

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

4.39.5 **Incorrect terms in a Confirmation**

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

4.39.6 **Telephone recordings**

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

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

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

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

## 4.40 Confirmation Practices

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

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

Individual Contract will be subject to the terms of the EFET Power Contract.

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

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

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

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

## PART F

## CORE PROVISIONS

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

*Issue (cc) in the Instruction Letter*

#### 4.41.1 Elections contemplated by Election Sheet

The standard elections contemplated in the Election Sheet pertaining to the EFET Power Contract (the "**Election Sheet**") will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above). For the avoidance of doubt, any additional provisions that are inserted in Part II of the Election Sheet can, however, change the substance of those opinions and are therefore outside the scope of this Opinion. Please also refer to paragraph 4.38.2, in which amendments to the core provisions are addressed.

#### 4.41.2 CSA

The standard elections contemplated in Clause 14 of the CSA (except for election 12 (*Additional provisions*) which falls outside the scope of this Opinion for the reasons mentioned in paragraph 4.37.1) will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above).

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

Please note that where under the applicable Governing Law the exchange would be regarded as the creation of new security interests, this could have an impact on general bankruptcy issues, in particular the voidness of post-

Insolvency dispositions by the Counterparty and the voidability of preferential transactions.

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

Our Opinion as set out herein will not be affected if the VAT Annex, the Allowances Appendix or Italian Appendix is entered into, regardless of whether Commodity Options and Commodity Transactions, Commodity Swaps and/or Allowances Transactions are entered into. Please note however that any additional provisions that are agreed between the Parties in the Appendices can of course change the substance of our opinions, in particular with regard to the Core Provisions mentioned in paragraph 4.38 below; these amendments are therefore left outside of the scope of this Opinion.

Specific attention is drawn to:

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

(b) the analysis with regard to set-off of interest in paragraph 5.5 below, that may *mutatis mutandis* apply to the Default Interest stipulations in Clause 8.1(a) of the Allowances Appendix.

4.41.4 **Qualification of allowances and Allowances Transactions**

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

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

4.42 **Core Provisions**
*Issue (dd) in the Instruction Letter*

4.42.1 Core provisions

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

(a) Clause 1;

(b) Clauses 10.3, 10.4 (except as stated in 4.38.2 below) and 10.5; and

(c) the Netting Clause,

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

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

***Clause 10.4 (Automatic Termination)***

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

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

***Clause 10.5(c) (Material Reason)***

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

This amendment would not affect our Opinion as set out herein. It is noted though that this amendment may lead to more limited occasions to terminate the EFET Power Contract.

***Netting Clause***

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

4.43 **Inclusion EFET Power Contract in CPMA**
*Issue (ee) in Instruction Letter*

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

## PART G

## GOVERNING LAW, ARBITRATION AND JURISDICTION

4.44 **Choice of law**
*Issue(ff) of the Instruction Letter*

If the EFET Power Contract is governed by the Governing Law, the courts of The Netherlands will observe and give effect to the choice of the Governing Law as the laws governing the EFET Power Contract in any proceedings in relation to the EFET Power Contract, subject to the limitations of Rome I as set out in paragraph 4.3.3(a) above.

4.45 **Submission to jurisdiction**
*Issue (gg) of the Instruction Letter*

Submission by a Counterparty to the jurisdiction of the German Institution of Arbitration or the courts of Germany or any other arbitritation or court, if so expressed in the EFET Power Contract, is valid and binding upon such Counterparty. A Dutch court would declare itself not competent (*onbevoegd*) in the event that a Party to the EFET Power Contract containing an exclusive choice of forum clause or choice of arbitration clause attempted to sue the other Party before the courts of The Netherlands.

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

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

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

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

## PART H

## REGULATORY REGIME

### 4.46 Financial regulatory issues

*Issue (gg) of the Instruction Letter*

*General Overview*

4.46.1 Under the FMSA, a license requirement applies to anyone providing investment services or performing investment activities in The Netherlands. Providing investment services (*verlenen van beleggingsdiensten*) or performing investment activities (*verrichten van beleggingsactiviteiten*) is defined with reference to the concept of "financial instruments". Financial instruments are those listed in Annex I Section C of MiFID2.[53] These include emission allowances (and derivatives on such allowances) as well as derivatives transactions with regard to climatic variables, freight rates, emission allowances, inflation rates or other economic statistics.

Commodity derivatives are defined separately in article 2(1)(30) of MiFIR to include securitized derivatives.[54] Excluded are REMIT wholesale energy products traded on an OTF that must be physically settled, spot contracts and contracts for commercial purposes.[55] Subject to the same exceptions, Commodity Transactions, Commodity Options and Commodity Swaps may well be considered to be "financial instruments" and "commodity derivatives" under the FMSA.[56] Commodity Transactions relating to emission allowances are not commodity derivatives but financial instruments as they fall within C(4) of Annex I.

The types of regulated investment services and activities include the following (insofar as these relate to "financial instruments" and then only to the extent performed in a professional or commercial capacity):

(1) Reception and transmission of client orders

(2) Execution of orders on behalf of clients

[53] Directive 2014/65/EU, OJ L.173

[54] Regulation (EU) 600/2014, OJ L.173

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

[56] Regardless of the fact whether these transactions are physically or cash settled.

(3) Dealing on own account

(4) Portfolio management

(5) Investment advice

(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis

(7) Placing of financial instruments without a firm commitment basis

(8) Operating an Multilateral Trading Facility

(9) Operating an Organised Trading Facility

4.46.2 The Individual Contracts will - in principle - trigger a licensing requirement if entered into with Counterparties within the Netherlands in the course of a business or profession. The licensing requirement does not depend on the customer type. There is no specific exemption for an entity that only deals with Dutch institutional investors.[57] The Netherlands also does not apply a "characteristic performance" test and as a result regulated MiFID activities or services *are deemed to be performed in the Netherlands* once the services are actually provided to one or more Dutch residents. This means that the Dutch licensing regime is triggered when providing a regulated service for or entering into a regulated contract with one or more Dutch residents.[58] However, if the exclusive initiative for the provision of investment services by a non-Dutch entity to the Dutch Counterparty comes from the Dutch Counterparty, then such non-Dutch entity could rely on the "initiative (or reverse solicitation) test" (see paragraph 4.46.6 below).

[57] Please note that certain customers which are themselves subject to regulation, such as AIF or UCITS funds and their managers, are limited in their choice of suppliers. This is not a licensing restriction as such, but an important legal restriction on the ability of certain Counterparties to deal with other Parties. However, the burden to ascertain whether the Counterparty is permitted to be supplied with a particular product or service rests on the Counterparty.

[58] If an entity has its registered office or ordinary residence outside the Netherlands, but targets the Dutch market in order to engage in a licensable activity on a cross border basis, and in the course of a business or profession, to persons and/or entities having their registered office or ordinary residence in the Netherlands, licence requirements under Dutch law need to be observed. There are no clear guidelines as to when such activity is deemed to be carried out in the Netherlands, and whether a licensing requirement is triggered will need to be assessed on a case-by-case basis. However, it can be assumed that the activities requiring a licence will be given a fairly wide application and that an activity that is targeted at customers in the Netherlands (and where Dutch customers subsequently enter into a contract) will be deemed to be carried out in the Netherlands and so would require a licence. In general, "targeting customers" in the Netherlands will be deemed to occur when provision or marketing of specific products and/or services is directed at local customers: for example, through advertising products or services in local language newspapers or local websites; or where meetings (whether in person or by teleconference) are held with local customers during which specific products and services are discussed. "Targeting" customers (and triggering of the licensing requirement) could occur regardless of whether the entity providing the product or service is acting "in-country", and regardless of the volume or frequency of products and services provided.

4.46.3 Therefore, the mere fact that a Party enters into an Individual Contract with a Dutch Counterparty, without having "targeted" Dutch Counterparties, may already be sufficient to trigger license requirements. Solicitation by a third party could also be attributed to the service provider depending on whether the third party was influenced in its behaviour by any incentives or other benefits or group company relationships.

4.46.4 Note that if the financial instruments or investment service is provided by:

(i) an EU regulated entity, all products and services can in principle be lawfully provided in accordance with the EU directives for financial services following notification to the regulator in the home member state. Under certain EU laws (CRD IV, AIFMD, MiFID2), an EEA entity licensed under the local laws pertaining to the activity which is in-scope for the relevant EU laws may notify via its home Member State's regulatory authority the regulatory authority of a host Member State of its intention to provide services on a cross-border basis (a "**Passport**"). The result is that the activities for which a license has been obtained under home Member State laws can be performed on a cross-border basis also in the host Member State without the need for a further/new licence. A Passport will therefore entitle the passported entity to perform business activities as far as it holds a license for this in its home Member State, and provided that there are no restrictions included in the passport notification in respect of such activities. This system is fully incorporated in the FMSA.

(ii) non-EEA entity, a licence will be required under the FMSA, unless the non-EEA entity makes use of the cross border exemption for MiFID services as described in 4.46.5 (c) below (available for three specific countries: Australia, USA and Switzerland) or relies on the initiative test as described in paragraph 4.46.5(C) below.

4.46.5 Note that:

(A) marketing activities in themselves do not trigger the license requirements. Actually, the license requirements are triggered only when the actual in-scope financial products or financial services are provided;

(B) entities which are not registered in the Netherlands as a Dutch or EU incorporated bank are never permitted (without dispensation from the

Dutch Central Bank[59]) to use the word "bank" in their name or when conducting marketing in the Netherlands, including in respect of unregulated products or services, except if contacts and contracts are exclusively with professional market parties (*professionele marktpartijen*, "**PMPs**") as defined in the FMSA, which include (but is not limited to) banks, investment firms, asset managers, insurance companies, certain large corporates,[60] pension funds, and regulated and unregulated investment funds and companies. This prohibition should not apply to a Party providing investment services or performing investment activities in the Netherlands on the basis of reverse solicitation (available for MiFID services);

(C) a formal exemption from the FMSA's license requirement exists for investment firms based in Australia, the USA or Switzerland which restrict their MiFID investment services and activities in the Netherlands to professional clients (as such term is defined in MiFID2).[61] All firms that provide MiFID investment services and/or activities as part of their business can qualify as "investment firm". Despite the formal exemption from the license requirement, such investment firms are subject to all of the usual conduct of business rules that apply to licensed MiFID investment firms (but note that many conduct of business rules do not apply in relation to professional clients).[62]

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[59] It is possible for this restriction to be lifted if a dispensation from the Dutch Central Bank has been obtained by the non-EU entity.

[60] This category includes the following:

1. Large Enterprises: Large undertakings meeting two of the following size requirements on a company basis:

- balance sheet total: EUR 20,000,000;

- net turnover: EUR 40,000,000;

- equity capital: EUR 2,000,000,

2. Substantial Enterprises: Any enterprise or entity with total assets of at least EUR 500,000,000 according to its balance sheet.

3. Sophisticated Investors: Any enterprise, entity or natural person with a net equity (*eigen vermogen*) of at least EUR 10,000,000 and who or which has been active in the financial markets on average twice a month over a period of at least two consecutive years prior to the relevant interactions.

[61] Article 10 of the FMSA's Exemption Regulation provides that investment firms that have their statutory seat in Australia, the USA or Switzerland are exempt from the requirement to obtain a license for providing investment services or performing investment activities in the Netherlands (both in the meaning of the MiFID) when dealing with MiFID professional clients only, provided that they are supervised in their home state for the investment services or activities concerned. To be able to rely on this exemption, the AFM wants the applicant to prove that it is supervised in its home state with respect to the investment services or activities that it wishes to offer in the Netherlands. The applicant can prove this in two ways: (1) through a declaration signed by the relevant home state regulator; or (2) through a letter including the website address of the home state regulator if from such website it appears that the applicant is subject to supervision (e.g. this could appear from a register of authorised firms on the home state regulator's website).

[62] This cross-border exemption for MiFID investment services may be amended in the near to mid-term future. In particular, if and when the European Commission will regard Australia, the US and Switzerland (and maybe other

*Initiative (reverse solicitation) test*

4.46.6 The initiative test allows a non-Dutch financial institution or company to perform investment services for Dutch parties without the need to obtain a Dutch license pursuant to the FMSA (or for EU institutions: use a Banking Directive of MiFID passport) in the event that the following tests are all met:

(i) it was the Dutch Counterparty which approached the foreign financial institution for the *specific service* which resulted in the contract entered into between them; the application of the initiative test is dependent on the actual request for one or more specific services; [63] and

(ii) the foreign financial institution has not actively marketed nor promoted its investment services in the Dutch market (either directly or indirectly through affiliates or third parties), either by personal visits, advertising, websites, e-mails or otherwise);[64] and

(iii) the foreign financial institution does not offer additional services to the Dutch Counterparty and does not actively seek to expand any mandate received from that Counterparty (i.e. once the initial contract has been entered into or the initial service has been provided without a license being required, each further and additional service must also be rendered solely at the Counterparty's initiative in order to avoid a license becoming required).

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countries) as "equivalent" countries, in accordance with the relevant provisions of MiFIR, then there will no longer be any supervision over investment firms from such countries if they register with ESMA and provided that such firms provide MiFID investment services and/or activities only to eligible counterparties or professional investors (with the exclusion of "opt-up" professional investors).

[63] Therefore, if the Counterparty at its initiative were to ask about trading for instance, cash equities with the relevant financial institution and a representative of that institution were to subsequently inform it about the financial institution and provide it with further details on trading cash equities with the financial institution, then that would satisfy the initiative test (provided also the other conditions set out above are met, in particular point (ii)), but if the sales person were to provide it with details of other services which were not originally requested by the Dutch Counterparty, the requirements under the initiative test would no longer be complied with as in that case this would be considered as offering additional services.

[64] The existence of any marketing activities for relevant services and targeted at Dutch residents (whether by the relevant entity or its group companies) can make it difficult to rely upon this exemption. In other words, it is often difficult to demonstrate with larger firms that they have not promoted themselves at all, see condition (ii) above where we set out that indirect marketing through affiliates or third parties should not take place. It is not decisive that the marketing of investment services is not specifically targeted at Dutch residents, i.e. when marketing information is available to Dutch residents, the initiative test is likely to fail. This is because electronic marketing makes it more difficult to conclude that marketing information is not available for Dutch investors.

The burden of proof in demonstrating compliance with this exemption rests with the foreign financial institution seeking to rely on it and would require the relevant entity to demonstrate that the initial contact came from the Dutch Counterparty. There are no formal requirements as to what evidence should be kept. It would be prudent to keep as many file notes and as much correspondence as possible to evidence compliance with the initiative test. Evidence of compliance with the initiative test can also be a matter of incorporating representations in the client documentation (i.e. that the service was not marketed to the customer and that the customer has at its own initiative approached the bank or investment firm). Including representations in the documentation is not sufficient if in reality the firm failed to comply with the three sub-tests of the initiative test.

*Exemption for Own Account Trading; Non-Commodity Derivatives*

4.46.7 In the Netherlands, there are two dealing on own account exemptions, the one stems from MiFID II and the other is a local (and even more liberal) exemption. These are summarized below.

(A) *MiFID II on own account dealing exemption*

The MiFID II dealing on own account exemption (as incorporated in the FMSA) is available to:

"persons dealing on own account in financial instruments (…) and not providing any other investment services or performing any other investment activities in financial instruments (…) unless such persons:

- are market makers;
- are members of or participants in a regulated market or a Multilateral Trading Facility (MTF), on the one hand, or have direct electronic access to a trading venue, on the other hand, except for non-financial entities who execute transactions on a trading venue which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their groups;
- apply a high-frequency algorithmic trading technique; or
- deal on own account when executing client orders".

An entity would be able to rely on the dealing on own account under the Dutch implementation of MiFID II in light of its overall business, even where it also acts as market maker (outside the Netherlands) in the instrument which is being traded or provides investment services to clients outside the Netherlands. From a Dutch law perspective, we only look at the activities conducted in the Netherlands. If activities in the Netherlands (i.e. with Dutch customers/counterparties) are restricted to dealing on own account, the exemption can be relied on.

(B) *Domestic dealing on own account exemption*

The domestic on own account dealing exemption (Article 10a of the Exemption Regulation to the Dutch Financial Supervision Act) is available to entities from outside the EEA that deal on own account in financial instruments with Dutch Counterparties. This new exemption, which took effect on 5 January 2018, provides for an even more liberal regime in respect of own account traders. The new exemption benefits traders for own account that are not exempt pursuant to MiFID II (in particular because they fall within any of the categories mentioned under (A)(i) to (iii) above), by providing that:

> *"the FMSA does not apply insofar investment activities are performed by investment firms from outside the EEA which in the Netherlands only deal on own account (in the meaning of MiFID II) by trading in financial instruments with or through persons or entities that are authorised pursuant to the FMSA to provide investment services or deal on own account in the Netherlands."*

The restrictions mentioned above under (A)(i), (ii) and (iii) do not apply. So even if a firm is a market maker in the Netherlands, or a member of a Dutch trading platform, or applies a high-frequency algorithmic trading technique when trading in the Netherlands, this local exemption can still apply. Examples given by the Ministry of Finance of entities that may rely on the exemption include entities that trade on a trading platform (with other participants of the platform), whether as direct member or participant or as DEA user. The exemption can also be relied upon where the trade is OTC. However, a condition to rely on this exemption is that the non-EEA firm trades with or through persons that are authorised (as a matter of Dutch law) to provide investment services or deal on own account in the Netherlands. This means that the Dutch Counterparty to the trade would have to be a Dutch Bank, Dutch Investment Firm, Dutch Insurance Company, Investment Fund or other proprietary traders, and that these operate in the Netherlands with a license or by relying on an exemption.

Reliance on both exemptions only possible if the firm has no client relationship with the Dutch customer/counterparty

(C) *Restrictions applicable to Both Exemptions*

Both dealing on own account exemptions require that the firm does not at the same time "execute orders in financial instruments on behalf of a customer". This raises the question whether an entity, when executing transactions in MiFID financial instruments, exclusively deals for its own account or perhaps also (at the same time) executes an order "on behalf of a customer". The EU (MiFID II) and Dutch legislator acknowledge that a firm can deal on own account, but at the same time also on behalf of a customer. In line with MiFID II, dealing on own account just means "trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments". Whether the execution of a transaction in financial instruments is (also) done on behalf of a client (which would preclude reliance on the exemptions) is, according to the European Commission:

> *"a question of fact in each case which ultimately depends on whether the client legitimately relies on the firm to protect his or her interests in relation to the pricing and other elements of the transaction (such as speed or likelihood of execution and settlement) that may be affected by the choices made by each firm when executing the order"*

The Commission has listed some considerations which, taken together, will help to determine the answer to this question. They include the following (quote of Commission text):

> *"Whether the firm approaches (initiates the transaction with) the client or the client instigates the transaction by making an approach to the firm. In those cases where the firm approaches a retail client and suggests him to enter into a specific transaction it is more probable that the client will be relying on the firm, to protect his or her interests in relation to the pricing and other elements of the transaction;*
>
> *Questions of market practice will help to determine whether it is legitimate for clients to rely on the firm. For example in the wholesale OTC derivatives and bond markets buyers conventionally 'shop around' by approaching several dealers for a quote, and in these circumstances there is no expectation between the parties that the dealer chosen by the client will owe best execution [in which case the dealer does not act "on behalf of" the client; Clifford Chance Amsterdam];*

*The relative levels of transparency within a market will also be relevant. For markets where clients do not have ready access to prices while investment firms do, the conclusion will be much more readily reached that they rely on the firm in relation to the pricing of the transaction".*

The Commission concludes by stating that *"these factors are likely to support the presumption that, in ordinary circumstances, a retail client legitimately relies on the firm to protect his or her interests in relation to the pricing and other parameters of the transaction. Similarly, prima facie application of these factors is likely to lead to the presumption that in the wholesale markets clients do not rely on the firm in the same way".*

Legal commentators have concurred with these views from the Commission. Note that there is no further guidance from the Dutch financial regulators as to when a firm is (exclusively) dealing on own account. The factors described by the Commission and indicating whether or not a firm deals exclusively on own account or also for the account of clients are fact specific. In practice firms are likely to make a regulatory risk assessment and conclude that they deal exclusively on own account and do not service a client in the way as described by the Commission.

Contractual representations can support a dealing on own account defence, e.g. to the effect that each party:

- enters into the contract as principal;
- is not relying on advice from the other party;
- has made and will make its own decisions regarding the entering into of any transaction based upon its own judgement and upon advice from such professional advisers as it has deemed necessary to consult;
- understands the terms, conditions and risks of each transaction and is willing to assume (financially and otherwise) those risks.

*Exemption for Own Account Trading; Commodity Derivatives and Emission Allowances*

4.46.8 Article 2(1)(j) of MiFID2 contains a separate own account dealing exemption in respect of commodity derivatives and emission allowances (or derivatives thereof). This exemption applies only to those entities:

(i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or

(ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to *the customers or suppliers of their main business*;

provided that:

- for both these cases individually and on an aggregate basis this is *an ancillary activity to their main business, when considered on a group basis,*[65] and that main business is not the provision of investment services within the meaning of MiFID2 or banking activities, or acting as a market-maker in relation to commodity derivatives,
- those entities not apply a high-frequency algorithmic trading technique; and
- those entities notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business.

Note that the exemption under (i) requires that the entity does not at the same time execute orders in financial instruments on behalf of a customer. This raises the question whether the entity, when executing transactions in MiFID financial instruments, purely deals for its own account or perhaps also (at the same time) executes an order "on behalf of a customer". The analysis under (C) above applies here as well.

4.47 **Currency or exchange control laws**

Counterparties are obliged to comply with all notification and registration requirements of DNB in connection with all payments to be made by the parties under the EFET Power Contract to or from non-residents of The Netherlands in accordance with the General Reporting Instructions 2003 (*Rapportagevoorschriften betalingsbalans-rapportages 2003*) issued by DNB pursuant to the External Financial Relations Act 1994 (*Wet Financiële Betrekkingen Buitenland 1994*), although a failure to perform any of these formalities will not adversely affect the validity, effectiveness, enforceability or admissibility in evidence of the agreements or any payment made or to be made thereunder.

[65] This ancillary business test has been elaborated in Commission Delegated Regulation 2017/592, OJ. L87/492.

## PART I

## OTHER PROVISIONS

Apart from the recommendations mentioned in paragraphs 4.3.4, 4.12 and 4.16.2(b), we have also set out a few other textual suggestions that EFET members may wish to consider in Appendix B.

## PART J

## EXECUTIVE SUMMARY ON CLOSE-OUT NETTING AND REGULATORY ISSUES

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

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

4.50 If Automatic Termination of Individual Contracts is not selected to apply to the EFET Power Contract, the Terminating Party would be able to terminate all outstanding Individual Contracts between the Parties upon the Insolvency of its Counterparty in this jurisdiction and such termination would be enforceable under the laws of this jurisdiction subject to our observations in paragraph 4.2 (which relate, *inter alia*, to Individual Contracts which are outstanding as of the day of the Insolvency judgment and which are within the scope of articles 38/237 BA as these would be terminated by operation of law) and in our qualifications below (which relate to the ability of resolution authorities to terminate outstanding derivatives agreements with BRRD Entities and Dutch Insurance Companies for purposes of bail-in).

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

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

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

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

4.55 The entry into of Individual Contracts may require a license under the FMSA, unless an exemption from such license requirements is available. The Netherlands has fully transposed the MiFID2/MiFIR regime for proprietary trading in commodity derivatives without goldplating. An overview is provided in Part H of this Opinion.

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

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

## 5. QUALIFICATIONS

The Opinion expressed above is subject to the following observations:

**Meaning of "Enforceable"**

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

5.2 no part of this Opinion is to be read as a statement that judgments rendered by foreign courts would be enforceable in The Netherlands or that all the procedures of such courts (such as discovery of documents or the compulsion of witnesses by subpoena) will be available against a Counterparty; generally speaking, an enforceable judgment obtained in a foreign court against a Counterparty in an action instituted in the manner contemplated by the EFET Power Contract will be recognised and enforced by the courts of The Netherlands without re-trial or re-examination of the merits, on the basis of and subject to the limitations imposed by the applicable enforcement treaty or European regulation (such as for example Council Regulation (EC) No. 1215/2012 on Jurisdiction and the Enforcement and Judgments in Civil and Commercial matters of 12 December 2012 (the "**Judgments Regulation**")) and in the absence of such an internationally binding arrangement no such recognition or enforcement will be afforded to the foreign judgment;

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

**Insolvency Proceedings/Regulatory Interventions**

5.4 all calculations under the Netting Clause and the CSA may have to be made by reference to a date not later than the date on which the judgment declaring the Insolvency Proceedings was rendered.[66] Although there is no express provision in the BA stating this, it is held that as a general rule an Insolvency judgment fixes the rights of the creditors unalterably as of the Commencement Time. Any amount by which any Settlement Amount and/or the Termination Amount increased between the Commencement Time and the (later) date on which the Solvent Party exercises the remedies under the Netting Clause or the CSA, may not be recoverable and therefore not capable of set-off. Accordingly, all amounts included in the calculations or the set-off under the Netting Clause may have to be calculated by reference to a date not later than the insolvency judgment date which may occur prior to the date of close out and/or the valuation date for the purpose of netting. This risk does not arise in case the Insolvent Party is a Dutch Credit Institution or a Dutch Investment Firm and the Netting Clause is treated as a 'netting arrangement' (see paragraph 4.3.3(g) above). The risk is furthermore

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

somewhat mitigated where the CSA qualifies as a financial collateral arrangement;[67]

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

5.6 if the DNB or the AFM finds that a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm, or an Investment Fund (or its Manager or Custodian) does not comply with the solvency, liquidity and administrative directives ("*richtlijnen*") issued by it, or if there are other indications of a development which in the judgment of the DNB or the AFM endangers or could endanger the solvency or liquidity of such an entity, then the DNB or the AFM can determine that, as of a certain moment in time, all or certain bodies of the Dutch Credit Institution, Dutch Insurance Company, Dutch Investment Firm or Investment Fund (or its Manager or Custodian) can only exercise their powers with the approval of one or more persons (known as silent administrators, "*stille curatoren*") designated by the DNB or AFM. Pursuant to the FMSA, the Dutch Credit Institution, Dutch Insurance Company, Dutch Investment Firm or Investment Fund (or its Manager or Custodian) can challenge the validity of any act performed without such approval, if the other party to that act knew that no such approval was given, or could not have been ignorant thereof. The appointment of a silent administrator and accordingly the necessity of the approval referred to is not normally published. It is likely that without a publication or without it being otherwise obvious to the other party that the person or persons was/were designated as referred to, the other party will not know, nor ought to have known, that the approval referred to was required;

***Resolution powers affecting Dutch Insurance Companies***

5.7 The preparation, application and implementation of Transfer Measures (or their foreign equivalents) will affect the rights of a Party in respect of its Transactions with a Dutch Insurance Company (or with any entity incorporated under Dutch law which is part of the same group as the Dutch Insurance Company). Regardless

[67] The Retroactive Effect Rule is partially disapplied for financial collateral arrangements and for acts performed pursuant to such arrangements (e.g. transfer of additional Collateral) in that: (i) the actual time of the judgment applies, instead of the Commencement Time, to such financial collateral arrangements and acts; and (ii) if such financial collateral arrangements or acts were entered into, or took place, on the same day as the judgment opening the Insolvency Proceedings, they are valid provided the other party is able to show that it was not aware, nor should have been aware, of such judgment

of the laws governing the contractual relationship with the Dutch Insurance Company (or with such a group entity), a Party will not be entitled – except with DNB's prior approval - to exercise acceleration rights, invoke termination events or events of default, exercise set off (including netting) rights or apply any other remedy against the relevant entity if any such rights or remedies arise as a result of either of the following (hereinafter: "**Relevant Events**") :

(i) the preparation, application or implementation of a Transfer Measure (or its foreign equivalent) in relation to the Dutch Insurance Company, or

(ii) any act or omission (including any default) resulting from it;

(the "**Automatic Stay**").

The Automatic Stay does not apply to (i) rights or remedies arising from financial collateral arrangements with the Dutch Insurance Company; or (ii) rights or remedies arising from a Dutch Insurance Company's participation in a "system"[68] as against other such participants.

Consequently, the exercise of set-off and/or netting rights against a Dutch Insurance Company (or any entity which is part of the same group) based solely on the occurrence of a Relevant Event may be mandatorily and indefinitely deferred (until DNB approval is obtained) unless they occur in the context of a CSA which qualifies as a financial collateral arrangement with the Dutch Insurance Company.

Once the Recovery and Resolution (Insurers) Act takes effect:

(i) Transfer Measures will be abolished and so will the Automatic Stay;

(ii) the resolution powers of DNB in respect of Dutch Insurance Companies will be harmonized with those for BRRD Entities and the analysis in paragraph 5.8 below will then apply *mutatus mutandis* to Dutch Insurance Companies.

[68] I.e. a system within the meaning of Article 212a(b) BA, being (i) a system designated by the Dutch Ministry of Finance pursuant to Article 212d of the BA; or (ii) a formal arrangement governed by the laws of a member state of the European Union which has been notified by such member state to the Commission of the European Communities as a system within the meaning of the Settlement Finality Directive.

**Effect of BRRD and SRMR**

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

*Mandatory Default Override*

5.8.1 Under Article 1:76b and Article 3A:57 FMSA, provided that the BRRD Entity's substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed, the taking of a crisis prevention measure (as defined in the BRRD) or a crisis management measure (as defined in the BRRD; this includes a Resolution Power) in relation to a BRRD Entity, or the occurrence of any event directly linked to such a measure, cannot constitute an enforcement event (within the meaning of the FCA Law), and shall not make it possible to exercise against the BRRD Entity any termination, suspension, modification, netting or set-off rights, to obtain possession, exercise control or enforce or create any security over any asset of the BRRD Entity, or to enforce security interests. However, rights to terminate based on the existence or occurrence of other circumstances and the operation of the Netting Provisions in relation to them, should not be affected (article 68(4) BRRD).[69]

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

*Suspension Powers*

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

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

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

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

(iii) under Article 3A:54 FMSA, to suspend the contractual termination, acceleration or close-out rights[70] of a party to a contract with a BRRD Entity provided that such BRRD Entity's substantive obligations under the contract continue to be performed.

Any period of suspension as referred to above must end no later than midnight at the end of the first business day following the day on which the order providing for the suspension is published. Thereafter the suspension or restriction is automatically lifted.

*Partial Property Transfers*

5.8.4 A property transfer may apply to only part of the assets and liabilities of a BRRD Entity (such a transfer being referred to as a "*partial property transfer*").[71] A partial property transfer could cause the transfer of some, but not all, of the Transactions (or obligations arising under Transactions), with the result that the ability to net the amounts due in respect of different Transactions against the amounts due in respect of others is impaired. The same could also result from the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party to an agreement.

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

5.8.5 Article 76 BRRD (article 3A:60 FMSA) provides that in the case of a partial property transfer to a transferee (or the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party to an agreement), the Member States must ensure the protection of certain arrangements. This includes, in particular, security

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

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

arrangements, set-off arrangements[72] and netting arrangements[73] or title transfer financial collateral arrangements. Pursuant to Article 3A:60 FMSA, rights and liabilities between a person and a BRRD Entity are protected if they are rights and liabilities which either the person or the BRRD Entity is entitled to set-off or net under any such arrangement existing between them.

5.8.6 Articles 77-80 BRRD provide that if a partial property transfer has been made in contravention of Article 76, the partial property transfer does not affect the exercise of the right to set-off or net (i.e. these rights can be exercised irrespective of the partial property transfer). There are RTS (Commission Delegated Regulation (EU) 2017/867, OJ. 2017, L.131/15) which further specify the classes of arrangements to be protected under Article 76 BRRD and thereby affect the scope of protected arrangements also under Dutch law.

*Bail-In Powers*

5.8.7 Bail-in (article 26 SRMR/article 3A:44 FMSA) may be applied to liabilities owed by a BRRD Entity under or in connection with the German Master Agreement, or a Transaction, and would then reduce or eliminate the amount owed with the effect that the ability of the non-defaulting Party to net amounts due in respect of that liability against liabilities owed by the non-defaulting Party to the BRRD Entity is commensurately reduced or eliminated. However, in this regard articles 3A:44(3), 60 and 61 FMSA prohibit bail-in from being applied in relation to a liability which is:

(i) a liability which either the creditor or the BRRD Entity is entitled to set-off or net under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement between them ("*the relevant arrangement*");

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

[73] As defined in article 2(1)(98) BRRD: "*an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC*".

(ii) a liability that relates to a derivative[74] which has not been converted into a net debt, claim or obligation in accordance with the relevant arrangement;

Bail-in may therefore only be applied in respect of derivatives liabilities after close-out of the relevant derivatives contract (article 49(2) BRRD), and for that purpose article 63(1)(k) BRRD (article 3A:51 FMSA) grants the resolution authority the ability to terminate and close out any derivatives (whether collateralised or not). Any resulting net close-out amount payable by a BRRD Entity, to the extent that it is not a secured liability, is consequently subject bail-in, even though the actual contract (prior to close-out) was a secured liability.

**Choice of Governing Law**

5.9 if both Parties to the EFET Power Contract would be established in The Netherlands, the validity of the choice for a Governing Law (not being Dutch law) is uncertain as in these circumstances, an "international connection" appears to be missing. In view of the type of transactions contemplated under the EFET Power Contract, however, a persuasive argument could be made that there is a sufficient international connection, but the matter is as yet undecided;[75]

**Notification Duty for Events of Default**

5.10 in addition to the consequences of any Transfer Measures as set out in paragraph 5.7 above, any contractual or statutory obligation, regardless of the governing law, of a Dutch Insurance Company (or a Dutch entity forming part of the same group as such Dutch Insurance Company) to notify another party of the preparation,

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

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

application and execution of Transfer Measures or to provide any details in relation thereto, shall be unenforceable (article 3:267g FMSA);[76]

**General Qualifications**

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

5.12 although Part H of this Opinion provides a general description of the applicable regulatory regime regarding licensing requirements and available exemptions for Parties entering into commodity derivatives, no opinion is given (or may be inferred or implied) as to whether any of the Parties to the EFET Power Contract requires a license, exemption or dispensation for providing regulated banking, investment, or payment services in this jurisdiction (whether acting on a cross-border basis or otherwise). Nevertheless, any failure to obtain such a license, exemption, or dispensation will not render the EFET Power Contract or any Individual Contract null, void or voidable as matter of Dutch law;

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

5.14 no opinion is given as to whether any Party needs to comply with or as to the consequences of non-compliance with any applicable provisions of EMIR and any technical standards made thereunder in respect of anything done by it in relation to or in connection with the EFET Power Contract, any Individual Contract or the CSA, respectively. However, article 12(3) of EMIR provides that any

[76] Note also that article 3:267g FMSA is to be abolished when the Recovery and Resolution (Insurers) Act becomes effective (estimated to be 01.01.2019).

infringement of the rules under Title II of EMIR "*shall not affect the validity of an otc derivative contract or the possibility for the parties to enforce the provisions of an otc derivative contract*"; consequently any failure by a party to so comply should not make the EFET Power Contract or any Individual Contract thereunder invalid or unenforceable;

5.15 with reference to our opinion in Part (A) above, it should be noted that with respect to disputes regarding verification of claims against a Counterparty that is subject to Insolvency Proceedings in this jurisdiction, the court of The Netherlands which has declared the Insolvency Proceedings has exclusive jurisdiction;

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

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

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

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

## 6. RELIANCE

This Opinion:

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

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

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

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

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

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

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

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

Yours faithfully,

**F.G.B. Graaf**
**advocaat**
**Clifford Chance LLP**

# APPENDIX A

## OVERVIEW OF INSOLVENCY PROCEEDINGS AND RESOLUTION PROCEEDINGS

1. ***Bankruptcy: general overview***

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

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

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

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

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

2. ***Moratorium of payments: general overview***

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

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

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

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

3. ***Insolvent Foreign Companies***

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

If a Foreign Company's COMI is located in a Regulation State[77], then, pursuant to article 3 EU Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings will have universal effect throughout the other Regulation States, *i.e.* (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be

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

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

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

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

4. ***Emergency Measures***

Bankruptcy (*faillissement*) can be applied to Dutch Credit Institutions and Dutch Insurance Companies (as well as to Dutch branches of Third Country Credit Institutions, Third Country Insurance Companies and Third Country Investment Firms). However, the FMSA imposes Emergency Measures as a substitute procedure to the BA's moratorium of payments (*surseance van betaling*) in respect of Regulated Entities.

Both bankruptcy and moratorium can be applied to Dutch Investment Firms, as well as to the Dutch branches of EEA Investment Firms (unless their home member state applies liquidation or reorganisation measures first; see paragraph 4.22 of this Opinion) and Third Country Investment Firms.

In relation to an EEA Credit Institution or an EEA Insurance Company, neither bankruptcy nor moratorium of payments nor Emergency Measures can be imposed in this jurisdiction.

In relation to Regulated Entities: (i) the FMSA provides that only DNB may petition a Dutch court for the application of Emergency Measures to such a Regulated Entity and (ii) the BA provides that no third party (but only DNB) can file a petition for the bankruptcy of any such Regulated Entity. In relation to a Third Country Credit Institution and a Third Country Insurance Company, Emergency Measures only encompass the business activities conducted from the branch(es) located in this jurisdiction.

Emergency Measures are comparable to a moratorium of payments and a number of the BA's provisions apply thereto mutatis mutandis; the court appoints one or more administrators in order to restore order to the business of the Regulated Entity and these administrators do not require the cooperation of the Regulated Entity's management in taking the decisions which they consider in the interests of creditors. At any time during Emergency Measures, the court may authorise the administrators to transfer the Regulated Entity's business in whole or in part to another institution or to wind it up and may issue a bankruptcy order in respect of the Regulated Entity. Emergency Measures under the FMSA do not materially affect the analysis set out in this Opinion.

Once the Recovery and Resolution (Insurers) Act takes effect, Emergency Measures will be abolished for all entities mentioned above to which they can currently be applied.

5. ***Intervention Measures***

5.1 Transfer Measures

DNB has the power under the FMSA to (i) transfer of all or part of the business of a Dutch Insurance Company, its parent company if established in this jurisdiction, or a Third Country Insurance Company to a private sector purchaser, or (ii) transfer of all or part of the business of such an entity to a "bridge institution". DNB can submit a plan for such a transfer to the Dutch courts in the following situations:

(i) if DNB petitions for the bankruptcy of such an entity;

(ii) during the bankruptcy of such an entity;

(iii) if DNB petitions for the application of Emergency Measures;

(iv) during the application of the Emergency Measures; or

(v) if DNB petitions for the application of Transfer Measures.

Upon the court having approved the Transfer Measures, it will appoint one or more administrators charged with the execution of the transfer. Transfer Measures qualify as reorganisation measures under Solvency II.

Once the Recovery and Resolution (Insurers) Act takes effect:

(i) Transfer Measures will be abolished and so will the Automatic Stay;

(ii) the resolution powers of DNB in respect of Dutch Insurance Companies will be harmonized with those for BRRD Entities.

5.2 Nationalisation Measures

If the creditworthiness of a Dutch Credit Institution, a Dutch Insurance Company, Dutch Investment Firm or any other regulated entity qualifying as a financial undertaking (*financiële onderneming*) within the meaning of the FMSA threatens the stability of the Dutch financial sector, the Dutch Minister of Finance can take

Nationalisation Measures, which could include public ownership (nationalisation) of or any other measures in relation to such an entity.

6. *Effect of SRMR and BRRD*

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

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

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

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

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

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

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

6.5 Instead of or prior to any Insolvency Proceedings, a BRRD Entity may be subject to one or more of the Resolution Powers. In relation to termination rights, netting and set-off, the effects of any of the aforementioned Resolution Powers (and other ancillary powers exercisable under the FMSA) are considered in paragraph 5.8 below.

7. ***EEA Credit Institutions & EEA Insurance Companies***

In relation to an EEA Credit Institution or an EEA Insurance Company, no Insolvency Proceedings can be imposed by the courts of this jurisdiction. Reorganisation or liquidation measures with regard to such institutions can only be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution or that EEA Insurance Company and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution or EEA Insurance Company. Where any EEA Credit Institution or EEA Insurance Company is subject to insolvency proceedings in another Member State in accordance with (the rules implementing) the WUDCI or Solvency II, the issue of enforceability of the Netting Clause in insolvency situations must in our view be determined in accordance with the paragraphs 4.3.3 (g) and (h).

8. ***Retroactive Effect Rule***

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

# APPENDIX B

## NECESSARY OR DESIRABLE AMENDMENTS

Although this is ultimately a matter to be determined under the Governing Law, we believe that the events specified in Clause 10.5(c) adequately refer to Insolvency Proceedings as defined in this Opinion. Resolution Proceedings and Nationalisation Measures do not necessarily qualify as insolvency or winding-up proceedings under Dutch law. Certain Resolution Powers may result in the Counterparty being left with no assets, being run-off or being liquidated. If all Resolution Proceedings were excluded from Clause 10.5(c) by adding wording to that effect, then termination would only be possible if those proceedings resulted in a Material Reason under any of the other sub-clauses of Clause 10.5. If Parties wish to have the ability to terminate on the occurrence of Resolution Proceedings and Nationalisation Measures, without making these insolvency related matters under 10.5(c), language is suggested to that effect under (B) and (C) below. *None of the proposed language has been approved by German or English law counsel.*

(A) The risk in the case of an EFET Power Contract with a Dutch Credit Institution, Dutch Insurance Company, a Dutch Investment Firm, or an Investment Fund where parties have selected automatic termination is that the appointment of a silent administrator (as mentioned in paragraph 4.3.4 above) qualifies as an insolvency related event covered by Clause 10.5(c), resulting in an immediate termination of all outstanding Individual Contracts without the other Party knowing it. To address this risk and also to make sure that the other Party is able to terminate the Agreement if and when it becomes aware of the appointment of a silent administrator we would recommend inserting an additional event of default in Clause 10.5 of the EFET Power Contract:

> *"if a non-disclosed silent administrator ("stille curator") pursuant to the Dutch Financial Markets Supervision Act ("Wet op het financieel toezicht") as amended, restated or re-enacted from time to time) is appointed over or in respect of a Party established in The Netherlands (for the avoidance of doubt, the appointment of a silent administrator ("stille curator") shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement)."*

The effect of this language would be that the appointment of a silent administrator would be an Event of Default, but would not be considered to be able to cause a "silent" termination of Individual Contracts in case automatic termination is selected.

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

> *"if a Party becomes subject to any form of transfer measure (*overdrachtsregeling*) or any form of special measure (*bijzondere maatregel betreffende de stabiliteit van het financiële stelsel) *within the meaning of Chapter 3.5.4A or Part 6 respectively of the Netherlands Financial Markets Supervision Act (*Wet op het financieel toezicht*) as amended, restated, or re-enacted from time to time or any proceedings or steps are commenced to apply any such measures to such Party (for the avoidance of doubt, such measures, proceedings or steps shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement)".*

Note, however, that invoking such events can be delayed due to the Automatic Stay (mentioned in paragraph 5.7 of our Opinion), although non-Dutch courts may not give effect to the overriding effect of these mandatory Dutch law provisions. Note also that Chapter 3.5.4A of the FMSA is to be abolished when the Recovery and Resolution (Insurers) Act becomes effective (estimated to be 01.01.2019).

(C) As there may be some uncertainty as to whether (i) the taking of Nationalisation Measures in respect of a Dutch Credit Institution, a Dutch Insurance Company, a Dutch Investment Firm or an Investment Fund (or its Custodian or Manager) or (ii) the occurrence of Resolution Proceedings in respect of BRRD Entities is covered by the Events of Default (see our introductory comments above), it may be appropriate to expand these so that there is no doubt that the relevant Party is in a position to terminate and close-out the Individual Contracts. This can be achieved by inserting an additional event of default in Clause 10.5:

> *"if a Party becomes subject to any form of crisis prevention or crisis management measure, any resolution measure or any special measure (*bijzondere maatregel*) within the meaning of Parts 1, 3A or 6 of the Netherlands Financial Markets Supervision Act (*Wet op het financieel toezicht*) as amended, restated, or re-enacted from time to time or any proceedings or steps are commenced to apply any such measures to a Party (for the avoidance of doubt, such measures, proceedings or steps shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement);"*

Note, however, that invoking such events can be delayed, inter alia, in case the BRRD Entity continues to perform its substantive obligations under the contract (see paragraph 5.8 above), although non-Dutch courts may not give effect to the overriding effect of these mandatory Dutch law provisions. Once the Recovery and Resolution (Insurers) Act becomes effective (estimated to be 01.01.2019), Part 3A will be expanded to cover the exercise of recovery and resolution powers in respect of Dutch Insurance Companies.