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MEMORANDUM OF LAW

on the

Validity and Enforceability of Close-out Netting under the EFET General Agreements concerning the Delivery and Acceptance of Electricity and of Natural Gas and related Collateral Arrangements

dated
20 January 2023

prepared for

European Federation of Energy Traders

T A B L E   O F   C O N T E N T S

1 Introduction

1.1 Schönherr Attorneys-at-law – branch Slovenia, Tomšičeva 3, 1000 Ljubljana, Slovenia ("**Schönherr**" or "**we**"), has been retained by the European Federation of Energy Traders ("**EFET**") to opine on the questions set out in the letter of EFET dated 11 July 2022 (the "**EFET Letter**") in connection with the EFET General Agreement concerning the Delivery and Acceptance of Electricity[1] (the "**EFET General Agreement Electricity**") and the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas[2] (together with the EFET General Agreement Electricity, the "**EFET General Agreements**" and each an "**EFET General Agreement**") as well as the collateral arrangements provided for under the EFET Credit Support Annex to the EFET General Agreement[3] (the "**EFET Credit Support Annex**").

1.2 The EFET General Agreement may further be used together with:

1.2.1 For Electricity:

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

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

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

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

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

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

[1] In the Version 2.1(a), published on 21 September 2007.
[2] In the Version 2.0(a), published on 11 May 2007.
[3] In the Version 3.1, published on 4 November 2021.

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

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

(ix) the UK ETS Allowances Appendix (Power) (Version 1.0, published 29 July 2021);

1.2.2 For Natural Gas:

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

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

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

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

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

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

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

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

(xviii) the Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 20 September 2013);

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

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

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

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

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

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

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

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

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

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

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

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

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

(xxxii) the UK ETS Allowances Appendix (Gas) (Version 1.0, published 13 December 2021);

1.2.3 For electricity and Natural Gas:

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

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

(xxxv) the Ratification Letters for Amendments to Covered Principal Agreements governed by English law or German law, respectively, concerning the giving of notices (the "**E-Notice Agreement**"), published 13 October 2020;

(xxxvi) the EFET Electronic Confirmation Agreement, published 20 March 2017;

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

(xxxviii) the EFET Master Netting Agreement (Version 1.0, published June 2010) (the "**EFET Master Netting Agreement**");

(xxxix) the 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) (the "**Cross-Product Master Agreement**");

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

(xli) the EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011)

(collectively, the "**Opinion Documents**").

2 Opinion limited to Slovenian law as at date of Opinion

2.1 This opinion (the "**Opinion**") is solely based on the laws and regulations officially issued by any Slovenian legislative authority, as applied and officially published by the Slovenian courts, the European Court of Justice, the General Court and the competent administrative authorities as at the date of this Opinion, all of which are collectively referred to herein as "**Slovenian law**". We neither express nor imply any opinion on any laws other than Slovenian law (even if found to be applicable by Slovenian conflict of laws rules) and we have made no investigation of any other laws which may be relevant in relation to the Opinion Documents, even if, under Slovenian law, such laws would have to be applied.

2.2 We assume no obligation to update the opinions expressed herein if laws, facts or circumstances change after the date hereof unless specifically instructed by EFET to provide an update.[4]

3 Interpretation and construction

3.1 In this Opinion Slovenian legal concepts are expressed in English terms and not in the original Slovenian terms. The concepts concerned may not be identical to the concepts described by the same English term, as they exist under the laws of any other jurisdiction. This Opinion may thus only be relied upon under the express conditions that (i) any issues of interpretation or liability arising hereunder will be governed by the laws of Slovenia and as interpreted by Slovenian courts and (ii) the competent courts in Ljubljana are to have exclusive jurisdiction in respect of all disputes which may arise out of or in connection with this Opinion.

3.2 Slovenian language terms appended to an English language term in parentheses shall prevail for purposes of interpretation hereof.

3.3 Capitalized terms used herein that are not defined herein shall have the meanings ascribed to them in the Opinion Documents unless the context otherwise requires. In addition, the Slovenian counterparties to which this Opinion applies are described and defined in Appendix ./A.

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[4] We note, for completeness, that at the date of this Opinion, a draft amendment of ZFPPIPP (as defined in Appendix ./F) is in the legislative process and expected to be adopted in 2023. ZFPPIPP amendment may, following its entry into force, impact the conclusions reached in this Opinion.

3.4 For the purposes of this Opinion, any reference to "**belief**" or words of similar import means that our assessment is based on our analysis of Slovenian law, our professional experience and the relevant legal sources, if any are available. It implies, however, that, for lack of court practice, we cannot exclude that a Slovenian court or other authority would take positions that deviate from what we express as our belief. Generally, our opinions expressed herein are given on the basis that they represent a fair view of the legal position under Slovenian law but do not purport to reflect all positions (if any) taken by the courts and legal writing in the past with respect to a particular legal issue.

4 No opinion of fact

We express no opinion as to matters of fact.

5 Assumptions

5.1 For the purposes of this Opinion, we have been asked by EFET to make the following assumptions in accordance with the EFET Letter:

5.1.1 General assumptions

5.1.1.1 Two counterparties enter into an EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest ("**COMI**") in Slovenia ("**Party A**"; Party A and the other party (this being "**Party B**") together, the "**Parties**" and each a "**Party**").

5.1.1.2 Party A is a type of entity described in Appendix ./A.

5.1.1.3 The relevant EFET General Agreement is governed by the laws of Germany or England and Wales.

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

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

5.1.1.6 The Individual Contracts provide for the physical delivery of Commodities (as defined in Appendix ./B) in exchange for cash. However, some of them may also provide for cash settlement.

5.1.2 Additional assumptions for questions under Part I (see at 8.1 below)

5.1.2.1 The relevant EFET General Agreement is governed by any law (including English, German or Slovenian law).

5.1.2.2 After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Slovenia and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty.

5.1.3 Additional assumptions for questions under Part II – Slovenian Multibranch Party (see at 8.2.1 below)

5.1.3.1 The relevant EFET General Agreement is governed by any law (including English, German or Slovenian law).

5.1.3.2 Party A has entered into Individual Contracts under the EFET General Agreement through offices in Slovenia as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Slovenia.

5.1.4 Additional assumptions for questions under Part II – Foreign Multibranch Party (see at 8.2.2 below)

5.1.4.1 The relevant EFET General Agreement is governed by any law (including English, German or Slovenian law).

5.1.4.2 A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its COMI in a country other than Slovenia ("**Country H**") has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including, in each case, a branch of Party F located in and subject to the laws of Slovenia (the "**Slovenian Branch**").

5.1.4.3 After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

5.1.5 Additional assumptions for questions under Part III (see at 8.3 below)

5.1.5.1 Although it is a bilateral form in that it contemplates that each counterparty may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the Eligible Credit Support.

5.1.5.2 The counterparties agree that Eligible Credit Support will include Cash, Letters of Credit and Parent Company Gua rantees. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency. Cash will only be delivered by (electronically) transferring Cash to the account and not in the form of (physical) notes and coins.

5.1.6 Additional assumptions for questions under Part V (see at 8.5 below)

5.1.6.1 As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties, in each case, (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT or other means of electronic transmission).

5.1.6.2 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.

5.1.7 Additional assumptions for questions under Part VI (see at 8.6 below)

The same additional assumptions as set out at 5.1.2 and 5.1.3 above shall apply.

5.1.8 Additional assumption for the question under Part VII (see at 8.7 below)

The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Slovenia (including English or German law).

5.2 Furthermore, for the purposes of this Opinion we have assumed that:

5.2.1 Each Party to the EFET General Agreement has all the requisite capacity, powers and authorities and has taken all necessary corporate or other action to enter into and perform that EFET General Agreement and to effect the Individual Contracts.

5.2.2 If the Opinion Documents are, based upon a respective choice of law, governed by a law other than Slovenian law, we assume that such choice of law is legal, valid, binding and enforceable under the chosen law, and that the Opinion Documents are legal, valid, binding and enforceable under the law, by which they are expressed to be governed.

5.2.3 Provisions of the Opinion Documents that we deem essential to our opinion have not been altered in any material respect.

5.2.4 No Material Reason in respect of a Party has occurred and is continuing at the time of entering into the EFET General Agreement and any Individual Contract thereunder.

5.2.5 No transactions contemplated under the EFET General Agreement or any individual contract thereunder are carried out in the context of (i) a regulated market within the meaning of Article 4 (1) no 21 Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") or (ii) a system within the meaning of Article 38 of the Slovenian Market in Financial Instruments Act (*Zakon o trgu finančnih instrumentov*) (implementing Article 2 lit a of Directive 98/26/EC on settlement finality in payment and securities settlement systems).

6 Executive Summary

The following executive summary of the results must be read together with our detailed explanations and limitations in this Opinion and only in connection with them.

What types of counterparty are covered by this Opinion?	Please see Appendix ./A
What types of transaction are eligible for close-out netting?	Please see Appendix ./B
Does the Opinion require or recommend that Automatic Termination applies to Party A?	In our view – given the relative remoteness of the applicable risks – the choice between unilateral Early Termination and Automatic Termination (within the meaning of § 10.5 of the EFET General Agreement) should, in principle, have a neutral effect as regards the

	enforceability of the Netting Provisions;[5] however, all other things being equal, the choice of Automatic Termination may be viewed as potentially beneficial, as it: (A) could – from a practical perspective – reduce the risk of the Party B from losing out on the account of late exercise of early termination right (prior distribution of the Party A's bankruptcy estate); and (B) may reduce the (remote) risk of successful challenges by creditors under the rules of ZFPPIPP.
Are the Termination Provisions of the agreement enforceable in Slovenia?	Yes (subject to the limitations and qualifications set out in this Opinion).
Are the Close-out Netting Provisions enforceable in a local insolvency?	Within the scope of the Provisions on Netting Agreements,[6] the enforceability of Close-out Netting Provisions[7] in the event of opening of local insolvency proceedings against Party A is - subject to the limitations and qualifications set out in this Opinion – to be determined according to the laws governing the relevant EFET General Agreement, *i.e.*, primarily by the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement. Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law and, hence, Slovenian substantive insolvency law will be decisive, we believe that the Close-out Netting Provisions will – subject to the limitations and qualifications set out in this Opinion

[5] As defined in Section 7.1 below.
[6] As defined at 3.3.2 of Appendix ./E
[7] As defined in Section 7.1 below.

	–, be given effect in the event of opening of insolvency proceedings against Party A, *provided* that the Individual Contracts subject to the relevant EFET General Agreement qualify as "qualified financial contracts" or "other qualified contracts" within the meaning of ZFPPIPP.
Would the laws of Slovenia characterize the transfer of Eligible Credit Support as effecting an unconditional transfer of ownership or is there a risk of recharacterizing such transfer as creating a security interest?	In case Slovenian substantive law was determined as the law applicable to the relevant Eligible Credit Support in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above), the following applies: Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title would be construed as entitlement to a claim against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit (*akreditiv*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Based on general Slovenian law principles, we do not believe that a Slovenian court would not recognize and uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive accordingly, full entitlement to a claim against the relevant third-party (see at 8.3.2.2 below for further details).

Is any action required to ensure that ownership title continues to rest with Party B?	No actions or steps other than those required under the law determined as the law applicable to the Eligible Credit Support in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 below) need to be taken and maintained. In case Slovenian substantive law was to apply, once Party B has received full entitlement to the claim against the relevant third-party (see at 8.3.1.2.2 and 8.3.1.3.2 below), no further actions or steps are required to ensure that full entitlement to such claim continues to remain with Party B.
Are there any recommended amendments to the standard documents?	Please see our recommendations at 8.3.6.2 and 8.3.9 below.
Does the Opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in Slovenia?	In case Party A is an Insurance Undertaking, please see at 9.4.1 below. It should be clear from the documentation used to which class of assets (i.e., Unallocated Assets and Allocated Assets[8] or to which respective separate fund or division thereof, respectively) the EFET General Agreement and the Individual Contract thereunder are allocated. Furthermore, each Party should carefully scrutinize whether the other Party has all the requisite capacity, powers and authorities to enter into and perform the EFET General Agreement and any Individual Contracts thereunder.[9] This holds, in particular, true in case the other Party is a Municipality where certain limitations apply (see also at 1.8

[8] Each such terms as defined at 9.4 below.

[9] Please note, however, that we do not express any opinion on whether Party A may (*i.e.*, has capacity and authority to) enter into the EFET General Agreement and any Individual Contracts under applicable Slovenian laws, their constitutional documents and/or their licenses.

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7 General legal analysis – enforceability of Close-out Netting Provisions

7.1 Background and summary of conclusions

Please refer to Appendix ./E for a general overview of the Slovenian legal framework in respect of netting arrangements.

This Section 7 sets out an analysis, from the perspective of the applicable Slovenian legal framework, of the specific provisions in the EFET General Agreement governing:

(A) early termination – *i.e.*, the Early Termination right of Party B or Automatic Termination (if elected by the Parties) due to an insolvency-related Material Reason occurring in respect of Party A (§ 10, particularly §§ 10/5/c(ii), 10/5/c(iv), 10/5/c(vi) of EFET General Agreement) ("**Termination Provisions**"); and

(B) netting – *i.e.*, provisions whereby several mutual obligations/exposures between Party A and Party B are, as a consequence of application of Termination Provisions, replaced with a single Termination Amount (§ 11 of EFET General Agreement) ("**Netting Provisions**");

(Termination Provisions and Netting Provisions together, the "**Close-out Netting Provisions**").

On the basis of our conclusion that the Close-out Netting Provisions (as set out in the EFET General Agreement) qualify as 'netting arrangements' within the meaning of ZFPPIPP and ZRPPB-1 (see 7.2 below), the following applies (by way of summary and subject to the qualifications set out herein):

(i) Within the scope of the Provisions on Netting Agreements: In constellations within the scope of the Provisions on Netting Agreements (see Section 3 of Appendix ./E for further details) the enforceability of Party B's right to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A is determined by the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties.

(ii) Beyond the scope of the Provisions on Netting Agreements: In constellations where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, we believe that the Close-out Netting Provisions will, be given effect in the event of opening of local insolvency proceedings against Party A, *provided* that the Individual Contracts subject to the relevant EFET General Agreement qualify as "qualified financial contracts" or "other qualified contracts" within the meaning of ZFPPIPP, as set out below.

7.2 Qualification as "netting arrangement" within the meaning of ZFPPIPP

We believe that EFET General Arrangements should qualify as "netting arrangements" within the meaning of ZFPPIPP (see 2.2.1.2 (a) of Appendix ./E):

(A) The provisions on Early Termination for Material Reason (§ 10.3 of the EFET General Agreements), setting reasons for termination, correspond to the (requirement for the) rules under which the agreement is deemed terminated or under which the non-defaulting party holds the right to terminate the agreement (cf. 2.2.1.2 (a) of Appendix ./E, first indent);

(B) § 11.2 of the EFET General Agreements, referring to the Calculation of the Termination Amount, provides certain rules for calculating the close-out values of counterclaims (Settlement Amounts) by reference to their liquidation/replacement values in case of Termination for Material Reason (cf. 2.2.1.2 (a) of Appendix ./E, second indent);[10]

(C) Pursuant to § 13.2 of the EFET General Agreements, unless agreed otherwise, all payments shall be made in EUR, implying that the requirement referring to the rules on conversion of amounts into single currency (cf. 2.2.1.2 (a) of Appendix ./E, third indent) should not be applicable;

(D) § 11.1 of the EFET General Agreement sets out a rule whereby a single (net) Termination Amount is payable (following the establishment/calculation of individual Settlement Amounts) by one Party to the other, thereby meeting the requirement as regards the rules on determination of netting the obligations of the contractual parties (cf. 2.2.1.2 (a) of Appendix ./E, fourth indent).

The same conclusion can also be derived from the perspective of ZRPPB-1 (see 3.3.1 of Appendix ./E).

7.3 Qualification as "qualified financial contract" or "other qualified contract"

[10] In our view, the provisions of § 11.2 of the EFET General Agreements – in spite of basically vesting the Terminating Party with the right to calculate individual Settlement Amounts (in a commercially reasonable manner – cf. § 10.3.(c) of the EFET General Agreements), rather than referring to objective calculation rules/reference points – should be viewed as meeting the criterion of 'rules for calculation close-out values' as required by ZFPPIPP in respect of 'netting arrangements'. In other words, the fact that § 11.2 vests the Terminating Party with a unilateral right to determine the contents of a contractual relationship (which is potentially problematic from the viewpoint of mandatory provisions of Slovenian law – cf. 7.4.3 below), should, in our belief, not in and of itself disqualify the Close-out Netting Provisions pursuant to the EFET General Agreement as a 'netting arrangement' within the meaning of ZFPPIPP.

In constellations <u>beyond the scope of the Provisions on Netting Agreements</u> (see 7.1 above), where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, further analysis as to whether the Individual Contracts subject to the EFET General Agreement fall within the scope of "qualified financial contracts" or "other qualified contracts" (as defined under Articles 24a and 24b ZFPPIPP, respectively – cf. 2.2.1.2 (b) of Appendix ./E) is necessary.

Pursuant to Article 24a ZFPPIPP, a "qualified financial contract" includes a contract related to financial instruments qualifying as such under the Market in Financial Instruments Act (*Zakon o trgu finančnih instrumentov*, "**ZTFI-1**") or derivative financial instruments relating to commodities or emission rights as underlying instrument, that may be settled also physically by delivering the underlying instrument.

Pursuant to Article 24 b ZFPPIPP an "other qualified contract" includes an individual or master agreement for consideration (*odplačne pogodbe*) having as its object trading with power or other energy sources (*energenti*) and with respect to which the netting arrangement is customary for such kind of trading.

7.3.1 Transaction falling within the scope of Article 24a ZFPPIPP

As indicated above, the concept of a 'qualified financial contract' within the meaning of ZFPPIPP includes contracts related to financial instruments under ZTFI-1 (implementing MiFID II). Financial instruments pursuant to Article 7 (2) ZTFI-1 are:

(i) *"(1) Transferable securities";*

(ii) *"(2) Money-market instruments";*

(iii) "*(3) Units in collective investment undertakings*"*;*

(iv) "*(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash*"*;*

(v) "*(5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of a default or other termination event*"*;*

(vi) "*(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled*"*;*

(vii) "*(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in item (6) above and not being for commercial purposes, which have the characteristics of other derivative financial instruments*"*;*

(viii) "*(8) Derivative instruments for the transfer of credit risk*"*;*

(ix) "*(9) Financial contracts for differences*"*;*

(x) "*(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of a default or other termination event*"*;*

(xi) "*(11) any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in the items (1) to (10), which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market OTF, or an MTF*";

(xii) "*(12) Emission allowances consisting of any units recognised for compliance with the requirements of Section 4 of the Slovenian Environmental Protection Act* ("**ZVO-2**")[11] *(transposing Directive 2003/87/EC (Emissions Trading Scheme) as well Directive (EU) 2018/410)*"*.*

Furthermore, the concept of 'qualified financial contracts' includes contracts related to derivative financial instruments relating to commodities or emission rights as an underlying instrument that may be settled also physically by delivering the underlying instrument. Therefore, in our view, emission allowances derivatives and physically settled commodity derivative transactions fall within the scope of Article 24a ZFPPIPP even if they would not qualify as financial instruments under ZTFI-1.

In this context, we note that commodity (*blago*) is not a defined term neither in the ZFPPIPP nor in ZTFI-1. However, Commission Delegated Regulation (EU) 2017/565 provides a definition of commodity as "*any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity*". While natural gas is not explicitly mentioned, we believe that the wording

[11] We note, for completeness, that ZTFI-1 explicitly refers to the recently repealed Environmental Protection Act (ZVO-1), however, we believe this to be a mere oversight in drafting and provisions of Environmental Protection Act (*Zakon o varstvu okolja*, "ZVO-2", Official gazette of the RS, no. 44/22) are applicable.

of the definition "*energy such as*" clearly shows that it was not intended to limit the meaning of commodity to electricity as the only eligible type of energy. Accordingly, we believe that electricity and natural gas qualify as commodities for the purposes of Article 24a ZFPPIPP.

7.3.2 Transaction falling within the scope of Article 24b ZFPPIPP

Pursuant to Article 24b ZFPPIPP, the application of special netting arrangement rules also extends to 'other qualified contracts', encompassing any 'agreements for consideration having as its object trading with power or other energy sources (*energenti*),' without a requirement for such an agreement to be a derivative financial contract or a financial instrument pursuant to ZTFI-1.

In this context, we believe that the EFET General Agreement and associated Individual Contracts qualify as 'individual or master agreement for consideration'. According to the explanatory notes of the ZFPPIPP amendment that introduced Article 24b ZFPPIPP (*i.e.*, ZFPPIPP-E), the provision was adopted to mitigate restrictions on business cooperation experienced by Slovenian electricity traders (involved in trading electricity, emission allowances and related derivatives), which was caused by the legal uncertainty as regards the enforceability of netting arrangements. The explanatory notes of the Slovenian legislator *inter alia* explicitly mention "EFET agreements" as one of the reasons why adoption of said provision was necessary.[12]

We note that energy source (*energent*) is not a defined term neither in the ZFPPIPP nor in Slovenian energy legislation.[13] However, we believe that its meaning can be inferred from the context of Slovenian energy legislation, *e.g.*, the recently adopted Gas Supply Act provides in Article 1 (2) that "the purpose of this act is to ensure competitive, secure, reliable and affordable gas supply, taking into account the principles of sustainable development, and to establish a comprehensive competitive, flexible, fair and transparent gas market, taking into account the important role of natural gas a transitional energy source (*energenta*) in the transition to a carbon free economy". Furthermore, Energy Efficiency Act defines "energy" as all forms of energy sources (*energentov*) as defined in Article 2d of Regulation (EC) 1099/2008, pursuant to which "energy products" mean combustible fuels, heat, renewable energy, electricity, or any other form of energy.

[12] See explanatory notes of the Slovenian legislator: Predlog zakona o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP-E), p. 50 -52.

[13] Neither the Energy Act (*Energetski zakon* – EZ-1, Official Gazette RS no. 17/14 et seq.), Electricity Supply Act (*Zakon o oskrbi z električno energijo* – ZOEE, Official Gazette RS no. 172/21), Energy Efficiency Act (*Zakon o učinkoviti rabi energije*) Official gazette RS no. 158/20, Act on the Promotion of the Use of Renewable Energy Sources (*Zakon o spodbujanju rabe obnovljivih virov energije* – ZSROVE, Official gazette RS no. 121/21 et seq.) or the Gas Supply Act (*Zakon o oskrbi s plini* - ZOP Official Gazette RS no. 204/21 et seq.) define the term "energent".

Accordingly, we believe that scope of Article 24b ZFPPIPP is limited to transactions having as its object trading with power and energy sources, such as natural gas, combustible fuels, electricity and similar.

7.3.3 Transactions potentially falling outside the scope of Articles 24a and 24b ZFPPIPP

Finally, we note that there is arguably a degree of uncertainty as to whether green certificates / capacity rights may qualify as commodities (to the extent not constituting emission allowances pursuant to Article 7 (2) no 12 ZTFI-1. As discussed under 7.3.1 above, we believe that the notion of 'commodity' should be interpreted pursuant to Commission Delegated Regulation (EU) 2017/565.

Green Certificates and Capacity Rights, albeit unlikely "commodities" in the strict sense of the word, should in our view still be eligible underlyings for purposes of MiFID II and, hence, benefit from the Slovenian substantive netting privilege as set out above. This is because point 10 of Section C of Annex I to MiFID II also covers other derivative contracts relating to "*assets, rights, obligations, indices and measures*" not otherwise mentioned in Section C of Annex I to MiFID II. Point 10 of Section C of Annex I to MiFID II is further specified by Article 8 of Delegated Regulation 2017/565. According to Article 8 of Delegated Regulation 2017/565, derivative contracts relating to any of the following assets also fall under point 10 of Section C of Annex I to MiFID II (to the extent certain criteria are met; see further below):

(i) "*(a) telecommunications bandwidth*";

(ii) "*(b) commodity storage capacity*";

(iii) "*(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity*";

(iv) "*(d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except where the contract is already within the scope of Section C of Annex I to Directive 2014/65/EU*";

(v) "*(e) a geological, environmental or other physical variable, except if the contract is relating to any units recognised for compliance* *with the requirements of Directive 2003/87/EC of the European Parliament and of the Council*";

(vi) "*(f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred*";

(vii) "*(g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation*";

(viii) "*(h) an index or measure based on actuarial statistics*".

Based on the above, we believe that Green Certificates should fall within the scope of item (iv) and Capacity Rights should fall within the scope of item (iii).

Hence, derivative contracts relating to Green Certificates and Capacity Rights should qualify as transaction falling within the scope of Article 24a ZFPPIPP, provided, however, that one of the following conditions is satisfied:

(a) the relevant contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event; or

(b) the relevant contract is traded on a regulated market, an MTF, an OTF, or a third-country trading venue that performs a similar function to a regulated market, MTF or an OTF; or

(c) the relevant contract satisfies the conditions under Article 7 (1) of Delegated Regulation 2017/565.[14]

7.4 Close-out Netting Provisions from the perspective of Slovenian law

7.4.1 Termination Provisions

7.4.1.1 Within the scope of the Provisions on Netting Agreements

It follows from the above (and the general regime as described in Section 3 of Appendix ./E) that within the scope of the Provisions on Netting Agreements, the arrangements contemplated by the EFET General Agreement will be assessed on the

[14] Essentially, these are contracts (a) that (i) are traded on a third-country trading venue that performs a similar function to a regulated market, an MTF or an OTF, (ii) contain an express statement that they are to be traded on, or that they are subject to the rules of, a regulated market, an MTF, an OTF or such a third-country trading venue, or (iii) are equivalent to a contract traded on a regulated market, MTF, an OTF or such a third-country trading venue, with regards to the price, the lot, the delivery date and other contractual terms, and (b) that are standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

basis of the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties; consequently, the Termination Provisions (either unilateral Early Termination rights or Automatic Termination provisions) should be recognized and given effect in accordance with the law chosen by the parties, irrespective of the type of Individual Contracts subject to the EFET General Agreement (*i.e.*, irrespective of whether or not meeting the criteria for 'qualified financial contracts'/'other qualified contracts'). However, please see also 7.4.3 below.

7.4.1.2 Beyond the scope of the Provisions on Netting Agreements

7.4.1.2.1 General

It follows from the above (and the general regime as described in Sections 2 and 3 of Appendix ./E) that, in constellations where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, a Slovenian court (assessing the matter – *e.g.*, in the context of insolvency proceedings initiated against Party A) will assess the Termination Provisions from the perspective of Slovenian mandatory rules – even if the parties have chosen foreign (*e.g.*, English or German) law as the governing law in respect of the EFET General Agreement.

7.4.1.2.2 Transactions meeting criteria for 'qualified financial contracts'/'other qualified contracts'

In respect of transactions where the EFET General Agreement is entered into in respect of Individual Contracts <u>meeting the criteria for 'qualified financial contracts'/'other qualified contracts'</u> (see 7.3 above), Termination Provisions will enjoy protection of the 'netting safe harbour rules' and be upheld in accordance with their terms, subject to the same limitations as described in regards to constellations within the scope of the Provisions on Netting Agreements in Section 7.4.3 below.

7.4.1.2.3 Other transactions

In respect of transactions where the Individual Contracts do <u>not meet the criteria for 'qualified financial contracts'/'other qualified contracts'</u>, (see 7.3 above), we see a significant risk that the EFET General Agreement (and the Termination Provisions set out therein) will not benefit from the 'netting safe harbour rules' and will be subject to the general rules of ZFPPIPP which apply in respect of mutually unfulfilled (executory) contracts. In our view, this will result in, *inter alia*, the following:

- As discussed above, we believe that early termination rights should not be affected by the opening of insolvency proceedings against Party A.

- However, (i) claims arising from early termination will be subject to statutory set-off rules pursuant to ZFPPIPP; (ii) if effected prior to the opening of insolvency proceedings, the termination rights will be susceptible to challenge on the basis of general bankruptcy avoidance rules; (iii) if early termination would not be effected prior to the opening of insolvency proceedings, the statutory termination right (to the extent exercised by the insolvent debtor) – see 1.1 and 2.1.1 of Appendix ./E – will, in our view, take precedence (*i.e.*, result in termination of the EFET General Agreement with the consequences as set out by ZFPPIPP); and (iv) in the absence of the overall 'netting safe harbour', we cannot rule out a risk that the insolvent debtor's statutory termination right (if exercised – see the foregoing item (iii)) could successfully be effected on a selective basis (*i.e.*, in respect of some but not all Individual Contracts) – 'cherry-picking' risk.

In the absence of legal writing or jurisprudence on the point, we find it likely that the above consequences would also apply in the event of a 'mixed bag' – *i.e.*, scenarios where some but not all Individual Contracts would fall under the 'qualified financial contract'/'other qualified contract' category.

7.4.2 Netting Provisions

7.4.2.1 Within the scope of the Provisions on Netting Agreements

It follows from the above (and the general regime as described in Section 3 of Appendix ./E) that, within the scope of the Provisions on Netting Agreements, the provisions of § 11 EFET General Agreements (Netting Provisions) should be recognized and given effect in accordance with the law chosen by the parties, irrespective of the type of Individual Contracts subject to the EFET General Agreement (*i.e.*, irrespective of whether or not meeting the criteria for 'qualified financial contracts'/'other qualified contracts'). However, please see also 7.4.3 below.

7.4.2.2 Beyond the scope of the Provisions on Netting Agreements

7.4.2.2.1 General

It follows from the above (and the general regime as described in Sections 2 and 3 of Appendix ./E) that, where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, a Slovenian court (assessing the matter – *e.g.*, in the context of insolvency proceedings initiated against Party A) will assess the provisions of § 11 EFET General Agreements (Netting Provisions) from the perspective of Slovenian mandatory rules – even if the parties have chosen foreign (*e.g.*, German or English) law as the governing law in respect of the general arrangements.

7.4.2.2.2 Transactions meeting criteria for 'qualified financial contracts'/'other qualified contracts'

In transactions where the EFET General Agreement is entered into in respect of Individual Contracts meeting the criteria for 'qualified financial contracts'/'other qualified contracts' (see 7.3 above), the provisions of § 11 EFET General Agreements governing close-out netting will enjoy protection of the 'netting safe harbour rules' and be upheld in accordance with their terms (see 7.2 and 7.3 above), subject to the same limitations as described in regards to constellations within the scope of the Provisions on Netting Agreements in Section 7.4.3 below.

7.4.2.2.3 Other transactions

In respect of transactions not meeting the criteria for 'qualified financial contracts'/'other qualified contracts', (see 7.3 above), we see a significant risk that the EFET General Agreement (and the provisions of § 11 governing close-out netting) will not benefit from the 'netting safe harbour rules' and will, as a consequence, be subject to the general rules of ZFPPIPP which apply in respect of mutually unfulfilled (executory) contracts. In our view, this will primarily result in statutory provisions of ZFPPIPP prevailing over the arrangements set out in the EFET General Agreements – in particular (see also 1 of Appendix ./E):

(A) the (insolvency administrator of the) insolvent debtor (Party A) may chose to terminate the agreement based on statutory termination rights applicable to non-fulfilled (executory) contracts – on a selective basis ('cherry picking' risk); and

(B) upon such termination, statutory rules as regards the set-off of mutual obligations in accordance with ZFPPIPP will likely apply.

7.4.3 Implications under Rome I Regulation

Notwithstanding the foregoing, pursuant to Rome I Regulation and ZMZPP (see 2.2.2 of Appendix ./E) Slovenian courts could, in our view, refuse to recognise enforceability of Termination Provisions and/or Netting Provisions insofar as these (despite being enforceable under the applicable governing law) should be considered manifestly incompatible with the Slovenian public policy (or override mandatory provisions of Slovenian law). Selected issues are dealt with below (in turn, with respect to Termination Provisions and Netting Provisions).

7.4.3.1 Termination Provisions

It seems questionable whether Slovenian courts would enforce the right of Party B to wait for an indefinite period of time before exercising the right to Early Termination for reason of bankruptcy proceedings being instituted against Party A. This position is supported by the following reasoning:

(i) On the one hand, there is a risk that the failure to exercise Early Termination (upon occurrence of a Material Reason) will result in absence of any payments/proceeds from the bankruptcy estate. Although stipulating that any net claim resulting from the operation of a close-out netting mechanism (following termination) must be filed (applied for repayment) in the bankruptcy proceeding, the relevant rules of ZFPPIPP do not provide for a deadline for such application; since the rules of ZFPPIPP governing distribution of bankruptcy proceeds do not provide for a (mandatory) suspension in the event that a person entitled (under the netting exemption provisions) to apply for repayment fails to do so, such omission may result in non-payment due to the fact that the bankruptcy estate has been distributed (without taking into account the respective claim). While we see a hypothetical basis for an analogous use of rules referring to the bankruptcy administrator's deadline to terminate executory contracts (3 months upon (a) the date of finality of decision on the opening of a bankruptcy proceeding or (b) the date the bankruptcy administrator receives the notice of a creditor to report its claim), we can, for lack of practice or writing, not exclude the possibility that the competent Slovenian court would take a different view.

(ii) On the other hand (depending on specific circumstances surrounding a particular Early Termination event), delay with exercising of the Early Termination right could – *e.g.*, in case resulting in an increase of the (secured) net position of / Termination Amount payable to the counterparty (at the expense of other creditors of Party A) – be viewed as contrary to the general principles of Slovenian civil law (in particular the principle of good faith and fairness) and could, *inter alia*, result in unenforceability of a (part of) the claim or, potentially, even liability for damages on the part of the counterparty.

(iii) Lastly, in our understanding of the EFET General Agreements, a right of Early Termination can be exercised by the counterparty for as long as a Material Reason is continuing; in constellations where a Material Reason *e.g.*, consists of insolvency proceedings being initiated against Party A, we understand that the counterparty (Party B) would retain the right (and the Material Reason would be deemed as 'continuing' within the meaning of § 10.3(a) of the EFET General Agreement) even if, *e.g.*, the insolvent counterparty would perform all its obligations (*e.g.*, by providing additional credit support) thereunder. This could be viewed as being contrary to the Slovenian principles of contract law.

7.4.3.2 Netting Provisions

Netting Provisions would also not be upheld by Slovenian courts in case that they are implemented contrary to the requirements of good faith and conscionability (*dobra vera in poštenje*) and/or determinability of contractual subject matter (*določljivost predmeta pogodbe*), particularly in instances where one of the parties is granted a discretionary right to (unilaterally) determine the obligation of the other party. Under Slovenian law, contractual provisions granting one party a right to (unilaterally) determine the obligations of the other party are generally considered as contrary to the principles of good usages and trade (*dobri poslovni običaji*) and may, as such, not be enforceable in Slovenia (cf. Articles 38 and 446 OZ).[15] While we believe that, in cases where such right is to be

[15] See Plavšak N., Juhart M., Obligacijski zakonik s komentarjem, 3. knjiga, Ljubljana, GV Založba, 2004, p. 104. Also, Decision of the Supreme Court II Ips 673/94.

exercised in a commercially reasonable manner,[16] good arguments can be made that such provision does not fall foul of mandatory Slovenian rules (and should be enforceable for as long as the relevant party does in fact exercise such right in a commercially reasonable manner); however, we cannot rule out that, in the event of a dispute, a Slovenian court would take a different view.

7.4.4 Avoidance in bankruptcy proceedings

7.4.4.1 Within the scope of the Provisions on Netting Agreements

In principle, we believe that, within the scope of the Provisions on Netting Agreements, the EFET Agreements should be exempt from the general Slovenian bankruptcy avoidance rules (as se out in Appendix ./F). This position is based on the following: (i) the contractual constellation in the present case fulfils the criteria set out in Article 483 (1) ZFPPIPP (cf. 7.1 and 7.2 above); and (ii) we believe that the Regulation, including Article 13 thereof (and the analogous provision in Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1 – see 3.4.2 of Appendix ./E), should be applicable in the present context.

Notwithstanding the foregoing, we cannot entirely rule out a (remote) risk that a Slovenian insolvency court would uphold an action for avoidance based on general rules of ZFPPIPP (as set out in Appendix ./F):

- Given the wording of the Article 483 (1) ZFPPIPP (stating that the consequences of insolvency for "the *mutual* (*medsebojne*) rights and obligations of parties to a netting arrangement" shall be governed by the law chosen to govern the netting arrangement), it may be argued that the exception set out in Article 483 (1) ZFPPIPP only refers to the *inter partes* aspect of the legal relationship between the relevant counterparties – and does not trump the interests of third parties (creditors and the bankruptcy administrator) by precluding avoidance in bankruptcy proceedings. One could also argue that the right of creditors to challenge detrimental legal acts can be seen as forming part of the *ordre public* of Slovenia;

- It must, on the other hand, be noted that the line of reasoning set in the foregoing have no foundation in the jurisprudence of Slovenian courts. Valid arguments may also be

[16] As is the case with § 11 EFET General Agreement – cf. para 2.

made in support of the notion that the purpose of Article 483 (1) ZFPPIPP is to protect netting arrangements falling within its scope against the full spectrum of legal consequences of insolvency proceedings, including potential challenges, and should be interpreted accordingly.

7.4.4.2 Beyond the scope of the Provisions on Netting Agreements

In our view, in constellations where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, the EFET General Agreement could be subject to avoidance pursuant to the general rules of Slovenian law (see Appendix ./F).

While good arguments can be made that transactions where the EFET General Agreement is entered into in respect of Individual Contracts meeting the criteria for 'qualified financial contracts'/'other qualified contracts' (see 7.3 above) cannot be subject to avoidance based solely on the fact that they were entered into within a particular time period prior to the opening of the relevant insolvency proceedings (this is for *e.g.* explicitly stipulated in Article 14 ZFZ, applicable in the context of eligible financial collateral agreements entered into between eligible parties – see also 8.3.7 below and Appendix ./E), the question of susceptibility of such transactions to voidance is not resolved under Slovenian law and we cannot rule out that a Slovenian court may take a different view. In respect of transactions where the EFET General Agreement is entered into in respect of Individual Contracts not meeting the criteria for 'qualified financial contracts'/'other qualified contracts' (see 7.3 above), we believe that these may be challenged pursuant to the general rules of Slovenian law (see Appendix ./F).

7.5 Non insolvency-related Material Reasons

7.5.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements, the question whether the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable has – subject to the limitations and qualifications set out in this Opinion – to be answered according to the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties.

7.5.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply, we believe that, based on the reasoning and subject to the limitations outlined below, the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions should be enforceable.

7.5.2.1 Preventive restructuring proceedings

Preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*) under ZFPPIPP are aimed at enabling eligible distressed capital commercial companies (whereas not applying, *inter alios*, to Banks, Insurance Undertakings, Investment Firms, Pension Fund Management Companies and Municipalities; see Appendix ./E) to avoid insolvency and are therefore, by definition, not insolvency proceedings *strictu sensu*. However, preventive restructuring proceedings arguably might fall under § 10.5(c)(iv) of the EFET General Agreement.[17] This is because preventive restructuring proceedings may affect creditors' rights through, *inter alia* moratorium, suspension of payment obligations, restructuring of debt or reduction of claims.

Notwithstanding the above, we believe that our considerations with respect to enforceability of Close-out Netting Provisions with respect to transactions falling within the scope of Articles 24a/24b ZFPPIPP also extend to preventive restructuring proceedings, since pursuant to Article 44l ZFPPIPP also Article 164a ZFPPIPP should be analogously applied to preventive restructuring proceedings, according to which initiation nor approval of insolvency proceedings - and therefore also preventive restructuring proceedings by virtue of Article 44l ZFPPIPP - shall affect application of the rules on close-out netting.

7.5.2.2 Crisis prevention measures and resolution powers in respect of Banks

The institution of crisis prevention measures and resolution measures against a Bank (see at 1.2.5 and 1.2.5.3 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) crisis prevention measures and resolution measures may, for the reasons set out at 1.2.5 and 1.2.5.3 of Appendix ./E, affect creditors' rights, and (b) crisis prevention measures and resolution measures may include the appointment of a special

[17] In that these can be viewed as constituting "*any other relief under similar law[s] affecting creditors' rights*".

representative (*posebnega pooblaščenca*) (Article 289 ZBan-3) / extraordinary management board (*izredna uprava*) (Article 139 ZRPPB-1) by the Bank of Slovenia (see at 1.2.5.3 of Appendix ./E for further details).

Crisis prevention measures and resolution measures should, in and of themselves, not (i) constitute an enforcement event under ZFZ or an insolvency proceeding under ZFPPIPP and (ii) entitle a counterparty to terminate, modify, accelerate or exercise set-off and netting rights, as long as the substantive contractual obligations, including payment obligations and the provision of collateral, are fulfilled by the institution (Article 283 ZBan-3 / Article 137 ZRPPB-1).

Only if also other events of default in relation to the relevant Bank occur, the counterparty may exercise such rights Article 283 (7) ZBan-3).

A suspension or restriction under Articles 149 through 151 ZRPPB-1 (see at 1.2.5.6 of Appendix ./E) shall not constitute non-performance of a contractual obligation for the purposes of Article 137 ZRPPB-1 (please see above).

Consequently, as long as the Bank continues to fulfill its substantive contractual obligations under the relevant EFET General Agreement (or the obligations are suspended under Article 149 ZRPPB-1), the counterparty will not be entitled to close-out transactions under such EFET General Agreement and Automatic Termination will not apply or be triggered or (if the EFET General Agreement is governed by a third-country law) will, on the basis of Article 283 ZBan-3 constituting mandatory law, likely not be enforceable against a Bank in case the Bank of Slovenia orders crisis prevention measures.

7.5.2.3 Extraordinary administration of Insurance Undertakings

The appointment of extraordinary administration (*izredna uprava*) of the Insurance Undertaking (see 1.3.3 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) measures of extraordinary administration may affect creditors rights and (b) measure of extraordinary administration of Insurance Undertaking includes appointment of two or more extraordinary administrators and AZN exercises the powers of the Insurance Undertakings supervisory board and powers of the general meeting. (see 1.3.3 of Appendix ./E for further details).

ZZavar-1 does not contain special provisions as regards the effects of the adoption of extraordinary administration in respect of Insurance Undertakings on contractual netting provisions.

We note the following:

(a) Pursuant to Articles 318 (1) and 321 (2) ZZavar-1, AZN determines the type and scope of business that may be carried out by each extraordinary administrator and is authorized to give binding instructions to the extraordinary administrators.

(b) In the absence of statutory provisions to the contrary, we believe that the enforceability of contractual close-out netting provisions should not be affected by the adoption of extraordinary administration as regards Insurance Undertakings.

8 Specific questions

8.1 Part I: Enforceability of Close-out Netting

8.1.1 <u>*Automatic Termination*</u>*: Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in § 10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement?*

8.1.1.1 General remarks

Our conclusions in respect of enforceability of Termination Provisions set out in Section 7 above apply equally in respect of Automatic Termination as well as (unilateral) Early Termination (applicable to the extent the Parties have not elected Automatic termination). In our view, based on the discussions in Section 7 above, the following applies:

(i) Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements, it needs to be assessed under the laws governing the relevant EFET General Agreement (*i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement) whether selection of Automatic Termination is a prerequisite for, or recommended to secure, enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings, resolution proceedings or preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*) over the assets of Party A, or in the event of institution of any regulatory measures against Party A (in each case, as applicable; please see at 3.3.3 of Appendix ./E for further details).

(ii) Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law and, hence, Slovenian substantive insolvency law will be decisive, the following should be considered:

Under Slovenian substantive insolvency law, election of Automatic Termination is no prerequisite for enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over Party A's assets. This is because the Slovenian substantive netting privilege in 24a and 24b ZFPPIPP (see Section 2 of Appendix ./E) applies irrespective of whether the parties to a contract have agreed that these contracts are automatically rescinded, or may be rescinded at the option of one party, in case of the institution of insolvency proceedings against the other party.

Moreover, election of Automatic Termination should also be no prerequisite for enforceability of the Close-out Netting Provisions in the event of opening of resolution proceedings or preventive restructuring proceedings over the assets of Party A, or in the event of institution of any regulatory measures against Party A (in each case, as applicable; please see at 3.3.3 of Appendix ./E for further details).

To be sure, we believe that our conclusions set out at 7.4.1.2 above apply equally in respect of Early Termination and Automatic Termination provisions.

8.1.1.2 Early Termination right vs Automatic Termination

In our view – given the relative remoteness of the risks described in 7.4.3.1 above – the choice between unilateral Early Termination and Automatic Termination should, in principle, have a neutral effect as regards the enforceability of the Close-out Netting Provisions; however, all other things being equal, Automatic Termination may be viewed as potentially beneficial, as it:

(A) could – from a practical perspective – reduce the risk of the Party B from losing out on the account of prior distribution of the Party A's bankruptcy estate (cf. 7.4.3.1 above); and

(B) may reduce the (remote) risk of successful challenges by creditors under the rules of ZFPPIPP:

(i) As pointed out in 7.4.3.1 above, in our view there is a remote risk that Early Termination may be deemed to qualify as a challengeable legal act (at least in domestic constellations / beyond the scope of Provisions on Netting Agreements) and subsequently be (successfully) challenged by creditors;

(ii) By extension, we believe that, compared to Early Termination, Automatic Termination upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement is less likely to be considered as a challengeable transaction;

(iii) That said, given that the wording of ZFPPIPP is generally restricted to "legal acts of the <u>bankruptcy debtor</u>" (see 9.3 below and Appendix ./F) – which should, as per the wording of the provision, not extend to legal acts of creditors (such as effecting Early Termination rights) – we see the risk set out in indent (i) above (and hence, the difference between the two methods of termination) as low.

8.1.1.3 Application of Automatic Termination

For scenarios where the Parties have selected Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement, the following should also be considered:

We understand that pursuant to the Material Reason described in § 10.5(c)(iv) of the EFET General Agreement, Automatic Termination (if elected to apply by the Parties pursuant to § 10.4 of the EFET General Agreement) would already be triggered upon filing for the (opening) of insolvency proceedings (*uvedba postopka*) by the defaulting Party or any of its creditors (*upniki*). This is because § 10.5(c)(iv) of the EFET General Agreement refers to the defaulting Party or any of its creditors (as the case may be) "instituting" proceedings against the defaulting Party with the aim of "seeking" reliefs under insolvency or similar laws. We believe that this clause should not be interpreted as referring to the formal opening (by the competent court) of insolvency proceedings against the defaulting Party but rather to filing for the (opening) of insolvency proceedings (*uvedba postopka*). While the Parties are requested to specify the Early Termination Date in such event in the Election Sheet, Automatic Termination may occur at a point in time when insolvency proceedings have not yet been (formally) opened and, hence, insolvency proceedings have not yet become effective.[18]

In this respect, Parties should consider that, by contrast to the formal opening of insolvency proceedings, filings for the opening of insolvency proceedings are not made public in Slovenia. In case of filings for the opening of insolvency proceedings by creditors of the defaulting Party, not even the defaulting Party itself may have knowledge of such filings.[19] Furthermore, there will be a time gap between the filing for, and the actual opening of, insolvency proceedings (if insolvency proceedings were opened at all). While, in case of a motion by the defaulting Party for opening of insolvency proceedings over its assets, formal opening of insolvency proceedings by the court generally does not take a significant amount of time, it may take

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[18] The consequences of opening (*začetek*) of insolvency proceedings generally arise on the beginning of the day when the competent court publicly notifies the creditors of the initiation thereof (i.e., publishes 'the call' (*oklic*)). For the sake of completeness, it should be noted that also filling for an insolvency proceeding (*uvedba postopka*) triggers certain consequences (*e.g.*, debtor prohibited from operating 'outside ordinary course of business', competences of debtor's corporate bodies are limited, etc.). See also Appendix ./E.

[19] Court must serve the defaulting party with the filing/motion for the opening of bankruptcy proceedings within 3 business days (Article 235 ZFPPIPP).

substantially longer in case of filings made by creditors of the defaulting Party (especially when the defaulting Party objects to the filing). Hence, there is a risk that Parties, not having knowledge of the occurrence of a Material Reason under § 10.5(c)(iv) of the EFET General Agreement (*i.e.*, filing for opening of insolvency proceedings), continue to enter into Individual Contracts irrespective of the relevant EFET General Agreement already having been (automatically) terminated. Parties thus need to carefully scrutinize whether to apply Automatic Termination for such scenarios and, if they elect to do so, which point in time should be specified as Early Termination Date in the Election Sheet. In this respect, the Parties could, *e.g.*, mitigate the aforementioned risks by agreeing that the formal opening of insolvency proceedings (*začetek postopka*), rather than the filing for the (opening) of insolvency proceedings (*uvedba postopka*) shall be the point in time for the triggering of Automatic Termination.

We understand that market participants entering into Individual Contracts under the EFET General Agreement with Slovenian counterparties, as a matter of generally accepted practice, address the above considerations by agreeing to apply the following amended wording of § 10.4 and § 10.5(c)(iv) of the EFET General Agreement:

§ 10.4 of the EFET General Agreement: "***Automatic Termination***: *If Automatic Termination is specified as applying to a Party in the Election Sheet, it shall apply to Party A and Party B and with termination effective (Early Termination Date) on the moment of occurring of the Material Reason under § 10.5(c) of the EFET General Agreement. With respect to § 10.5(c)(iv) of the EFET General Agreement this moment coincides with 11:59 p.m. on the day immediately preceding the day of the moment when the proceeding has been instituted as defined by the applicable law; and with respect to other Material Reason under § 10.5(c) of the EFET General Agreement the moment of occurring of the Material Reason shall be defined by the applicable law*."

§ 10.5(c)(iv) of the EFET General Agreement: "*institutes or has instituted against it, based on a published final court's decision or commencement of the proceedings, a proceeding seeking a judgement of insolvency, bankruptcy, compulsory settlement proceeding, including simplified compulsory settlement proceeding, or any other relief under any bankruptcy or insolvency law or other similar law affecting creditor's rights or a petition* *is presented for its winding-up or liquidation, verified by a final court's decision on the commencement of such a proceeding*."

In our view, the above amendments adequately addresses the risks outlined above.

8.1.1.4 Non-application of Automatic Termination

For scenarios where the Parties have not selected Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement, it is recommended that Party B exercises its right of Early Termination within due course following the occurrence of such Material Reason – as discussed in detail under 7.4.3.1 above. In this respect, please also see our recommendation regarding <u>§ 10.5(c)(iv) of the EFET General Agreement</u> in 8.1.1.3 immediately above.

Furthermore, we believe that a termination notice given in accordance with the E-Notice Agreement should be recognized as a valid termination notice under Slovenian law. Similarly, we have no reason to believe that the concept of deemed receipt of the termination notice established under 1 of Schedule 1 (*Amendments and E-mail Address Details*) to the E-Notice Agreement might be challenged by a Slovenian court or insolvency administrator.

8.1.2 *<u>Calculation of Termination Amount</u>: Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Slovenia or is there a risk that such determination could be challenged by a liquidator, receiver or third party?*

8.1.2.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements, enforceability of § 11 of the EFET General Agreement will be governed by the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement.

Notwithstanding the foregoing, enforceability of § 11 of the EFET General Agreement in such constellations may also be subject to the limitations set out at 8.1.2.4 below.

8.1.2.2 Beyond the scope of the Provisions on Netting Agreements / in respect of qualifying Individual Contracts

Where the Provisions on Netting Agreements do not apply and the EFET General Agreement is entered into in respect of Individual Contracts meeting the criteria for 'qualified financial contracts'/'other qualified contracts' (see 7.3 above), Netting Provisions will enjoy protection of the 'netting safe harbour rules' and be upheld in accordance with their terms.

Notwithstanding the foregoing (and consistently with the discussion in section 7.4.3 above), pursuant to Rome I and ZMZPP Slovenian courts could, in our view, refuse to recognise enforceability of the Netting Provisions insofar as these (despite being enforceable under the applicable governing law) should be considered manifestly incompatible with the Slovenian public policy or override mandatory provisions of Slovenian law (please also see 2.2 of Appendix ./E). In this regard, we believe that in order to mitigate the risk of Netting Provisions not being enforceable, these need to be implemented in accordance with the requirements of good faith and conscionability (*dobra vera in poštenje*) and/or determinability of contractual subject matter (*določljivost predmeta pogodbe*), particularly in regards to the right of Party B to (unilaterally) calculate the Termination Amount pursuant to § 11 of the EFET General Agreement (which, from the perspective of Slovenian law, would be tantamount to a discretionary right to (unilaterally) determine the obligation of the other contractual party – Party A).

8.1.2.3 Beyond the scope of the Provisions on Netting Agreements / in respect of non-qualifying Individual Contracts

Where the Provisions on Netting Agreements do not apply and the EFET General Agreement is governed by Slovenian law and entered into in respect to transactions not meeting the criteria for 'qualified financial contracts'/'other qualified contracts', we believe that statutory provision of ZFPPIPP would apply, overriding provisions of the EFET General Agreement. As a general rule, rules of insolvency proceeding regarding set-off (see also 3.4 of Appendix ./E) and possibility of the insolvency administrator to unilaterally "cherry-pick" (i.e. selectively terminate) unperformed (executory) contracts override any conflicting contractual clauses stipulated by the parties to the affected agreement. While Articles 24a and 483 (1) ZFPPIPP provide explicit legal basis for exclusion of said general rules of insolvency proceedings, we believe that in situations where such explicit legal basis does not exist the court and insolvency officials would strictly apply the general rules and such Netting Provisions would likely be unenforceable.

8.1.2.4 Additional limitations

Slovenian law provides for certain overriding mandatory principles as regards damages and the calculation of damages, respectively, which may not be derogated from by the Parties and which, although not directly geared at commodities derivatives business, might be relevant in regard to the Termination Amount calculations and related payments foreseen in the EFET General Agreement. For instance, such mandatory principle would be that no contractual limitation or exclusion of liability is possible in advance for damages caused intentionally (*naklep*) or by gross negligence (*huda malomarnost*) (please also refer to our considerations under 8.4.1.4 below).

In particular (and notwithstanding the foregoing), if an individual EFET General Agreement were governed by Slovenian law (or a court would apply Slovenian law on the basis of Article 3 (3) Rome I), we cannot rule out the risk that the provisions of § 11 of the EFET General Agreement (insofar it provides the right of Party B to unilaterally calculate the Termination Amount) may not be fully enforceable. For reasons analogous to those discussed in 7.4.3 above, we would deem the respective risk as lower in case such discretion were to be exercised reasonably and such determination were to be adequate and not arbitrary under the then prevailing circumstances.

In the event that the Termination Amount calculations and relevant payment obligations foreseen in the EFET General Agreement would yield results that would be incompatible with the foregoing, these would be superseded by Slovenian substantive law. Whereas it is difficult to quantify this risk from the language of the EFET General Agreement without reference to the facts of specific Individual Contracts, we understand that generally the relevant clauses have been drafted aiming at commercially balanced results, so that this risk should probably be small.

8.1.3 *<u>Single agreement concept</u>: Do the laws of Slovenia recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated* *manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.*

In accordance with the general principle of contractual autonomy, we believe that EFET General Agreement and Individual Contracts entered into on its basis would – consistently with the will of the parties – be viewed by a Slovenian court as forming a single agreement (see § 1 (1) of the EFET General Agreement). Provisions on close-out netting in §§ 10 to 11 of the EFET General Agreement would generally apply to all Individual Contracts concluded under the relevant EFET General Agreement.

Furthermore, where the Provisions on Netting Agreements do not apply (otherwise, this would need to be assessed on the basis of the laws governing the relevant EFET General Agreement), we believe that provisions allowing or providing for the termination and close-out netting of some but not all Individual Contracts under the EFET General Agreement may not be enforceable under Slovenian substantive insolvency law. This is because, in our interpretation, the Slovenian netting safe harbour set out in Article 24a ZFPPIPP should be construed as requiring termination of <u>all</u> Individual Contracts and (subsequent) set-off of <u>all</u> mutual claims resulting from the terminated Individual Contracts.

8.1.4 <u>Currency conversion</u>*: Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the Parties in the Election Sheet) enforceable under the laws of Slovenia or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?*

No, we believe that there is a risk that an agreement between the parties in the Election Sheet that the insolvent counterparty is obliged to pay the amount of any compensation claim in a foreign currency would not be enforceable and could be challenged by a liquidator, receiver or third party.

Pursuant to the general regime of ZFPPIPP (see 1.1 of Appendix ./E), the opening of insolvency proceedings will result in transformation of claims denominated in foreign currency into Euro claims, at the official rates as published or determined and published by the Bank of Slovenia at the moment of commencement of insolvency proceedings.

In our view, the claim resulting from a netting arrangement (Termination Amount resulting from the application of Netting Provisions) – even if such netting arrangement is subject to the Provisions on Netting Agreements or netting exemption as per Articles 24a/24b and 483 (1) ZFPPIPP – will not benefit from the netting exemption *itself*. In other words, we believe that general regime of ZFPPIPP (see previous paragraph) would also apply to such a claim – and such claim would be subject to mandatory conversion as is the case in respect of other foreign currency (*i.e.*, other than Euro) claims.

Support for this view can also be found in Articles 164a and 264a of ZFPPIPP, which exclude netting arrangements from the general effects of insolvency proceedings, according to which, if, after the netting of mutual rights and obligations in accordance with the rules as set out in the netting arrangement, a net monetary claim would arise against the insolvent debtor from the other party to the contract, the approved compulsory settlement or bankruptcy proceeding shall have effect in respect of that claim. These provisions indicate that ZFPPIPP does not aim to establish a different regime for claims arising from close-out netting and other (net) claims.

8.1.5 *Counterparty's legal/regulatory status: Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?*

8.1.5.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements it needs to be assessed based on the laws governing the relevant EFET General Agreement (*i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement) whether enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A is dependent upon, or otherwise affected by, Party A's legal or regulatory status.

Please note, in particular, the limitations set out at 9.5 below.

8.1.5.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law and is entered into in respect of Individual Contracts meeting the criteria for 'qualified financial contracts'/'other qualified contracts' (see 7.3 above), enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A will, subject to the limitations set out at 7.1 through 7.3 above and 9.5 below, not be dependent upon, or otherwise affected by, either Party's legal or regulatory status.

8.1.6 *<u>Multiple types of products</u>: Please specify if any of your conclusions under this 8.1 would be changed or qualified if the Parties would enter into several Individual Contracts for multiple types of products (e.g., some Individual Contracts would provide for delivery of electricity/natural gas, other ones for green certificates) under the same EFET General Agreement? Is there a risk that any safe harbor provisions applicable to one type of product, but not the other, would cease to apply as a result?*

8.1.6.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements this question has to be answered according to the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement.

8.1.6.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, we believe that conclusions reached under this 8.1 would not change to the extent that all Individual Contract under the relevant EFET General Agreement would benefit from the Slovenian substantive netting privilege in Articles 24a and 24b ZFPPIPP.

If there were, however, also Individual Contracts not falling within the scope of Articles 24a and 24b ZFPPIPP (see 7.3 above, *i.e.*, 'mixed-bag'), we believe there is a risk that this would negatively impact on the enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A. The Slovenian courts are yet to address such a scenario and we cannot exclude the risk that they would consider Individual Transactions as separate transactions if falling outside the scope of 24a/24b ZFPPIPP. Notably, there would be a risk that such Individual Contracts would be considered as separate transactions, falling outside the single agreement concept, triggering a risk of 'cherry picking' by the insolvency administrator. We believe that the question to what extent the close-out netting mechanism provided for under the Close-out Netting Provision remains enforceable in such a scenario, would, however, not only need to be assessed under applicable Slovenian substantive insolvency law but also under the laws governing the EFET General Agreement / EFET Credit Support Annex (*e.g.*, English or German law).

Other than as set out above, we do not believe that the conclusions reached under this 8.1 would be adversely affected if the Parties entered into several Individual Contracts for multiple types of products under the same EFET General Agreement.

8.1.7 *Enforceability: Are the rights of Party B to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?*

8.1.7.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements enforceability of Party B's right to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions irrespective of the insolvency of Party A is determined by the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties.

8.1.7.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Slovenian law, we believe that, based on the reasoning and subject to the limitations outlined at 7.4.1.2 above, the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable irrespective of the insolvency of Party A.

8.2 Part II: Multibranch Parties

8.2.1 Slovenian Multibranch Party

8.2.1.1 *Would there be any change in your conclusions reached under 8.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?*

8.2.1.1.1 General

No, we believe that our conclusions reached under 8.1 above would apply even if Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency. Under Slovenian law, branches do not constitute a separate legal entity, but form part of the company having established the branch (its 'parent' company). A branch is an extension, and acts in the name and for the account of, the establishing company.[20] The establishing company is the holder of rights and obligations and is as such liable for the operation of the branch.

ZFPPIPP applies to insolvency proceedings of legal entities or natural persons established in Slovenia. As discussed above, a branch is not a (separate) legal entity. Pursuant to Article 224 of the ZFPPIPP, the bankruptcy estate of the insolvent debtor shall consist of all assets of the bankrupt debtor. In our view, it follows from the above that assets held by a branch of Party A would form a part of the bankruptcy estate of the establishing company, regardless of the circumstance that a branch (and the respective assets) would be located abroad. Pursuant to Article 224 of the ZRPPB-1, the same rules apply for bankruptcy of a Bank.

8.2.1.1.2 Banks and Investment Firms

Furthermore, if Party A is a Bank or an Investment Firm, we believe that no (secondary) insolvency proceedings may be opened in Slovenia in relation to its branch in EU Member State or EEC Member State. Pursuant to Article 263 ZRPPB-1, the administrative or judicial authorities of the home Member State shall have exclusive competence to decide on the implementation of one or more reorganization measures in a Bank and to decide on the opening of compulsory termination proceedings (which include bankruptcy proceedings) in respect of a Bank. This competence includes deciding on measures in respect of branches of that Bank established in other Member States. Within the meaning of ZRPPB-1, home Member State is a Member State in which an institution has been granted authorization. In cases of Banks established in Slovenia, such authorization is granted by the Bank of Slovenia.

Pursuant to Article 269 of the ZRPPB-1, which transposes Articles 3 and 9 of the Directive 2001/24/EC and Article 66 of the BRRD, decisions of judicial or administrative authorities of Member State in which a Bank is authorized with respect to reorganization measures or winding-up proceedings are recognized in Slovenia without any special recognition proceedings and therefore have direct effect. Accordingly, we believe that

[20] See Articles 31 (2) and 671 of the Companies Act (*Zakon o gospodarskih družbah*, "**ZGD-1**"), Official Gazette of the RS, no. 65/09.

under Slovenian law, only authorities of home Member State may initiate compulsory termination proceedings against Banks and legal effects of these proceedings would be governed by the law of such home Member State (see also Article 10 of Directive 2001/24/ES).

If branch(es) of Party A (which is a Bank or an Investment Firm in this scenario) would be located outside the EU or the EEC, we believe that the above considerations would generally apply from the perspective of Slovenian law. We cannot however exclude the risk that under the law of a third country (where a branch would be located) separate proceedings could be initiated and that legal consequences of such separate proceedings would deviate from our general conclusions from the perspective of Slovenian law. As discussed, under Slovenian law, bankruptcy estate consists of all the assets of the debtor. Article 272 ZRPPB-1, implementing Article 67 BRRD, provides that, in respect of assets located in a third country (or shares, other instruments of ownership, rights or liabilities governed by the law of a third country), Bank of Slovenia may require that a failing entity, the administrator or the acquirer take all necessary steps to ensure that the transfer, write down, conversion or other action becomes effective in said third country. Where Bank of Slovenia assesses that, in spite of all the necessary steps taken by the failing entity, or by the administrator, it is highly unlikely that the transfer, conversion or action will become effective in relation to certain assts located in a third country (or certain shares, other instruments of ownership, rights and liabilities under the law of a third country), it shall not proceed with the transfer, write down, conversion or action. If the Bank of Slovenia has already decided on the said measures, it shall, by way of a new decision, decide that the imposed resolution measure shall have no effect in respect of assets, shares, instruments of ownership, rights or liabilities concerned. We believe that resolution measures by any third country authority that would disregard netting arrangements with respect to the branch of Party A would contravene the laws of Slovenia and their recognition would consequently be refused, noting however, that there is no court jurisprudence available on this issue.

We note, for completeness, that third-country resolution proceedings are subject to recognition proceedings in Slovenia (see Article 273 ZRPPB-1). Bank of Slovenia refuses recognition or enforcement of third-country resolution proceedings if it considers *inter alia* that the effects of such recognition or enforcement would be contrary to Slovenian law.

8.2.1.2 *Would the EFET General Agreement be treated as a single unified agreement by the Slovenian receiver under the laws of Slovenia, regardless of the treatment of the EFET General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?*

We believe that, if Slovenian bankruptcy proceedings are opened against Party A, and provided that the relevant branch(es) of Party A are established in a country(-ies) where Party A and the branch are treated as one single entity, the Slovenian insolvency administrator will treat the EFET General Agreement and all Individual Contracts thereunder as single, unified agreement with respect to Party A and branches of Party A.

As discussed under 8.2.1.1.1 above, branches are not regarded as separate legal entities and the general rule under Slovenian insolvency law is that the bankruptcy estate of the insolvent debtor shall consist of all assets of the bankrupt debtor (including assets located abroad / held by a non-Slovenian Branch of the insolvent debtor). Therefore, we believe that under the laws of Slovenia separate treatment of Individual Contracts would not be allowed in such a constellation (*i.e.*, by reason of the multi-branch nature of the constellation alone).

On the other hand, with respect to branches of Party A in countries that treat the branch as separate legal entity, we see a risk that the Slovenian insolvency administrator would not recognize the inclusion of Individual Contracts concluded by such branch into the close-out netting of Party A.

With respect to Banks and Investment Firms, we note that within the EEC the administrative or judicial authorities of the home Member State have exclusive competence to decide on the implementation of one or more reorganization measures in a Bank and to decide on the opening of compulsory termination proceedings (as discussed under **Error! Reference source not found.** above) in accordance with the home country authority approach under BRRD and Directive 2001/24/EC. Accordingly, judicial authorities of other countries (including also countries where close-out netting may be unenforceable) cannot initiate separate proceedings. If a branch is not located within the EEC, and the branch is treated as a separate legal entity under the laws of such third country, there is a risk that separate resolution proceedings would be initiated in a third country. However, recognition of such separate proceedings in Slovenia would in our view be refused under Article 273 ZRPPB-

1, on the grounds of being contrary to the laws of Republic of Slovenia due to non-application of close-out netting (namely, recognizing such effects would be contrary Article 154 ZRPPB-1).

8.2.2 Foreign Multibranch Party

8.2.2.1 *Would there be separate proceedings in Slovenia with respect to the assets and liabilities of the Slovenian Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Slovenia defer to the proceedings in Country H, so that the assets and liabilities of Slovenian Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the Slovenian Branch initiate separate proceedings in Slovenia even if the relevant authorities in Slovenia did not do so?*

Based on the reasoning and subject to the limitations outlined below, there could be separate proceedings in Slovenia with respect to the Slovenian Branch of an insolvent corporation domiciled outside of Slovenia (a "**Foreign Corporation**"), a bank / insurance undertaking (other than a re-insurance undertaking) domiciled outside the EEA ("**Foreign Institution**") or a financial institution as defined in CRR licensed in another Member State ("**EEA Financial Institution**").

8.2.2.1.1 General

We understand that in this scenario Party F is subject to insolvency proceedings in Country H, where it has its COMI Slovenian Branch is not a separate legal entity and the holder of its rights and obligations, assets and liabilities is the parent company (please also see our considerations under 8.2.1 above).

If Country H is an EU Member State, Insolvency Regulation generally applies and jurisdiction to open insolvency proceedings (*i.e.*, main insolvency proceedings) primarily lies with the courts of the Member State within the territory of which the debtor's COMI is situated, which we understand to be the Country H. The COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see Article 3 of the Regulation). The law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (Article 7 of the Regulation). The effects of main insolvency proceedings generally encompass all of the debtor's assets located in the EU where the

Regulation is applicable (Denmark thus excluded). Pursuant to Articles 19 and 20 of the Regulation, any judgement opening insolvency proceedings by the courts of Member State within the territory of which the debtor has its COMI shall be recognized in in all other Member States from the moment that it becomes effective in State of the opening of proceedings (Country H) and shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings. Therefore, the effects of the opening or commencement of insolvency proceedings in another Member State are not subject to a special procedure for recognition of those insolvency proceedings in Slovenia. This shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court (Article 32 (1) of the Regulation).

Slovenian courts may have jurisdiction to open insolvency proceedings pursuant to Article 3 (2) of the Regulation, if Party F has an establishment within the territory of Slovenia, with the effects of such proceedings limited to the assets of Party F situated in the territory of Slovenia, provided that main insolvency proceedings pursuant to Article 3 (1) of the Regulation have not yet been opened. Pursuant to Article 34 of the Regulation, secondary insolvency proceedings may be opened in Slovenia, after the opening of the main insolvency proceedings, if the debtor has an establishment in Slovenia. In this case the debtor's insolvency shall not be re-examined and the effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of Slovenia.

If Country H is not an EU Member State, provisions of Chapter 8 of ZFPPIPP (Insolvency Proceedings with International Elements) apply in regard to effects of foreign insolvency proceedings. The foreign insolvency administrator may submit a request for recognition of foreign insolvency proceedings in accordance with Article 460 of ZFPPIPP. The court may recognize the foreign insolvency proceedings either as a main insolvency proceedings (provided that the debtor's COMI is in that country) or a secondary insolvency proceedings (if the debtor has a business unit in that country but not its COMI). If foreign insolvency proceedings are recognized as main insolvency proceedings, domestic insolvency proceedings may only be opened as secondary insolvency proceedings, which is limited to the assets of the insolvent debtor located in Slovenia and to other assets which are part of the insolvency estate to the extent necessary for the realization of cooperation with foreign courts and administrators (see Article 474 ZFPPIPP).

8.2.2.1.2 Banks

If Country H is a Member State of the EU, we believe that, in accordance with the provisions of the Directive 2001/24/ES, the administrative or judicial authorities of the home Member State shall have exclusive competence to decide on the implementation of one or more reorganisation measures in a Bank and to decide on the opening of compulsory termination proceedings (which include bankruptcy proceedings) in respect of a Bank, as discussed under 8.2.1.1.2 above.

If Country H is not a Member State of the EU, Slovenian Branch would qualify as a Union branch within the meaning of ZRPBB-1 (*i.e.*, a branch of a third-country institution located in an EU Member State). Pursuant to Article 167 ZRPPB-1, the Bank of Slovenia may act in relation to a Union branch established in Slovenia that (A) is not subject to any third country resolution proceedings or (B) is subject to third country proceedings but the recognition or enforcement of third country resolution proceedings was refused pursuant to ZRPPB-1 (Article 273 (4)). Bank of Slovenia may apply resolution measures if these are necessary from the perspective of the Slovenian public interest and at least one of the following conditions is met:

(i) the Union branch no longer meets, or is likely not to meet, the conditions imposed by Slovenian law for its authorisation and operation within Slovenia and there is no prospect that these conditions will be met within in a reasonable timeframe;

(ii) the third-country institution is, in the opinion of the Bank of Slovenia, unable or unwilling, or is likely to be unable, to pay its obligations to creditors in Slovenia or other Member State, or obligations that have been created or booked through the branch, as they fall due, and Bank of Slovenia is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in a reasonable timeframe; or

(iii) the relevant third-country authority has initiated resolution proceedings in relation to the third-country institution, or has notified Bank of Slovenia of its intention to initiate such a proceeding.

8.2.2.2 *If there were separate proceedings in Slovenia with respect to the assets and liabilities of the Slovenian Branch, would the receiver or liquidator in Slovenia and the Slovenian courts, based on the facts above, include Party F's position under the EFET General Agreement, in whole or in part, among the assets of Slovenia and, if so, would the receiver or liquidator and the Slovenian courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms? The most significant problem arising would be if an Slovenian receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Slovenian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Slovenian Branch to the liquidator or receiver of the Slovenian Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement. In considering this issue, please assume that close-out netting under the EFET General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.*

8.2.2.2.1 General

We understand that insolvency proceedings for Party F have been instituted in Country H and that separate proceedings have been initiated in Slovenia with respect to assets and liabilities of a Slovenian Branch.

Under Slovenian law, branches do not represent a separate legal entity, but merely form part of the company which has established the branch ('parent' company) and act in its name and for its account (as discussed under 8.2.1.1.1 above). Therefore, from the perspective of Slovenian law, the Slovenian Branch and Party F would form a single legal entity.

We believe, subject to the below, that a Slovenian court and a Slovenian insolvency administrator would include Party F's or the EEA financial institution's position under a EFET General Agreement as a whole.

If Country H is a Member State of the EU and the Regulation applies, we believe that Slovenian insolvency administrator would recognize the Close-out Netting Provisions of the EFET General Agreement in accordance with their terms and recognize the result of netting as one single claim or obligation (this is on the basis that, under the laws of Country H, the Slovenian Branch forms a single legal entity with Party F). If, under the laws of Country H the Slovenian Branch would form a separate legal entity, we believe that the result of netting shall be recognized as one single claim or obligation to the extent the claims and obligations are attributed to the Slovenian Branch.

If the Regulation is not applicable, a Slovenian court and a Slovenian insolvency administrator would recognize the Close-out Netting Provisions of the EFET General Agreement in accordance with their terms and recognize the result of netting as one single claim or obligation if, under the laws of Country H, the Slovenian Branch forms a single legal entity (with Party F). If, under the laws of Country H the Slovenian Branch would form a separate legal entity, we believe that the result of netting shall be recognized as one single claim or obligation to the extent the claims and obligations are attributed to the Slovenian Branch.

8.2.2.2.2 Banks

Pursuant to Article 154 ZRPPB-1, implementing Articles 76 to 79 of BRRD, safeguard for counterparties in partial transfers shall apply to *inter alia* netting arrangements in resolution proceedings irrespective of the number of parties involved in the arrangements and of whether the arrangements arise under or are governed in whole or in part by the law of another Member State or of a third country. In such separate proceedings in Slovenia, Bank of Slovenia is obliged to prevent transfers of some, but not all, of the rights and liabilities that were protected under a netting arrangement between the institution under resolution and another person and the modification or termination of rights and liabilities that are protected under such netting arrangement. Therefore, we believe that Bank of Slovenia will include Party F's position under the EFET General Agreement in whole among the assets of either Company F or the Slovenian Branch.

8.2.2.3 *Please consider your answer to your question assuming instead that Party F has no branch located in Slovenia, but has assets in Slovenia.*

8.2.2.3.1 Banks / Insurance Undertakings licensed in another EEA State

There would not be any change in our conclusions reached under 8.2.2.1 above.

8.2.2.3.2 Foreign Institutions

In respect of Foreign Institutions, Slovenian courts would, in the absence of a Slovenian Branch, have no jurisdiction for the institution of bankruptcy proceedings against a Foreign Institution even if there were assets of that Foreign Institution located in Slovenia.

8.2.2.3.3 Foreign Corporations / EEA Financial Institutions

Where the Regulation applies (see at 3.1 of Appendix ./E), Slovenian courts would, in the absence of a Slovenian Branch[21], have no jurisdiction for the institution of insolvency proceedings against a Foreign Corporation or EEA Financial Institution even if there were assets of that Foreign Corporation / EEA Financial Institution located in Slovenia.

Where the Regulation does not apply, Slovenian courts have jurisdiction for the institution of insolvency proceedings against a Foreign Corporation or EEA Financial Institution if there are (at least) assets of that Foreign Corporation / EEA Financial Institution located in Slovenia (Article 52 (2) no 3 second indent ZFPPIPP).

8.3 Part III: Collateral

8.3.1 *Governing law: Under the laws of Slovenia, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?*

8.3.1.1 General remarks

The Slovenian Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku*, "**ZMZPP**") and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**") recognize a contractual choice of law governing the obligation to transfer title (*titulus*) or to grant security interest if one party to a collateral arrangement is organized in a foreign jurisdiction.

While the contractual choice of law is, subject to the limitations on choice of law set out at 9.5.7 below, valid as concerns the Parties' obligations under the Opinion Documents (*i.e.*, questions in regard to determining the Parties' obligations,

[21] More precisely, in the absence of an "establishment" in Slovenia as such term is defined in Article 2 no 10 of the Regulation (*i.e.*, "*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*").

interpretation and remedies for breach of the agreement), the creation of rights *in rem* in any Eligible Credit Support as well as other issues concerning rights *in rem* (such as the establishment, acquisition, types, contents, effects, protection, transfer and loss of rights *in rem*) will be determined in accordance with Slovenian conflict of laws rules.

A choice of law regarding rights *in rem* which is not compliant with Slovenian conflict of law rules will be disregarded by Slovenian courts. Slovenian courts will uphold such transfer of ownership only if it is valid under the substantive laws which are to be applied according to Slovenian conflict of laws rules.

8.3.1.2 Eligible Credit Support in the form of Cash

8.3.1.2.1 Relevant conflict of laws rules

As far as the creation of rights *in rem* in any Eligible Credit Support in the form of Cash is concerned, the following applies:

From a Slovenian law perspective, money held on an account would, in our view, qualify as a receivable due from the account bank to the account holder. According to Article 14 (3) of Rome I, the concept of assignment (*odstop*) referred to in Article 14 of Rome I also includes outright transfers of claims. This means that the conflict of laws rules in Article 14 Rome I similarly apply to outright transfers of claims (as provided for under the EFET Credit Support Annex). Pursuant to Article 14 (2) of Rome I, the law governing the assigned/transferred claim shall determine (i) its assignability, (ii) the relationship between the assignee/transferee and the debtor, (iii) the conditions under which the assignment/transfer can be invoked against the debtor and (iv) whether the debtor's obligations have been discharged. The law governing the receivable (*i.e.*, the law governing the account agreement) shall also govern the creation of rights *in rem* and, in particular, the steps to be taken to perfect a right *in rem* over the receivable.

8.3.1.2.2 Slovenian substantive law

Where, in accordance with 8.3.1.2.1 above, Slovenian law was found to be the law applicable in relation to the creation of a right *in rem*, the following applies:

Under Slovenian law, cash deposited to a bank account forms a credit balance (*dobroimetje*), which has the characteristics of a bank cash deposit (*bančni denarni depozit*), which, in turn, has the characteristics of a so-called non-authentic storage (*nepristna hramba*) (*depositum irregulare*).[22] On the basis thereof, the bank account holder has a monetary claim (*terjatev*) towards the bank for payment of an equal amount of money. Therefore, the credit balance (*dobroimetje*) on a bank account is the balance (nominal amount) of the bank account's holder's monetary claim towards the bank on the basis of the cash deposited to the account holder's bank account.[23] Therefore, from the perspective of Slovenian law, *in rem* ownership title (with respect to cash collateral) should, in our view, be construed as entitlement to a claim (against the account bank).

Accordingly, from the perspective of Slovenian law, any contractual obligation to transfer ownership in cash collateral (other than notes and coins) should, in our view, be interpreted as an obligation of the collateral provider to provide the collateral taker with a claim (*terjatev*) of the collateral taker against its account bank.

In case of transfer of money, the discharging effect of the transfer (*izpolnitveno ravnanje*) and the transfer of perils (*prenos tveganj)* would occur when the account bank of the collateral taker will receive the credit from the account bank of the collateral provider.[24]

On the basis of the above, we believe that the collateral taker will acquire a claim (*terjatev*) against their account bank (and hence *title* in the above sense of the word) once the amount in question is credited to their bank account.

8.3.1.3 Eligible Credit Support in the form of Letters of Credit / Parent Company Guarantees

8.3.1.3.1 Relevant conflict of laws rules

As far as the creation of rights *in rem* in any Eligible Credit Support in the form of a Letter of Credit (as defined in the EFET Credit Support Annex) or a Parent Company Guarantee is concerned, the following applies:

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22 Pursuant to Article 739 ZOR, non-authentic storage (*nepristna hramba*) is a situation where substitute goods (*genus*) have been deposited and the recipient has the right to use them and the obligation to return an equal quantity of goods of the same kind. Rules on loan agreements apply for the relationship between the recipient and the depositor.

23 This view was expressed in legal writing, namely Commentary of the Obligations Code (see Plavšak N., Obligacijski zakonik s komentarjem, 4. knjiga, GV Založba, Ljubljana 2004, str. 1281), and reaffirmed by the Supreme Court (see e.g., Decision of the Supreme Court III Ips 101/2013) and Higher Court in Ljubljana (see e.g., High Court in Ljubljana I Cpg 1622/2014).

24 See Article 293 OZ.

To the extent that the law applicable to the Letter of Credit or Parent Company Guarantee has not been chosen in accordance with Article 3 Rome I,[25] the law of the country where the issuing bank / guaranteeing bank / parent company has its habitual residence (*običajno prebivališče*)[26] shall be decisive (Article 4 (1)(b) of Rome I).

8.3.1.3.2 Slovenian substantive law

Where Slovenian law was found to be the law applicable in relation to the creation of a right *in rem*, the following applies:

(i) Standby letters of credit

From a Slovenian law perspective, a standby letter of credit (*akreditiv*) is construed in accordance with Chapter XXXVII of the Obligations Act (*Zakon o obligacijskih razmerjih*, "**ZOR**") (Articles 1072 to 1082) and constitutes an abstract obligation (*abstraktno obveznost*) vis-à-vis a third-party (the beneficiary (*upravičenec*)) assumed by the issuing bank upon the instruction of the principal to pay a certain amount on behalf of the principal to the beneficiary as soon as and to the extent certain (pre-agreed) conditions have been met (typically, timely presentation of a pre-agreed set of documents by the beneficiary to the issuing bank (*dokumentarni akreditiv*).

Due to the abstract (*abstraktna*) and independent (*neodvisna*) nature of the standby letter of credit, the issuing bank may, in principle, not raise any objections which may arise from the legal relationship between (i) the principal and the beneficiary (*upravičenec*) and (ii) the principal and itself.

For purposes of this Opinion, we have assumed that (i) there is no bank other than the issuing bank (*akreditivna banka*) involved in the provision of the relevant standby letter of credit by Party A (*i.e.*, in particular, no confirming bank) and (ii) the standby letter of credit is provided to Party B for security purposes only and, hence, does not serve fulfillment of

[25] In respect of a standby letter of credit, to the extent the law applicable to the legal relationship between the issuing bank and the beneficiary has not been chosen.

[26] For the purposes of Rome I, the habitual residence (*običajno prebivališče*) of companies shall be the place of central administration (*glavne uprave*).

any payment or other performance obligations of Party A.

(ii) Bank guarantees

From a Slovenian law perspective, a bank guarantee (*bančna garancija*) is construed in accordance with Chapter XXXVIII ZOR (Articles 1083 to 1087) and constitutes an abstract obligation (*abstraktno obveznost*) vis-à-vis a third-party (the beneficiary (*upravičencu*)) assumed by the guarantor upon the instruction of the principal to guarantee payment by the principal to the beneficiary of any and all amounts due under a particular (or the entire) legal relationship between the principal and the beneficiary.

Due to the abstract (*abstraktna*) and independent (*neodvisna*) nature of the bank guarantee, the guaranteeing bank may, in principle, not raise any objections which may arise from the legal relationship between (i) the principal and the beneficiary (*upravičenec*) and (ii) the principal and itself.

(iii) Parent Company Guarantees

We note that non-bank guarantees are not explicitly regulated under Slovenian law and that, traditionally, a view has been held in legal practice that 'guarantees' given by non-bank institutions should be construed according to the general rules on surety (*poroštvo*).[27] However, we believe that non-bank guarantees – including parent company guarantees – should be viewed as constituting *sui generis* contracts and thus recognized in accordance with the provisions of ZOR on bank guarantee *mutatis mutandis*.[28]

Therefore, our considerations under (ii) above generally apply to guarantees provided by a parent company.

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27 Which is a form of an accessory (*akcesorno*) personal credit support (*inter alia*, entitling the surety (*porok*) to certain objections based on the underlying legal relationships (between the principal and beneficiary / beneficiary and itself).

28 This view is supported by legal writing (see Vlahek A., Damjan M., *Novi obliki zavarovanja obveznosti v našem prostoru: nebančna garancija in poroštvo na prvi poziv* (New forms of security in our area: non-banking guarantee and suretyship on first demand), Podjetje in delo, no. 8, 2015, p. 1463).

Based on the legal nature of Letter of Credits (as described above), any contractual obligation to "provide a Letter of Credit" (see § 3.2(b) of the EFET Credit Support Annex) constitutes an obligation of Party A to provide Party B with a claim of Party B against the relevant issuing bank / guaranteeing bank / parent company, as applicable. Therefore, from the perspective of Slovenian law, we believe that 'transfer of title' should be construed as establishment of an entitlement to a claim (of the collateral taker/Party B) against the relevant issuing / guaranteeing bank or a parent company.

According to Slovenian law, Party B will receive a claim against the relevant issuing bank when it has received notification of the issuing bank that it has opened the standby letter of credit (see Article 1073 ZOR) or once it received the document setting out the conditions under which the bank undertakes to pay the guaranteed amount (see Article 1083 (2) ZOR).

8.3.2 *<u>Characterisation</u>: Would the laws of Slovenia characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a recharacterization?*

8.3.2.1 General remarks

In case Slovenian substantive law was determined as the law applicable to the relevant Eligible Credit Support in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above), the following applies:

Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), from the perspective of Slovenian law, strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title should be construed as entitlement to a claim against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit (*akreditiv*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Please see above.

Accordingly, Party B will, in lieu of an *in rem* ownership title in the Eligible Credit Support and subject to receipt of the declaration of acceptance by the issuing bank / conclusion of a contract in respect of guarantees (see at 8.3.1.3.2 above for further details), receive a claim (*terjatev*) against the relevant third party.

8.3.2.2 Re-characterization risk

Under Slovenian law, the provisions of a contract should primarily be interpreted in accordance with the ordinary meaning of its terms (Article 82 (1) OZ). When interpreting disputed provisions, common interest of the contracting parties should be given priority over the literal meaning of the terms, taking into account the general principles of Slovenian civil law (Article 82 (1) OZ).

As discussed above, we understand that in accordance with § 7 (1) and (3) of the EFET Credit Support Annex, the Parties intend to transfer Eligible Credit Support to the Transferee, vesting the Transferee with all rights, title and interest, free and clear of any liens, claims, charges, encumbrances or any other interest of the Transferor or any third person.

Based on the above, we believe that, at least in constellations falling within the scope of ZFZ, a Slovenian court should recognize and uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive accordingly, full entitlement to a claim against a third-party; however, in the absence of any jurisprudence on the issue, we cannot exclude the risk that a Slovenian court would adopt a different view.

In constellations outside the scope of ZFZ[29] (and where Slovenian substantive law applies), the legal nature of Cash collateral – as contemplated by the EFET Credit Support Annex – is unclear. On the one hand, the provision of Cash (for the purposes as contemplated by the EFET General Agreement) could be construed as a security transfer (*prenos v zavarovanje*) or a (possessory) pledge on movables. However, within the meaning of Slovenian law, Cash credited to a bank account is not a movable / physical object for the purposes of rights *in rem* law which could be considered as an individually determined independent object (*species*), but rather a generic matter (*genus*) in immaterial form, and as such by definition falls

[29] See at Appendix ./G for a detailed analysis of the scope of application of the ZFZ.

outside the scope of security transfer or pledge on movables.[30] On the other hand, the Cash collateral arrangement – as contemplated by the EFET Credit Support Annex – could (from the perspective of Slovenian law) be construed as a *sui generis* arrangement akin to an advance payment on the account of a secured obligation (in respect of which, however, no jurisprudence corroborating the legal robustness/effects of such structures – in particular in insolvency scenarios – is publicly available).

In terms of risk mitigation, the risk of any re-characterization appears to be best mitigated by omitting any conduct evidencing any intention of the Parties contrary to what is stipulated in § 3 (2) in conjunction with § 7 (1) and (3) of the EFET Credit Support Annex.

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

No actions or steps other than those required under the law determined as the law applicable to the Eligible Credit Support in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above) need to be taken and maintained. This means that such questions need to be assessed on the basis of the law applicable to the Eligible Credit Support.

In case Slovenian substantive law was to apply: (i) once Party B has validly received full entitlement to the claim against the relevant third-party (please see at 8.3.1.2.2 and 8.3.1.3.2 above), no further actions or steps are required to ensure that full entitlement to such claim continues to remain with Party B; and (ii) no filing, registration or perfection requirements, or other procedures, need to be observed and no consents or governmental or regulatory approvals need to be obtained to continue such interest in the claim against the relevant third-party.

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30 Cash in the form of notes and coins could however be pledged by the pledge on movables, if said coins or notes would be sufficiently individualises, e.g. placed in an envelope (See Juhart M., Berden A. and others, Stvarnopravni zakonik s komentarjem (Commentary of the Rights in Rem Act), GV Založba, Ljubljana, 2004, p. 707.). We however understand that the Delivery of Eligible Credit Support foreseen by the EFET Credit Support Annex is limited to transferring Cash to the account of the Transferee and notes and coins fall outside this scope.

Enforcement of the claim acquired by Party B under a Letter of Credit may, however, be subject to satisfaction of further conditions set out in the relevant Letter of Credit (*e.g.*, in respect of standby letters of credit (*akreditiv*), timely presentation of a pre-agreed set of documents to the issuing bank).

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

8.3.4.1 Effect of substitution

The legal consequence of a substitution of Eligible Credit Support will be that the right *in rem* in the Eligible Credit Support will, upon exchange (*i.e.*, re-transfer of former Eligible Credit Support to Party A and acceptance of new Eligible Credit Support by Party B), cease to exist; whereas, with respect to the substitute Eligible Credit Support a right *in rem* will be newly created and avoidance/suspect periods (if any; see for further details under 8.3.7 below) will (newly) commence.

8.3.4.2 Consent of Party B

The presence or absence of Party B's consent to such substitution has no impact on the conclusions reached at 8.3.4.1 above.

Consent by Party B to such substitution would, for the reasons set out below, be necessary, as a practical matter. This is because Party A has, upon valid acquisition of a right *in rem* in the relevant claim (*terjatev*) by Party B, no longer any proprietary interest in the Eligible Credit Support. Accordingly, Party A may no longer dispose of the Eligible Credit Support. Party A only has a claim for re-transfer of Equivalent Credit Support (see § 4.2 of the EFET Credit Support Annex). Therefore, a substitution of Eligible Credit Support once validly transferred to Party B will only be possible where Party B agrees to (cooperates with a view to enabling) such substitution.

8.3.5 *Determination of net amount payable upon termination: Party B's right in relation to the transferred collateral upon termination of the relevant EFET General Agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Slovenia insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit*

Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?

8.3.5.1 Within the scope of the ZFZ

Within the scope of the ZFZ (*i.e.*, where the Parties are meeting the requirements of the personal scope of ZFZ and Eligible Credit Support in the form of Cash is concerned)[31], the following applies:

Since the Close-out Netting Provisions should qualify as close-out netting provisions (also) within the meaning of the ZFZ[32] (cf. 2.4 of Appendix ./E) we believe that § 11 of the EFET Credit Support Annex should be valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "*other amounts payable*". We base such belief on the following reasons:

Close-out netting is expressly recognized by the ZFZ. Pursuant to Article 12 ZFZ, contractual close-out netting provisions are effective:

(i) notwithstanding any judicial or other attachment or the commencement or continuation of compulsory settlement, bankruptcy or compulsory liquidation proceedings in respect of the collateral provider and/or the collateral; and

(ii) notwithstanding any purported assignment, encumbrance or otherwise disposition by the collateral taker in respect of the secured claim.

Further, pursuant to Article 10 (4) ZFZ, in case the conditions for enforcement of collateral[33] arise before the date on which

[31] See at Appendix ./G for a detailed analysis of the scope of application of the ZFZ.

[32] Pursuant to Article 3 (1) no 12 ZFZ, close-out netting means "*a provision that, on the occurrence of an enforcement event the obligations of the parties are accelerated so as to be immediately due, that non-monetary obligations are converted into the monetary obligations and they are subject to set off (close-out netting) as per their current value*". Based upon this definition, we come to conclude that the Close-out Netting Provisions should qualify as a close-out netting provision within the meaning of ZFZ (*i.e.*, providing for termination and replacement of the Parties' obligations under the EFET General Agreement by a single net claim; see, in particular, § 10.3(a) and (b) of the EFET General Agreement).

[33] Definition of "Conditions for enforcement of collateral" (*pogoji za izvršitev finančnega zavarovanja*) under Article 3 (1) ZFZ is an equivalent of the "enforcement event" (*dogodek izvršitve*) as per the Article 2 (1)(l) of the Financial Collateral Directive. While the definition is not transposed verbatim, we nevertheless believe that the deviations do not affect the meaning / conditions of the definition.

the collateral taker is obliged to provide substitute collateral, the collateral taker may subject it to close-out netting. The ZFZ thus also recognizes close-out netting where a title transfer financial collateral arrangement was established. Article 10 (4) ZFZ implements Article 6 (2) of the Financial Collateral Directive[34]. We note that the text of ZFZ in its literal translation appears to deviate (slightly) from the text of the Financial Collateral Directive, however, we believe these deviations to be purely editorial and see no reason for an interpretation deviating from the Financial Collateral Directive.

For completeness, we note that ZFZ does not expressly provide for the right of the collateral taker to set-off the value of the cash collateral for the purpose of discharge of the relevant financial obligations. However, given that this is provided in the Article 4 of the Financial Collateral Directive (and taking into account the general function/purpose of ZFZ in the Slovenian legal system), we believe that ZFZ should be interpreted in accordance with the provisions of the Directive and that the collateral taker would have such right.

8.3.5.2 Beyond the scope of the ZFZ

Beyond the scope of the ZFZ[35], the following applies:

We believe that § 11 of the EFET Credit Support Annex should be valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "*other amounts payable*" even where the ZFZ does not apply (in particular, where Eligible Credit Support in the form of Letters of Credit / Parent Company Guarantees is provided).

We have no reason to believe that the Parties' agreement, according to which Eligible Credit Support in the form of a Letter of Credit shall not be considered by the Valuation Agent when determining such "*other amounts payable*" (except where Party B has drawn under any such Letter of Credit), would not be recognized by a Slovenian court.

[34] Article 6 (2) of the Financial Collateral Directive stipulates that: "*if an enforcement event occurs while any obligation of the collateral taker to transfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, the obligation may be the subject of a close-out netting provision*".

[35] See at **Error! Reference source not found.** for a detailed analysis of the scope of application of the ZFZ.

This should also hold true in a Slovenian insolvency-scenario of Party A, given that the claim (*terjatev*) of Party B under a Letter of Credit / Parent Company Guarantee provided by Party A under the EFET Credit Support Annex against the relevant issuing bank / guaranteeing bank / parent company (as the case may be) will not form part of the insolvent estate of Party A.

While a power of attorney granted, or an instruction or order given, by a Slovenian entity will, generally, automatically terminate upon the opening of local insolvency proceedings over the relevant entity's assets (see Chapter 5.3 of ZFPPIPP), this should not be the case for the instruction given by Party A prior to the opening of insolvency proceedings to the relevant third-party (*i.e.*, the issuing bank, guaranteeing bank or parent company, as the case may be) to issue a Letter of Credit / Parent Company Guarantee to the extent the relevant third-party has already complied with such instruction. This means that, to the extent the relevant third-party has already issued the Letter of Credit / Parent Company Guarantee, the instruction given by Party A and, therefore, the respective Letter of Credit / Parent Company Guarantee will remain valid irrespective of the opening of insolvency proceedings over the assets of Party A.

For purposes of this 8.3.5.2, we have assumed that the term "*draws*" in the second sentence of § 11 of the EFET Credit Support Annex is, under the laws applicable to the EFET Credit Support Annex, to be understood as requesting and actually receiving payment under the relevant Letter of Credit / Parent Company Guarantee (at which point in time, the Eligible Credit Support will consist of Cash).

8.3.5.3 Additional limitations

Limitations on the above may arise in respect of Banks. As noted under 1.2.5.4 of Appendix ./E, if derivatives or other financial contracts are subject to a close-out netting arrangement, the Bank of Slovenia (or the independent valuer appointed by the resolution authority) will, as a basis for application of the bail-in tool, calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (Article 105 (3) ZRPPB-1). However, Bank of Slovenia would determine the value of liabilities arising from the derivatives or other financial contracts in accordance with Article 105 (4) ZRPPB-1 and, possibly, also the Commission Delegated Regulation (see 1.2.5.4 of Appendix ./E for further details).

8.3.6 *<u>Enforceability</u>: Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?*

8.3.6.1 Within the scope of the ZFZ

We believe that the rights of Party B under the EFET General Agreement and the EFET Credit Support Annex should, within the scope of the ZFZ (please refer to Appendix ./G for a detailed analysis), be enforceable in accordance with their terms even in the event of opening of local insolvency proceedings over the assets of Party A.

As noted under 8.3.5.1 above, according to Article 12 ZFZ contractual close-out netting provisions are effective:

(i) notwithstanding any judicial or other attachment or the commencement or continuation of compulsory settlement, bankruptcy or compulsory liquidation proceedings in respect of the collateral provider and/or the collateral; and

(ii) notwithstanding any purported assignment, encumbrance or otherwise disposition by the collateral taker in respect of the secured claim.

Based upon Article 12 ZFZ, the Close-out Netting Provisions which also extend to the financial collateral arrangements established under the EFET Credit Support Annex should, within the scope of the ZFZ, thus not be affected by the opening of insolvency proceedings over the assets of Party A.

8.3.6.2 Beyond the scope of the ZFZ

We believe that the rights of Party B under the EFET General Agreement and the EFET Credit Support Annex should, subject to the limitations set out in this Opinion, be enforceable in accordance with their terms in the event of opening of local insolvency proceedings over the assets of Party A, even where the ZFZ does not apply.

As mentioned under 7.4.3 and 8.1.2.4 above, special considerations however apply regarding constellations providing the right of Party B to unilaterally calculate the amounts owing to it by Party A (which may not be fully enforceable). In respect of § 11 of the EFET Credit Support Annex, this risk should be alleviated if the Parties elect an (independent) third party as the Valuation Agent.

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

8.3.7.1 Recovery of Eligible Credit Support provided

General Slovenian bankruptcy avoidance rules are provided in Article 269 et seq. of ZFPPIPP. Pursuant to these provisions, a transaction, (legal) act or omission of the bankrupt debtor may be challenged / voided upon the opening of bankruptcy proceedings, pursuant to an action of the bankruptcy administrator (acting on behalf of the debtor) or a creditor (acting on his own behalf and for the account of the debtor). ZFPPIPP will apply to the extent insolvency proceedings are commenced in Slovenia (*lex fori concursus*) (see Article 7 (2) lit m of the Regulation / Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1). Please see Appendix ./F for an overview.

Under the general rules of Slovenian bankruptcy avoidance law, for the avoidance action to be successful, both objective (*i.e.*, unfair preferential treatment of a creditor vis-à-vis other creditors or decrease of the net value) and subjective (*i.e.*, knowledge of insolvency) criterion need to be fulfilled simultaneously. For the purposes of this Opinion, the condition of unfair preferential treatment appears particularly important from the perspective of objective criterion. Unless the creditor for whose benefit the act was performed proves otherwise, the objective criterion shall be presumed to be fulfilled if:

(i) the act was performed for the purpose of discharging an obligation of the insolvent debtor under a bilateral contract or other bilateral transaction in favour of a creditor who discharged his counterclaim before the insolvent debtor discharged his counterclaim;

(ii) where, as a result of an act of the insolvent debtor, the creditor has acquired the status of creditor with right to priority repayment (*ločitveni upnik*) in respect of the payment of a claim which arose prior such act was performed; or

(iii) if the act was performed during the compulsory settlement proceedings contrary to limitations set out in Article 151 ZFPPIPP[36] (Article 272 (1) ZFPPIPP).

A creditor for whose benefit an act has been performed may rebut the said presumption, if it proves that the insolvent debtor performed its action within a period of time after receipt of counter-performance which, according to the business customs (*poslovni običaji*), usage (*uzance*) or practice established between the creditor and the insolvent debtor, is considered to be the ordinary period of time for the performance of an obligation under a legal transaction of such nature as the transaction on the basis of which the performance of the insolvent debtor has taken place (Article 272 (2) ZFPPIPP).

Subjective criterion (*i.e.*, knowledge of insolvency) pursuant to Article 271 ZFPPIPP shall be deemed to be fulfilled if (x) the creditor's claim was settled before it was mature, or (y) settled in a manner which is not customary under business customs (*poslovni običaji*), usage (*uzance*) or practice established between the creditor and the insolvent debtor, or (z) the legal act took place within last 3 months before the motion for the initiation of bankruptcy proceedings was brought (Article 272 (3) ZFPPIPP).

Any challenge pursuant to Article 271 ZFPPIPP would be excluded if the transfers of Eligible Credit Support took place outside the "suspect period", generally, more than 12 months preceding the initiation of insolvency proceedings over the assets of Party A.[37] [38]

In case of (successful) avoidance, the primary legal consequence is the cessation of legal effects of the avoided transaction as between the debtor and the counterparty.

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[36] After the opening of compulsory settlement proceedings, the debtor may only carry out ordinary business in connection with its regular activities and discharge liabilities arising from that ordinary business, unless expressly provided otherwise by ZFPPIPP.

[37] In relation to transactions at (significant) undervalue (transactions where the debtor received no consideration or only received consideration of a (relatively) low value), the applicable suspect period is 36 months.

[38] If the bankruptcy proceedings were opened within the compulsory settlement proceedings, the suspect period starts to run 12 months before the application for the initiation of compulsory settlement proceedings and ends with the commencement of bankruptcy proceedings.

Certain special rules (safeguards) for financial collateral arrangements regarding challenges in the suspect period are provided in ZFZ:

(a) Pursuant to Article 11 ZFZ, financial collateral arrangements and the rights acquired thereunder, including the rights to enforce the collateral, shall remain in force after the commencement or continuation of insolvency proceedings against the collateral provider or collateral taker.

(b) Rights concerning interest (*obresti*) which has accrued but not yet matured (*dospele*) at the date of the commencement of insolvency proceedings shall continue to apply (Article 11 (2) ZFZ).

(c) Furthermore, pursuant to Article 13 ZFZ (implementing Article 8 of Financial Collateral Directive), the financial collateral arrangement or provision of financial collateral shall not be treated as non-effective, void or be set aside, on the sole basis that the relevant financial collateral arrangement has come into existence or financial collateral has been provided (as applicable) within a certain period of time prior to the issuance of the decision of the court on opening of bankruptcy proceedings or court-ordered liquidation proceedings.

(d) If financial collateral arrangement or the relevant financial obligation (purported to be secured with financial collateral) has come into existence, or financial collateral has been provided on the day of, but after the moment of filing of motion for initiation of compulsory settlement proceedings or the opening of bankruptcy proceedings or court-ordered liquidation, it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures.

For matters not explicitly regulated in Articles 11 to 14 ZFZ, general rules of ZFPPIPP (including avoidance rules) apply.

8.3.7.2 Substitution of Eligible Credit Support

We believe that any substitution of Eligible Credit Support by Party A (see § 6 of the EFET Credit Support Annex) is a separate (and potentially voidable) transaction.

In regards to substitution of collateral by a counterparty within the suspect period, Article 14 ZFZ stipulates that where a financial collateral agreement provides for an undertaking to establish financial collateral, provide additional financial collateral in cases where the value of the financial collateral decreases or obligations of the secured claims increase, such substitution or replacement of financial collateral shall not be treated as invalid or reversed or declared void on the sole basis that such substitution was made before the initiation of the insolvency proceedings or that claim (to be secured by the relevant financial collateral) was established before the collateral has been substituted. Therefore, ZFZ strengthens the position of the collateral taker with respect to challenges during the suspect period.

The above does not exclude the possibility that a substitution or replacement of financial collateral could be contested if the substitution was disadvantageous to Party A's other creditors. Please refer to the summary of Slovenian avoidance rules set out in Appendix ./F below.

This will, in our view, be determined by comparing the value of the substitute assets with the value of the assets they were replacing. The relevant point in time for such evaluation / comparison would be the time of substitution (in case the value of the substitute assets is higher than the value of the replaced assets at that time). In such case, *e.g.*, an increase of the value of the substitute Eligible Credit Support or a decrease in the value of the initial Eligible Credit Support subsequent to the substitution might cause an (indirect) disadvantage of the creditors, which could trigger a risk that the substitution may successfully be challenged.

8.3.7.3 Provision of additional Eligible Credit Support

As set out at 8.3.7.1 above, ZFZ strengthens the position of the collateral taker with respect to challenges during the suspect period. Specifically, provision of additional financial collateral shall not be treated as invalid or reversed or declared void on the sole basis that such provision was effected before the initiation of the insolvency proceedings or that the claim (to be collateralised) was established before the collateral has been provided (Article 14 ZFZ). Thus, with respect to constellation where ZFZ applies, we believe that additional Eligible Credit Support transferred by Party A to Party B based upon the provisions of the EFET Credit Support Annex during the suspect period foreseen by Article 269 ZFPPIPP may likely not be (successfully) challenged according to Article 275 ZFPPIPP.

On the other hand, in constellations outside ZFZ, provision of additional Eligible Credit Support – if provided during the suspect period set forth by Article 269 ZFPPIPP – could be subject to (successful) voidance claim.

8.3.8 *<u>Transfer of title</u>: Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Slovenia in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under 8.3.3 above?*

These questions need to be assessed on the basis of the law determined as the law applicable to the Eligible Credit Support in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above).

In case Slovenian substantive law was to apply: On its face, § 3 (2) in conjunction with § 7 (1) and (3) of the EFET Credit Support Annex appears to be in the appropriate form to create an obligation of Party A to provide Party B with a claim (*terjatev*) against the relevant third-party (as applicable, dependent upon the form of Eligible Credit Support; see at 8.3.1.3.2 above).

Once Party B has validly received full entitlement to the claim against the relevant third-party, there are no (other) general formal requirements under Slovenian law that would need to be observed by Party B in order to continue to hold such interest in the relevant claim against the third-party. It may be, however, that the Eligible Credit Support as such (*e.g.*, the terms and conditions of Letters of Credit)) provides for specific formal requirements to be observed in order for the relevant claim (*terjatev*) to remain valid.

Furthermore, Parties should keep in mind that, under a Slovenian law governed standby letter of credit (*akreditiv*), the validity of the abstract obligation of the issuing bank vis-à-vis the beneficiary (*i.e.*, Party B) is dependent upon the validity of the instruction of the issuing bank by the principal (*i.e.*, Party A). Hence, if the instruction of the issuing bank by the principal was not valid, the beneficiary would not validly acquire a claim (*terjatev*) against the relevant issuing bank.

8.3.9 *<u>Other recommendations</u>: Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of? If yes, please provide detailed answer.*

As mentioned under 8.3.8 above, the validity of the abstract obligation of the issuing bank vis-à-vis the beneficiary under a Slovenian law governed standby letter of credit (*akreditiv*) is dependent upon the validity of the instruction of the issuing bank by the principal. Against this background, Parties may consider to provide for an additional representation in the EFET Credit Support Annex that any instruction by a Party forming the basis for issuance of a Letter of Credit by a third-party will be valid under applicable laws.

Other than as set out above, we do not have any other (specific) recommendations in regards to the collateral arrangements established under the EFET Credit Support Annex.

8.4 Part IV: General Enforceability

8.4.1 <u>*General enforceability*</u>*: Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices enforceable under the laws of Slovenia in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement), (ii) remedies for non-performance (§ 8 of the EFET General Agreement) and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of Slovenia, including whether these provisions could and/or need to be further 'expanded' and/or 'strengthened' under the laws of your jurisdiction. We are especially interested in provisions that you may believe, for example infringe upon the ordre public in Slovenia and that may be challenged by the courts in Slovenia irrespective of the laws that governs the EFET General Agreement.*

8.4.1.1 General remarks

We understand that the Parties have chosen the governing law of the EFET General Agreement other than Slovenian law (see § 22 of the EFET General Agreement). Therefore, we believe that the terms of the EFET General Agreement only need to stand the following (twofold) test:

(i) Do any terms of the EFET General Agreement violate overriding mandatory provisions of Slovenian law (Article 9 of Rome I)?

(ii) Are any terms of the EFET General Agreement manifestly incompatible with Slovenian public policy (*ordre public*) (Article 21 of Rome I)?

We believe that the provisions of the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit

Support Annex) and Appendices are generally enforceable under the laws of Slovenia, subject to the assumptions and limitations set out in this Opinion. *Prima facie*, we have no reason to believe that any provisions of the EFET General Agreement (other than the provisions specifically discussed in this Opinion) might be challenged by a Slovenian court as being manifestly incompatible with overriding mandatory provisions of Slovenian law, which are applicable irrespective of the choice of law, or Slovenian public policy (*ordre public*).

In this regard please also refer to our considerations regarding potential risk that § 11 EFET General Agreement would not be fully enforceable (insofar it provides the right of Party B to unilaterally calculate the Termination Amount) as set out in 7.4.3 and 8.1.2.4 above.

8.4.1.2 Non-performance due to Force Majeure

We believe that § 7 of the EFET General Agreement is enforceable under the laws of Slovenia, for the reasons stated below.

Under Slovenian civil law, the principle of contractual autonomy generally applies, allowing the parties to freely regulate their interests and create legal relationships they deem appropriate, provided that they are not contrary to mandatory legal provisions (*i.e.*, where the law explicitly prohibits autonomous regulation), morality or public order. Slovenian Obligations Code (*Obligacijski zakonik*, "**OZ**") does not explicitly define a *force majeure*, however, judicial practice and legal writing hold the view that the concept of *force majeure* is to be interpreted in the light of Article 153 (1) OZ. which, as regards to the exemption from liability for damage caused by a dangerous thing (*nevarna stvar*), provides that the holder is exempt from liability if proven that "*the damage arises from a cause which was outside the thing and the effect of which could not have been foreseen, avoided or averted*". The key elements are therefore the externality or separation from the person responsible, the unexpectedness of the event and the unpreventability of its impact.[39]

Furthermore, somewhat similar to *force majure*, Article 112 OZ also provides potential legal basis for termination or amendment of a contract if after the conclusion of a contract there

[39] See Plavšak, N., Juhart, M., Vrenčur, R.: Obligacijsko pravo: splošni del, GV Založba, Ljubljana 2009, p. 581. Also the Decision of the Supreme Court II Ips 515/2003.

has been a substantial change of relevant circumstances (*rebus sic stantibus* clause).[40]

Based on the above, we see no reason why a Slovenian court would come to conclude that § 7 of the EFET General Agreement is incompatible with overriding mandatory provisions of Slovenian law, which are applicable irrespective of the choice of law, or Slovenian public policy (*ordre public*).

8.4.1.3 Remedies for non-performance

We believe that § 8 of the EFET General Agreement would be enforceable under the laws of Slovenia and have no reason to believe that it might be challenged by a Slovenian court as being manifestly incompatible with overriding mandatory provisions of Slovenian law, which are applicable irrespective of the choice of law, or Slovenian public policy (*ordre public*).

The principle of contractual autonomy allows the parties to freely agree on the terms of their contract to the extent they are not contrary to the constitution, mandatory legal provisions or moral principles. We note that OZ provides similar provisions as those under § 8 of the EFET General Agreement, however, these provisions are not mandatory, and parties may subject their relationship to a different regime (see *e.g.*, Article 504 OZ)

8.4.1.4 Limitation of liability

Yes, we believe that § 12 of the EFET General Agreement would be enforceable under the laws of Slovenia, subject to the below considerations. According to the general principles of OZ (Article 242):

(i) no contractual limitation or exclusion of liability is possible in advance for damages caused intentionally (*naklep*) or by gross negligence (*huda malomarnost*);

(ii) the court may, at the request of the interested party, annul a contractual clause excluding liability for negligence (*lahka malomarnost*), if such an agreement is

[40] Article 112 OZ may be applied if, after the conclusion of the contract, circumstances arise which hinder the performance of obligations of a party or which render it impossible to achieve the purpose of the contract, in either case to such an extent that the contract is manifestly no longer in accordance with the expectations of the parties and would be according to general conviction unjust to keep it in force as is the party who is hindered in the performance of the obligation, or unable to fulfil the purpose of the contract, may demand the termination of the contract.

the result of a monopoly position of the debtor or a generally inequitable relationship between the contracting parties;

(iii) a contractual provision setting a maximum amount of compensation is valid, unless the set amount of compensation is manifestly disproportionate to the damage or if the law provides differently in a particular case, however, the creditor is entitled to full compensation (*popolna odškodnina*) if the debtor has caused the impossibility of performance intentionally or due to gross negligence.

Parties cannot deviate from this provision by way of agreement as it qualifies as a mandatory provision of Slovenian law.[41] There is no available judicial practice on the issue, however, we believe that there is a risk that Slovenian courts would consider said provision as an overriding mandatory provision in the sense of Article 9 (1) Rome I.[42]

While § 12 (4)(a) of the EFET General Agreement explicitly excludes limitation of liability for intentional default, there is however a degree of uncertainty whether the wording of § 12 (4)(c) of the EFET General Agreement acts as an exclusion of limitation in situations gross negligence (*huda malomarnost*). We believe that gross negligence should fall within the definition of "any action which endangers the fundamental legal rights of a Party or which violates a Party's fundamental contractual obligations", however, broad language of the provisions does not exclude a different interpretation any may be subject to a judicial dispute.

8.4.2 <u>E-Notice Agreement</u>*: Is there a risk that a notice, declaration or other communication given in accordance with the E-Notice Agreement may not be recognised as valid? Could the deemed receipt of a notice be challenged? Who bears the burden of proof that the document attached to the e-mail is not falsified?*

Pursuant to Article 10 (1) of Rome I, the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would

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41 See Juhart M., Plavšak N., Obligacijski zakonik s komentarjem, Ljubljana, 2003, 2. knjiga, p. 220.

42 For completeness, we note that we believe it unlikely that Article 242 OZ is part of Slovenian *ordre public*. According to established case law, *ordre public* does not encompass merely mandatory provisions of the Slovenian law, but only those imperative legal (and moral) rules, the violation of which would threaten the legal (and moral) integrity of domestic legal system (see Decision of the Supreme Court Cpg 2/2018). We see no reason why Article 242 would be an imperative legal / moral rules under Slovenian law, violation of which would threaten the foundations of Slovenian legal system.

govern it under Rome I if the contract or term were valid. Therefore, this question would generally need to be assessed applying the laws governing the relevant EFET General Agreement (*i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement).

If Slovenian law would apply, we believe that a notice, declaration or other communication given in accordance with the E-Notice Agreement should be recognized as valid under Slovenian law, provided that Slovenian statutory law does not stipulate a specific form requirement for a certain notice/declaration (see also at 8.5.1.1 below). Furthermore, we have no reasons to believe that the concept of deemed receipt of the termination notice established under 1 of Schedule 1 (*Amendments and E-mail Address Details*) to the E-Notice Agreement might be challenged by a Slovenian court or insolvency administrator.

Parties are generally free to regulate their relationship and may, within the limits set by mandatory law, also agree on the method of communication used for the confirmation of their agreement.

We note that pursuant Article 16.a ZPP, data in electronic form has the same evidentiary value as evidence in written / physical form in Slovenian judicial proceedings.

Regarding the question of burden of proof, we note that in accordance with general principles of Slovenian law, each party is required to provide the facts and evidence on which it bases its position. The burden of proof is with the party making a particular claim, however, burden of proof is not static but may shift during the proceedings, depending on the actions of the parties in regard to a particular claim.[43] If the dispute arises regarding the authenticity of the attached document, the party asserting the document attached to the e-mail is falsified is the one that bears the burden of proof. Only when the party claiming that the document is falsified would produce certain evidence in support of this claim, the burden of proof could shift to the other party.[44]

8.4.3 *Recommendations: Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its EFET Credit Support Annex.*

[43] See e.g., Decision of the Supreme Court VIII Ips 28/2019.

[44] See e.g., Decision of the Supreme Court VIII Ips 231/2017 which addressed the question of allegedly falsified contract submitted to the notary and clearly stated that the claimant had the burden of proof regarding the non-authenticity of the contract in accordance with Articles 7 and 212 ZPP.

At this point, we do not have any (specific) recommendations in regards to the general enforceability of the EFET General Agreement and the EFET Credit Support Annex.

8.5 Part V: Confirmation Practices

8.5.1 Binding Individual Contract

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

According to Article 10 (1) of Rome I, the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under Rome I if the contract or term were valid.[45] Hence, this question would need to be assessed on the basis of the laws governing the relevant EFET General Agreement (i.e., primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement).

In terms of Slovenian law, the following would apply. As a general rule, under Slovenian law, a contract is concluded when the essential elements of the contract have been agreed between the parties (Article 15 OZ). No specific form is required for the formation of legally binding and enforceable contract, unless when explicitly required by law. This is the case for, *e.g.* surety (*poroštvo*) which require a handwritten signature (or, alternatively, a qualified electronic signature) of the surety (*porok*) to be effective. When specific form is required by law, contract not concluded in said form is null and void (unless a different conclusion can be reached based on the law prescribing the form) (Article 51 OZ). The intention of the parties to conclude a contract may be expressed in words, customary signs or by other conduct from which it can be reliably inferred that such intention exists. Parties are free to agree that a specific form is a condition for the validity of their contract, however, if parties agreed on a specific form only for the sole purpose of having evidence of the conclusion or content of the contract, such contract is deemed concluded when the parties agreed on all its essential elements and the parties are under an obligation to produce the contract in the agreed form.

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45 Further to the *lex contractus* pursuant to Article 10 (1) of Rome I, an Individual Contract may also be considered valid from a formal perspective if one of the alternatives in Article 11 (1) and (2) of Rome I is satisfied (*favor negotii*).

Consequently, the formation of a legally binding and enforceable Individual Contract generally does not require any formal act under the laws of Slovenia and an Individual Contract is concluded when the Parties have agreed on its essential elements.

We believe that, subject to the below, Slovenian law does not contain any such specific form requirements for conclusion of Individual Contracts.

In case of financial collateral agreements, ZFZ imposes a requirement that any financial collateral arrangement must be evidenced in writing and must be sufficiently clear as to identify the financial collateral (as discussed in 2.5.1 Appendix ./G).

For transactions subject to Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"), recital 26 of Commission Delegated Regulation (EU) No 149/2013 ("**Delegated Regulation No 149**") may be relevant. It specifies that "confirmations" must either be "electronically executed" or signed by both counterparties. ESMA provides some further guidance on this in its Q&A-tool[46]. Question 5 of the ESMA Q&A deals with the issue of "electronic execution" of confirmations. ESMA states that confirmations sent by fax, on paper, or by manually sent e-mails do not meet the requirement of "electronic execution". ESMA apparently assumes that electronic confirmations are executed via an electronic platform or system. Following recital 26 of Delegated Regulation No 149 and respective ESMA guidance, non-electronic confirmations must thus be signed by both counterparties. However, according to the ESMA Q&A, an agreement providing for a negative affirmation mechanism would, arguably, be permissible in ESMA's view. This is also in line with the view expressed by the International Swaps and Derivative Association, Inc. ("**ISDA**").[47] ISDA also allows a negative affirmation mechanism as permissible form of confirmation. Both ESMA and ISDA thus apparently do not view the form requirement set forth in recital 26 of Delegated Regulation No 149 as being so strict that it would require any confirmation to be signed by both counterparties. In any case, given that EMIR, respectively Delegated Regulation No 149, provide a regulatory framework only, we believe that any violation of the form requirement set forth in recital 26 of Delegated Regulation

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[46] Questions and answers on the implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories dated 4 February 2016 ("**ESMA Q&A**").
[47] See ISDA Commentary on ESMA RTS on Confirmations dated 29 January 2013.

No 149 should have no impact on the legal validity of Individual Contracts.

Generally, it is recommendable either conclude an Individual Contract in writing or confirm their understanding that an Individual Contract was indeed concluded by means of a written Confirmation for the avoidance of potential disputes and regarding the existence and/or contents of the agreement and evidentiary purposes.

Furthermore, any relevant declarations of will (*izjava volje*) must be made by persons duly authorised to act on behalf of the counterparty in order to be binding upon the counterparty. In this respect, Parties may also consider providing for application of § 3.4 (*Authorised Persons*) of the EFET General Agreement.

8.5.1.2 *<u>Conclusion of a contract</u>: At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?*

As outlined at 8.5.1.1 above, under Slovenian law, a contract is concluded when the essential elements of the contract have been agreed between the parties and no specific form is required, unless explicitly required by law. Therefore, Individual Contracts may also be concluded orally.

8.5.1.3 *<u>Lack of objection to incorrect terms</u>: Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?*

No. We understand that a Confirmation under the EFET General Agreement acts as proof in a written form that an Individual Contract was concluded, evidencing the understanding of its terms by the party providing the Confirmation. Under Slovenian law a contract is concluded when essential elements of the contract have been agreed between the parties, therefore, the contract is valid as agreed between the parties, regardless of whether the Confirmation differs from said agreement, as outlined at 8.5.1.1 above. There is however a risk that in case of a dispute, party that failed to object to incorrect terms in a received Confirmation could not conclusively substantiate its claim before the court. The Confirmation containing terms contrary to what has been previously agreed upon between the

Parties might, rather, be seen as an offer (*ponudba*) of the party delivering such Confirmation to amend the terms and conditions of the relevant Individual Contract.

We note however that if the Parties were convinced that they were in agreement regarding the essential elements of their contract, but there was in fact a disagreement (*nesporazum*), either in regard to the nature of the contract, its basis (*causa*)[48] or about the object of the obligation, no contract was concluded due to the lack of consensus.

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

We believe that, in case Parties – when agreeing on the terms of the Individual Contract – have agreed upon this Individual Contract being concluded under, and on the terms of, the EFET General Agreement and this agreement is documented in a Confirmation (exchanged between the Parties *post* trade) by reference to the relevant EFET General Agreement, this should be considered sufficient to include the Individual Contract in the relevant EFET General Agreement.

Parties should, however, be particularly careful if there is more than one EFET General Agreement in place between those Parties.

8.5.2 Means of Evidence

8.5.2.1 <u>*Means of evidence*</u>*: Assumed there is a dispute with respect to the existence or the terms and conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in your jurisdiction: a (i) taped recording, (ii) witness' statement, (iii) email or other electronic message or transaction entry system, and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?*

As a general rule, Slovenian civil law imposes no specific restrictions neither on admissibility of means of evidence in civil

[48] Under Slovenian civil law, every contractual obligation must have a lawful basis (*causa*). Basis is impermissible if it contravenes the Constitution, mandatory regulations or moral principles. If there is no basis, or if the basis is impermissible, the contract is null and void (see Article 39 OZ).

proceedings nor any evidentiary rules that would attribute decisive importance to any particular means of evidence. It is up to the court to decide in each individual case which evidence is admissible and what is their evidentiary value. Pursuant to Article 8 of Civil Procedure Act (*Zakon o pravdnem postopku*, "**ZPP**"), the court decides which facts are to be regarded as proven, according to its own belief, on the basis on conscientious and careful assessment of each piece of evidence individually and of all the evidence taken together, and the basis of the success of the proceedings as a whole. The court may disregard evidence submitted by a party, however, it is obliged to substantiate its decision in the final judgement.

We note that certain means of evidence generally have increased evidentiary value, *e.g.*, public documents issued by the court or by the state authorities within the limit of their competence or other (legally) competent institution as evidence establish a (rebuttable) presumption of a fact.

Evidence such as taped recordings, witness' statements, e-mails or other electronic message or transaction entry system and/or facsimile would generally be eligible evidence in a potential dispute, subject to the below considerations.

Based on the constitutional right to equal protection of rights under the Slovenian Civil law derives a right of a party to state the facts and submit evidence, to be present at the taking of evidence, to examine witnesses or expert witnesses, and then be informed on the results of the taking of evidence. However, the right to evidence can be subject to limitations when it is necessary to protect the rights of others or to protect the public interest. Such limitations are a part of court's discretion when balancing between colliding constitutional rights and other protected interests in any particular case, *e.g.*, a collision between the right to privacy and right to be heard.

Regarding taped recordings submitted as evidence, we note that recordings obtained without the knowledge of the other party in violation of its right to privacy may only be admissible if there are justified circumstances for doing so, for *e.g.*, if such evidence is of particular importance for the exercise of another constitutional right. The court must apply the principle of proportionality and carefully assess which constitutional right should be given priority in the particular case.[49]

[49] Decision of the Slovenian Constitutional Court Up-472/02 from 7 October 2004.

Regarding witness' statements, the general rule is that witness testimony is given orally. Witness' testimony may be given in writing if it is ordered by the court or agreed between the parties. A witness who gave written testimony may still be summoned to give oral testimony at trial, if one of the parties requests it (Article 236.a ZPP).

ZPP attributes same probative value to evidence in electronic form and to physical documents.

8.6 Part VI: Core Provisions

8.6.1 *<u>Selections</u>: Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices change the substance of your conclusions reached under 8.1 and 8.2 above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.*

We believe that the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices should not change the substance of our conclusions reached under 8.1 and 8.2 above, provided that none of the selections (in and off itself or in a combination) would have the effect of directly or indirectly materially modifying or affecting the operation or implementation of any Core Provision (as defined at 8.6.2 below).

As far as § 6 of the EFET Credit Support Annex is concerned, please refer to 8.3.4 above on the effect of election of substitution of Eligible Credit Support with or without consent of Party B.

8.6.2 *<u>Core Provisions</u>: Considering your conclusions reached under 8.1 and 8.2 above, what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached under 8.1 and 8.2 above (each such provision a "**Core Provision**")?*

We consider the following provisions of the EFET General Agreement as Core Provisions: § 1.1, § 10.3(a), the third sentence of § 10.3(b), § 10.3(c), § 10.3(e), § 10.4, § 10.5(c), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.

8.6.3 *<u>Cross-Product Netting</u>: Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the Cross-Product EFET General Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product EFET General Agreement) change the substance of your conclusions reached under 8.1 and 8.2 above?*

8.6.3.1 EFET Cross Product Payment Netting Agreement

We believe that our conclusions reached under 8.1 and 8.2 above should not be materially affected if the EFET General Agreement was included in the EFET Cross Product Payment Netting Agreement.

We do not express an opinion on the validity or enforceability of the EFET Cross Product Payment Netting Agreement under the laws of Slovenia.

8.6.3.2 EFET Master Netting Agreement

We believe that our conclusions reached under 8.1 and 8.2 above should not be materially affected if the EFET General Agreement was included in the EFET Master Netting Agreement, provided that nothing in the other Netted Agreements (as such term is defined in the EFET Master Netting Agreement) (in and off itself or in a combination) would adversely affect the operation and/or implementation of the Close-out Netting Provisions.

We do not express an opinion whether (i) the EFET Master Netting Agreement is a netting agreement for purposes of Article 483 (1) ZFPPIPP (see at 3.3.2 of **Error! Reference source not found.** for further details) or (ii) any and all of the transactions covered by an EFET Master Netting Agreement may benefit from the Slovenian substantive netting privilege in Articles 24a and 24b ZFPPIPP (see at 7.3 above for further details). Furthermore, we do not express an opinion on the validity or enforceability of the EFET Master Netting Agreement under the laws of Slovenia.

8.6.3.3 Cross-Product Master Agreement

We believe that our conclusions reached under 8.1 and 8.2 above should not be materially affected if the EFET General Agreement was included in the EFET Cross-Product Master Agreement.

We do not express an opinion whether (i) the Cross-Product Master Agreement is a netting agreement for purposes of Article 483 (1) ZFPPIPP (see at 3.3.2 of **Error! Reference source not found.** for further details) or (ii) any and all of the transactions covered by a Cross-Product Master Agreement may benefit from the Slovenian substantive netting privilege in Articles 24a and 24b ZFPPIPP (see at 7.3 above for further details). Furthermore, we do not express an opinion on the validity or enforceability of the Cross-Product Master Agreement under the laws of Slovenia.

8.7 Part VII: Governing Law, Arbitration and Jurisdiction

8.7.1 *<u>Governing law</u>: Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Slovenia, and what would be the consequences if it were not?*

8.7.1.1 Choice of law

According to Article 3 (1) of Rome I, parties to a contract are, subject to certain exceptions, free to choose the law governing the terms of such contract (*svoboda izbire*).

The Parties' agreement on the governing law will – subject to the limitations set out below at 9.5.6 – thus be recognized under Slovenian law and the courts of Slovenia would have to uphold such choice of law.

Such choice of law would, however, only be recognized in relation to the Parties' obligations under the EFET General Agreement (*i.e.*, questions in regard to determining the Parties' obligations, interpretation and remedies for breach of the EFET General Agreement), but not in relation to the creation, type, contents, effects, protection, transfer and loss of any right *in rem* in the Eligible Credit Support. In this respect, the applicable law will be determined in accordance with Slovenian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above).

8.7.1.2 Submission to jurisdiction

8.7.1.2.1 Arbitration

The agreement to arbitrate contained in the § 22 EFET General Agreement is a valid and binding reference to arbitration of disputes under the EFET General Agreement, to the extent the dispute involves a proprietary claim or a matter which under Slovenian law can be resolved by settlement.[50]

Since Slovenia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (the "**New York Convention**") with no reservation of reciprocity, a foreign arbitral award (a "**Foreign Award**") rendered in a contracting state to the New York

50 See Article 4 (1) Arbitration Act (*Zakon o arbitraži* – ZArbit), Official Gazette of the RS, no. 45/08.

Convention in respect of the EFET General Agreement should be recognized and enforced by Slovenian courts in accordance with the New York Convention and Slovenian civil procedure and enforcement rules.

8.7.1.2.2 Submission to jurisdiction

If the Parties were to agree on the submission to the non-exclusive jurisdiction of a court having its seat in a state that is bound by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial Matters (the "**Brussels Regulation Recast**"), such agreement would be recognized, and a judgment obtained in such court would be enforced, in the Republic of Slovenia in accordance with Brussels Regulation Recast and Slovenian civil procedure and enforcement rules.

If, however, the Parties submitted to the non-exclusive jurisdiction of a court not having its seat in a state that is bound by the Brussels Regulation Recast, the question whether a judgment obtained in such court would be enforced in the Republic of Slovenia would need to be assessed on the basis of Chapter IV. of ZMZPP.

Articles 95 – 103 of ZMZPP set forth the conditions for declaring non-Slovenian judgments enforceable in the Republic of Slovenia. The main conditions are as follows:

(i) the judgement must be enforceable in the jurisdiction in which it was issued (Article 95 ZMZPP); and

(ii) reciprocity in terms of recognition and enforcement must be established by a treaty or regulations (Article 101 ZMZPP).[51]

8.8 Part VIII: Regulatory Regime

<u>Exchange controls / licensing requirements</u>: Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or the Individual Contracts?

8.8.1 Exchange control laws

[51] ZMZPP establishes a presumption of reciprocity until proven otherwise.

Subject to the relevant provisions of the Treaty on the Functioning of the European Union and national implementing measures (if any) adopted by the Bank of Slovenia thereunder there are no restrictions as regards payments in foreign currency or to foreign residents according to Slovenian law. The Foreign Exchange Control Act (*Zakon o deviznem poslovanju – ZDP-2*) regulates the provision of exchange operations (*menjalniško poslovanje*) and the issue, withdrawal and termination of the authorisation to provide exchange operations granted to a currency exchange operator by the Bank of Slovenia. Currency exchange operators, banks and savings banks are required to submit regular and ad hoc reports to the Bank of Slovenia in connection with their operations.

In case the performance of an obligation would be against the exchange control regulations of a member state of the International Monetary Fund, such obligation may be unenforceable in Slovenian according to Article VIII Section 2(b) of the Articles of Agreement of the International Monetary Fund.

8.8.2 Energy Law Requirements

8.8.2.1 Electricity

The activities of supply of and/or trade of electricity on the Slovenian market do not require any license. Other obligations under the electricity/energy regulatory framework do however apply depending on the business model pursued (*e.g.*, membership in the balancing scheme (*bilančna shema*); conclusion of different contracts, including with the market operator and transmission and/or distribution system operator; admission to power exchange; reporting obligations etc.).

8.8.2.2 Natural Gas

The activities of supply of and/or trade of natural gas on the Slovenian market do not require any license. Other obligations under the gas/energy regulatory framework do however apply depending on the business model pursued (*e.g.*, membership in the balancing scheme; conclusion of different contracts, *e.g.*, for membership in a virtual point; reporting obligations etc.).

8.8.2.3 Emissions Allowances, Green Certificates and Capacity Rights

Trading in emissions allowances, green certificates (more specifically, certificates of origin – *potrdila o izvoru*) or capacity rights on the Slovenian market does not require any license. Other obligations under the energy and environmental regulatory framework will however apply depending on the business model pursued (*e.g.*, obligation to register and open an account with the Emissions Register administered locally by the Slovenian Environmental Protection Agency for the purposes of trading on emission allowances; obligation to register and open an account with the Register of Certificates of Origin administered by the Slovenian Energy Agency for the purposes of trading in certificates of origin etc.).

8.8.3 Financial regulatory licensing requirements

8.8.3.1 Legal Background

The sale or purchase of financial instruments[52] (including all types of derivatives) for own account or the account of clients is listed among investment services (*investicijske storitve in posli*) within the meaning of the ZTFI-1 (see Article 11 (1) no 3 ZTFI-1). As a general rule, investment services may only be provided within the territory of the Republic of Slovenia by eligible entities who have obtained the requisite license or respective EU passport. These entities include (Article 59 ZTFI-1):

(i) brokerage companies (*borznoposredniška družba*);[53]

(ii) investment firms;

(iii) banks;[54] or

(iv) other financial institutions.

Investment services and activities may be performed in Slovenia by (a) brokerage companies and Banks established in Slovenia and (b) Banks, Investment Firms and financial institutions (within the meaning of Article 34 Directive 2013/36[55]) established in the EU/EEA Member State that either has a branch in Slovenia or is allowed to perform investment services and activities on cross-border basis.

[52] The Slovenian definition of financial instruments (essentially) coincides with the list of financial instruments for Section C of Annex I MiFID II. In addition, ZTFI-1 considers as financial instruments "any other derivative transaction in relation to rights, obligations, indices or measures which has the characteristics as other financial instruments.

[53] *I.e.*, Slovenian Investment Firms.

[54] The sale or purchase of financial instruments (including all types of derivatives) for own account or the account constitutes a mutually recognised service pursuant to Article 5 (2) no 7 of the Slovenian Banking Act (*Zakon o bančništvu*, "**ZBan-3**"). Credit institutions (institutions accepting deposit from the public) may only provide such services in the territory of the Republic of Slovenia if duly licensed/passported in respect of such service.

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

Regulated activities will trigger Slovenian licensing requirements if such activities are deemed performed within the territory of Slovenia. ZTFI-1 however contains no provisions addressing the question of when investment services and activities are being performed within the territory of Slovenia.[56]

With respect to banks, the license is issued by the Bank of Slovenia, while the relevant regulatory authority for other eligible entities is the Slovenian Securities Market Agency (*Agencija za trg vrednostnih papirjev*, "**ATVP**").

8.8.3.2 Exemptions under MiFID II

ZTFI-1 provides for certain exemptions from licensing requirements which may be relevant with a view to the EFET General Agreement.

According to Article 62 (1) no 10 ZTFI-1 (implementing Article 2 (1) lit. j MiFID II), persons:

(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;

are exempt from licensing requirements, provided that:

- for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis;

- those persons are not part of a group the main business of which is the provision of investment services within the meaning of ZTFI-1, banking services pursuant to ZBan-3 or acting as a market maker for commodity derivatives;

[56] We note that with respect to banking services ZBan-3 also stipulates that regulated activities will trigger Slovenian licensing requirements if such activities are deemed carried out in Slovenia. However, in contrast with ZTFI-1 it regulates the question and stipulates in Article 124 ZBan-3, that services are be deemed as carried out on cross-border basis in the territory of a country if (i) transactions are entered into in the territory of such country or (ii) mutually recognized financial services are offered to the public through agents or intermediaries. This provision while not strictly applicable can nevertheless offer some guidance of which criteria might be considered by the ATVP.

- those persons do not apply a high-frequency algorithmic trading technique; and
- those persons report upon request to the competent authority the basis on which they have assessed that their activity under points (i) and (ii) is ancillary to their main business.

8.8.3.3 Consequences

Potential legal consequence of carrying out investment services and activities/banking services in Slovenia on a commercial basis without the required license include administrative fines (up to EUR 500.000 in case of investment services and activities / EUR 250.000 in case of banking business of trading pursuant to Article 5 (2) no 7 ZBan-3) and could potentially lead to unenforceability and/or invalidity of agreements concluded when in breach of the licensing requirement (including associated accessory (*akcesorna*) securities/guarantees).

8.9 Part IX: Other Provisions

<u>Other recommendations</u>*: If you have other recommendations that you would like EFET members to consider (for example to fully optimize the EFET General Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.*

We have no additional recommendations.

9 Limitations and qualifications

9.1 Limitations and qualifications concerning certain Individual Contracts

If the enforceability of the Close-out Netting Provisions is governed by Slovenian substantive insolvency law, *i.e.*, if the Provisions on Netting Agreements do not apply, we believe that the following restrictions apply:

9.1.1 In respect of Individual Contracts not having elements of optionality or other derivative-like characteristics, *e.g.*, Individual Contracts entered into on a "spot" basis[57], there is, subject to the following sentence, a risk that they are not included in Annex II to CRR (please refer to Appendix ./D) and thus may not benefit from the Slovenian substantive netting privilege. Spot

[57] Customarily, these are transactions where settlement occurs at the latest two banking/trading days after the trade date; this also concurs with the definition of spot contract in Article 7 (2) of Delegated Regulation 2017/565.

transactions (such as spot "Physical Commodity Individual Contracts") do not meet the criteria of "qualified financial contract" or "other qualified contracts" under Article 24a ZFPPIPP (please see 7.3.1 above) as they are not financial instruments pursuant to ZTFI-1 nor do they have financial instruments as their underlying nor have any derivative characteristics. However, Article 24b ZFPPIPP extends the Slovenian substantive netting privilege also to "other qualified contracts" (please see 7.3.2 above) which in our view also encompasses "Physical Commodity Individual Contracts".

9.1.2 This Opinion only applies to "Commodity Forwards", "Commodity Options", "Commodity Swaps" and "Physical Commodity Individual Contracts",[58] if they (i) must be settled in cash, (ii) may at least be settled in cash at the option of one Party (even if effectively physically settled) other than by reason of default or other termination event, or (iii) can be physically settled, provided that they are traded on a regulated market and/or an MTF or OTF (except for wholesale energy products[59] traded on an OTF that must be physically settled). Where the underlying is a Green Certificate or Capacity Right, this Opinion also applies to "Commodity Forwards", "Commodity Options", "Commodity Swaps" and "Physical Commodity Individual Contracts" to the extent the conditions under Article 7 (1) of Delegated Regulation 2017/565[60] are satisfied.

9.2 Games and bets

Pursuant to certain legal scholars, certain provisions of the (Austrian) Civil Code (*ABGB*) are, in substance, still applicable in Slovenia.[61] This includes the provision of § 1270 ABGB, pursuant to which amounts due as a result of games and bets (speculative transactions) are not enforceable (via courts). We note that this is not a commonly accepted view in Slovenian legal writing and practice, and, even if held to apply, we would see any risks arising from such a position as remote with respect to the transactions analysed herein. This holds all the more true with respect to Individual Contracts for bona fide commercial/hedging purposes.

9.3 Avoidance rules

Under Article 269 et seq. ZFPPIPP certain actions taken by debtors that are held to be detrimental to their creditors may be set aside by the courts if a voidance action

[58] If the Individual Contract was not entered into on a "spot" basis (see footnote above); if the Individual Contract was entered into on a "spot" basis, please refer to 9.1.1 above.
[59] As defined in Article 2 no 4 of Regulation (EU) No 1227/2011.
[60] Essentially, these are contracts (a) that (i) are traded on a third-country trading venue that performs a similar function to a regulated market, an MTF or an OTF, (ii) contain an express statement that they are to be traded on, or that they are subject to the rules of, a regulated market, an MTF, an OTF or such a third-country trading venue, or (iii) are equivalent to a contract traded on a regulated market, MTF, an OTF or such a third-country trading venue, with regards to the price, the lot, the delivery date and other contractual terms, and (b) that are standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.
[61] M. Juhart in *Občni džavljanski zakonik*, *faksimile izdaje iz leta 1928*, GV Založba, 2012; Weber Nana, *Po 200 letih ODZ*, Pravna praksa, št. 3, 2012, p. 28.

is filed in insolvency proceedings by the insolvency administrator or a creditor. Please refer to Appendix ./F for a brief summary of Slovenian avoidance rules.

Early Termination of a EFET General Agreement can be qualified as challengeable legal act if the preconditions (as summarised in Appendix ./F) are met. If a voidance action were successful, the termination of, and the following close-out netting under, the EFET General Agreement would be invalid and unenforceable.

Further to the Article 269 et seq. ZFPPIPP, Slovenian law (Article 255 et seq. OZ) also provides for rights of avoidance irrespective of an insolvency scenario. Such rights of avoidance are, however, limited to the relationship between the parties (*inter partes*), as the avoidance of the legal act performed to the detriment of a creditor may only be challenged by filing a lawsuit, whereas the effect of such lawsuit is limited to the relationship between the parties and accordingly the challenged legal act only loses its effect against the debtor that filed the lawsuit and only to the extent necessary to satisfy the said debtor's claim(s) (Article 260 OZ).

Article 16 of the Regulation and Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1 (where applicable) impose a restriction on the ability of a Slovenian insolvency administrator to set aside set-off. Article 16 of the Regulation and Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1 limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors, if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

According to Article 138 ZRPPB-1, the application of resolution measures (see at 1.2.5 Appendix ./E) and the exercise of resolution powers (see at 1.2.5.6 of Appendix ./E) will not be subject to avoidance actions/proceedings in case of the subsequent opening of insolvency proceedings over the assets of the Bank or other eligible entity under resolution.

9.4 Limitations and qualifications from separate funds (*ločen sklad*)

Irrespective of the law governing an EFET General Agreement, the enforceability of close-out netting will be limited whenever Slovenian substantive law provides for certain funds of a Slovenian legal entity to constitute a separate fund (*ločen sklad*) or being exempt from execution.

9.4.1 Separate funds of Insurance Undertakings (other than Re-Insurance Undertakings)

We note that under ZZavar-1 an Insurance Undertaking must keep specific assets or pools of assets as cover with respect to certain classes of insurance. Pursuant to Article 241 ZZavar-1, a ring-fenced fund (*omejeni sklad*) should be established in an Insurance Undertaking (other than a Re-Insurance Undertaking) when the law, insurance terms or other legal basis provide that the assets arising from a specified segment of business of an Insurance Undertaking should be restricted so that they may only be used by the Insurance Undertaking for the purpose of meeting its obligations or covering the risks arising from that particular business (*i.e.*, ring-fenced).[62] The ring-fenced fund must be managed separately (*i.e.*, as a separate fund) to ensure that the Insurance Undertaking is able to meet its obligations in respect of those assets. Although these assets are included in computing the excess of assets over liabilities for own-fund purposes they cannot be made available to meet the risks outside the ring-fenced fund (*omejeni sklad*).[63] Furthermore, ZZavar-1 requires that an Insurance Undertaking establishes technical provisions (*zavarovalno-tehnične rezervacije*) in respect of all its liabilities to policyholders, insured persons and other beneficiaries under insurance contracts. The value of technical provisions must correspond to the amount an Insurance Undertaking would have to pay if it transferred its contractual rights and obligations immediately to another undertaking (Article 177 ZZavar-1) ("**Allocated Assets**").

In the event of bankruptcy proceedings, claims arising out of insurance contracts which are covered by technical provisions (*zavarovalno-tehnične rezervacije*) are treated as preferential claims (*prednostna terjatev*) and are paid out before other preferential claims set out under ZFPPIPP[64] (Article 421 ZZavar-1), while beneficiaries of claims arising from a ring-fenced funds obtain a right of priority repayment (*ločitvena pravica*) (Section 9.2 ZZavar-1).

We believe that the assets of an Insurance Undertaking (other than a Re-Insurance Undertaking) which are not allocated to a ring-fenced funds (*omejeni sklad*) and which do not serve to cover technical provisions (*zavarovalno-tehnične rezervacije*) may, subject to the requirements laid down in ZZavar-1, be used for other purposes by an Insurance Undertaking ("**Unallocated Assets**").

Whereas not set out by law, it should be clear from the documentation used to which class of assets (*i.e.*, Unallocated Assets and Allocated Assets or to which respective separate fund or division thereof respectively) the EFET General Agreement and the Individual Contracts thereunder are allocated. This is because the Allocated Assets relating to a particular ring-fenced fund (*omejeni sklad*) or division thereof are (as the name suggests) ring-fenced, *i.e.*, the counterparty of an Insurance Undertaking (other than a Re-Insurance Undertaking) will have no access to the assets of other ring-fenced fund (*omejeni skladi*) or divisions thereof maintained by the respective counterparty.

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[62] Article 241 ZZavar-1. More detailed regulation is provided in the AZN's Decision on ring-fenced funds (*Sklep o omejenih skladih*).
[63] In this regard ZZavar-1 is implementing Recital 49 of the Directive 2009/138/EU.
[64] Therefore, are payable out of the general bankruptcy estate before any other claims, including other preferential claims (once the costs of the bankruptcy proceedings and the bankruptcy administrator have been paid).

9.4.2 Pension funds (*pokojninski skladi*)

In the event of bankruptcy against a Pension Fund Management Company, the assets allocated to the pension fund (*pokojninski sklad*) constitute separate assets in respect to other assets of the Pension Fund Management Company and separate assets in regard to any other assets under its management. Enforcement may only be levied on the assets of a pension fund to secure or pay the claims of the members of that pension fund (Article 264 ZPIZ-2).

In addition, the assets of a pension company (*pokojninska družba*) which are intended to cover future liabilities and potential losses from risks arising from supplementary pension insurance business (*dodatno pokojninsko zavarovanje*) in respect of which the pension company is obliged to have technical provisions (*zavarovalno-tehnične rezervacije*) form a guarantee fund (*kritni sklad*) (Article 332č ZPIZ-2). Pension company manages the assets of a guarantee fund (*kritni sklad*) separately from its other assets. Enforcement can be levied against the assets of a guarantee fund (*kritni sklad*) only to secure or repay a claim of a policyholder (*zavarovalca*), insured (*zavarovanca*) or other beneficiary under the insurance contract in respect of which the guarantee fund was established.

9.5 Other limitations and qualifications

9.5.1 Pension funds

Assets combined in a pension fund may as a rule neither be pledged nor otherwise encumbered by the Pension Fund Management Company. However, the manager of a pension fund may temporarily pledge up to 10% of its assets as security for the repayment of a loan taken in order to ensure liquidity of the pension fund, limited to up to 10% of the value of the assets of the pension fund) Legal acts contrary to this rule are null and void (Article 282 ZPIZ-2).

9.5.2 Restrictions on the enforcement against the Republic of Slovenia and Municipalities

Pursuant to Article 149 of Enforcement and Security Act (*Zakon o izvršbi in zavarovanju*, "**ZIZ**"), debt enforcement against the Republic of Slovenia, Municipalities and non-profit institutes under public law (*javni zavodi*) is limited to those assets which can be used by the Republic of Slovenia, Municipalities' or the institutions' creditors without interfering with assets required for the performance of public service obligations. Furthermore, enforcement is also restricted in respect of funds that were provided to Municipalities by the government and are, *e.g.*, earmarked for the elimination of the consequences of natural disasters or co-financing of certain programmes/tasks. Furthermore, certain objects owned by these entities and necessary for the performance of their functions are explicitly excluded from enforcement (Article 32 (2) ZIZ).

9.5.3 Legislative power of the Republic of Slovenia

The Republic of Slovenia and its legislative bodies have legislative power as to the insolvency laws applying on the Municipalities and the national law on close-out netting. Through its legislative power it may implement special provisions regarding the insolvency of Municipality or may be used to restrict the enforceability of close-out netting under the EFET General Agreement in a pre-insolvency and a post-insolvency scenario. The legislative bodies of the Republic of Slovenia could, *e.g.*, decide that specific close-out netting legislation such as Articles 24a and 24b ZFPPIPP (see 7.3 above) shall not be applicable. In that case and if the relevant piece of legislation stands the tests established by the Slovenian Constitutional Court, including that the law must ensure equal treatment of creditors and must be proportionate (*sorazmernost*), the enforceability of Close-out Netting Provisions against the Municipalities could be adversely affected.

9.5.4 Little to no legal writing or court rulings are available on the opinions expressed in this Opinion. While we believe that the opinions expressed are well founded and justifiable, we cannot exclude that a Slovenian court or administrative authority would take views that deviate from the opinions expressed in this Opinion.

9.5.5 Certain aspects contemplated by the questions addressed to us may be affected by:

(i) avoidance laws (as summarized in Appendix ./F) or similar laws of general application relating to or affecting the enforcement of creditors' rights and remedies;

(ii) the unavailability of, or limitation on the availability of, a particular right or remedy because of equitable principles of general applicability or a requirement as to commercial reasonableness or good faith. This includes (without limitation) that in cases where a party is vested with a discretion, may determine a matter in its opinion or is granted the right to unilaterally determine essential terms of a contract, such discretion is to be exercised reasonably, such opinion is to be based on reasonable grounds and such determination needs to be adequate and not arbitrary under the then prevailing circumstances;

(iii) the exception of abuse of law, the invalidity of grossly disadvantageous stipulations or stipulations contrary to *bonos mores* in general terms and conditions or standard form contracts or similar concepts;

(iv) one of the Parties, or performance under the EFET General Agreement and/or any Individual Contracts thereunder being subject to national/international sanction laws, due to which obligations may be illegal or unenforceable in Slovenia by reason of Slovenian law or public policy (in each case, including European Union law or international law applicable in Slovenia as a matter of law, comity or otherwise).

9.5.6 "Enforceable" and similar terms used in this Opinion mean that an obligation is of a type which the Slovenian courts generally would enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the Opinion Documents and that orders for specific performance will be available in all circumstances. This includes, without limitation, that provisions of the Opinion Documents providing that the parties thereto may not initiate proceedings against certain other parties (*pactum de non petendo*) would not preclude a Slovenian court from commencing such proceedings even if initiated by a Party in breach of its contractual obligations.

9.5.7 Notwithstanding the recognition of English or German law (or the laws of any other country other than Slovenia, as the case may be), as the law governing the Opinion Documents:

(i) effect may be given to the overriding mandatory provisions of the law of Slovenia (as the law of the forum), in so far as those overriding mandatory provisions would render the performance of the Opinion Documents unlawful;

(ii) the courts of the Republic of Slovenia will apply Slovenian law insofar as it is mandatory irrespective of foreign law agreed between the Parties as the law governing the Opinion Documents;

(iii) the application of foreign law may be refused to the extent it is manifestly incompatible with public policy (*ordre public*) of the Republic of Slovenia;

(iv) regard will be given to the law of the jurisdiction in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance; and

(v) certain *in rem* aspects of the Eligible Credit Support to be provided under the EFET General Agreement / EFET Credit Support Annex are not susceptible of a choice of law and our opinions in this regard are limited to those assets comprised in the Eligible Credit Support that are governed by Slovenian law (in case of rights, claims and interests; see also at 8.3.1.2.1 and 8.3.1.3.1 above).

Despite a valid choice of law, a Slovenian court may apply Slovenian law, if it is unable to ascertain the content of the applicable foreign law (Article 12 ZMZPP). Where the choice of law to govern an agreement includes non-contractual obligations (*nepogodbene obveznosti*), Slovenian courts would determine the governing law in accordance with Article 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("**Rome II**"), such choice of law must be freely negotiated by parties pursuing a commercial activity and will not prejudice rights of third parties. Moreover, Slovenian law may still apply in such situation in respect of mandatory provisions of Slovenian law, if the choice of law includes non-contractual obligations.

9.5.8 Where all other elements relevant to the situation at the time of entry into the Opinion Documents (*e.g.*, in case of an EFET General Agreement between two Slovenian parties) are located in a country (*e.g.*, Slovenia) other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of Slovenian law which cannot be derogated from by agreement.

9.5.9 Where all other elements relevant to the situation at the time of entry into the Opinion Documents are located in one or more Member States, the Parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

9.5.10 The enforcement of the Opinion Documents in the Republic of Slovenia will be subject to Slovenian rules of civil and enforcement procedure arising by operation of law as applied by the courts of the Republic of Slovenia and the enforcement of judgments rendered by a court of another EU jurisdiction in the Republic of Slovenia is subject to the limitations set forth in the Brussels Regulation Recast (including, without limitation, Articles 45 and 46 thereof, referring amongst others to *ordre public*).

9.5.11 The enforcement in the Republic of Slovenia of a Foreign Award will be subject to the limitations and the rights of a court in a state that is a party to the New York Convention, in particular to refuse enforcement of an arbitral award for the grounds set forth in the New York Convention (including, without limitation, its Article V, referring amongst others to (i) the capability of settlement by arbitration under Slovenian law and (ii) public policy). Enforcement of a foreign award is subject to observance of Slovenian law regulating enforcement procedure, in particular the ZMZPP.

9.5.12 In view of the fact that the jurisdiction clause contained in the EFET General Agreement (see § 22 thereof) does not provide exclusively for arbitration, we note that judgments or other decisions of state courts outside the territorial scope of application of the Brussels Regulation Recast might not be enforceable in the Republic of Slovenia. We do not express an opinion as to whether an arbitral tribunal chosen under the Opinion Documents will accept jurisdiction in respect of a dispute arising thereunder.

In this context, we express no opinion as to whether or not a non-Slovenian court (applying its own conflict of laws rules and its own rules on international civil procedure) will act in accordance with the parties' agreement as to the choice of law and/or choice of forum.

9.5.13 On 31 January 2020, the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland (the "**UK**") from the European Union and the European Atomic Energy Community (the "Withdrawal Agreement") entered into force and gave effect to the UK leaving the European Union ("**Brexit**"). On 24 December 2020, the European Union and the UK agreed on the EU-UK Trade and Cooperation Agreement (the "**Brexit Deal**"). The Brexit Deal defines the post-Brexit relationship between the European Union and the UK, but, does not provide for any provision on cross-border cooperation on choice of law, courts and enforcement of court judgements in civil cases. As a result of Brexit, the Regulation (EU) no. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Brussels Regulation Recast**") and the Lugano Convention 2007 no longer apply to civil and commercial cases commenced in the UK on or after 1 January 2021. The UK has applied to join the Lugano Convention 2007 on 8 April 2020. However, consent is required from all existing member parties, including the European Union. On 28 June 2021, the European Commission, representing the European Union, refused to give its consent to the UK acceding to the Lugano Convention 2007. The UK, having previously been member as part of the European Union, has acceded in its own right to the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**") that, following Brexit, is effective as of 1 January 2021 and applicable to international cases with exclusive choice of court agreements concluded in civil or commercial matters. The Hague Convention requires courts of states which are contracting parties to the Hague Convention (the "**Contracting States**") to recognise and enforce judgments given by courts in other Contracting States that are designated by jurisdiction clauses. These jurisdiction clauses must be exclusive within the meaning of the Hague Convention which consequently limits its scope of application. In this regard (and based on relevant case law of Contracting States) there is considerable uncertainty that the Hague Convention is not applicable to jurisdiction clauses which only provide for one contracting party to submit to an exclusive jurisdiction (asymmetric clauses). Moreover, there is uncertainty about the application of the Hague Convention to clauses predating 1 January 2021, leaving room for potential application of the UK's common law rules. Also, the scope of application of the Hague Convention is narrower than the scope of the Brussels Regulation Recast. It is unclear whether a jurisdiction clause allowing only certain parties the right to bring an action in different jurisdictions is valid under the terms of Article 25 of the Brussels Regulation Recast (or Article 17 of the Lugano Convention 2007 or Article III of the Hague Convention, respectively) and accordingly we express no opinion on the validity of such a clause in the Transaction Documents (if any). Furthermore, it is unclear whether such jurisdiction clause would be considered as conferring exclusive jurisdiction on a respective court. If the Hague Convention were not to apply, the recognition and enforcement of a final judgment in civil and commercial matters given by a court in the territory of England was sought in Slovenia, this will be subject to the conditions and limitations set out in the Slovenian Act on International Private Law and Proceedings (*Zakon o mednarodnem zasebnem pravu in postopku*) (including, without limitation, under Articles 94 to 103 thereof) (if the Slovenian Act on International Private Law and Proceedings is deemed applicable by the Slovenian courts). Also, with the Brussels Regulation Recast no longer being applicable in that context, the Slovenian exequatur procedure will apply to judgments rendered in accordance with the Slovenian Act on International Private Law and Proceedings and require the applicant to provide the certificate of its enforceability under the laws of the UK.

10 No implied opinion

This Opinion is solely given in connection with the Opinion Documents and is limited to the opinions explicitly expressed herein and shall not be construed to express an implied opinion on any other matters in connection with the Opinion Documents or on any of the agreements, deeds or instruments referred to in the Opinion Documents but not expressly opined on herein.

In particular, we do not express (i) any opinion in respect of the accounting treatment of any of the transactions contemplated under the Opinion Documents, or (ii) any opinion on anti-trust law in connection with the Opinion Documents, nor do we express (iii) any tax opinion, (iv) any opinion on the enforceability of the terms of the Opinion Documents in the event of insolvency of Party A's Credit Support Provider, (v) any opinion on whether Party A may (*i.e.*, has capacity and authority to) enter into the EFET General Agreement and/or any or all of the Individual Contracts under applicable Slovenian laws, their constitutional documents and/or their licenses, or (vi) any opinion on consumer protection law aspects or the qualification of counterparties as consumers pursuant to the Slovenian Consumer Protection Act (*Zakon o varstvu potrošnikov – ZVPot*), pursuant to Article 6 (1) of Rome I or other Slovenian consumer protection legislation.

11 Purpose of Opinion

11.1 The purpose of this Opinion is to provide guidance to EFET and its members in understanding the issues that may be of relevance as a matter of Slovenian law and to satisfy the opinion requirements set forth by Articles 111 (2) and 296 (2)(b) of CRR and the Basel Committee on Banking Supervision of the Bank for International Settlements as set forth in the Basel Capital Accord of July 1998 and subsequent amendments and as set forth in the Basel II Revised Framework of November 2005 concerning the recognition of close-out netting for capital purposes and the recognition of collateral arrangements for credit risk mitigation purposes.

11.2 This Opinion shall not be relied upon by any person with respect to, or in connection with, any specific transaction or act undertaken or omitted to be undertaken.

12 Addressees; liability

12.1 This Opinion is rendered (i) only to EFET and is for the sole benefit of EFET and its members (the "**Addressees**") in connection with the Opinion Documents only and (ii) on the basis of our framework contract with EFET, dated 28 January 2021. It is not to be transmitted to anyone else nor may it be relied upon by anyone else or for any other purpose or quoted or referred to in any other document or filed with anyone without our express prior written consent.

12.2 Any claims for any losses, costs, expenses and damages or other claims against Schönherr Attorneys-at-law – branch Slovenia under or in connection with this Opinion, if any, vest exclusively in the Addressees and cannot be validly assigned or otherwise transferred to any party other than an Addressee.

13 Disclosure

13.1 We agree that a copy of this Opinion may be disclosed to your professional advisers, auditors and counterparties in connection with the initiation of business transactions under the Opinion Documents, provided that they agree to keep this Opinion confidential and provided further that they are not entitled to rely on this Opinion and that we do not accept any contractual duty or duty of care to them.

13.2 Notwithstanding the foregoing, we agree that a copy of this Opinion may be disclosed to any other person, if so required by applicable law, rule or regulation or any competent judicial, governmental or supervisory body, provided that no such person is entitled to rely on this Opinion and that we do not accept any contractual duty or duty of care to any such person.

Very truly yours,

Schönherr Attorneys-at-law – branch Slovenia

odvetniška pisarna
schönherr
podružnica v Sloveniji
Tomšičeva 03, 1000 Ljubljana
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Appendix ./A
Entity Types[65]

IMPORTANT NOTICE: The below categorization of counterparties is indicative only, does not constitute (or replace) legal advice, and is qualified in its entirety by the detailed explanations given in this Opinion. We recommend that readers review all relevant sections of this Opinion and satisfy themselves as to the conclusions reached prior to making any determinations and do not rely solely upon the information contained in this Appendix ./A. The information contained in this appendix must rather be read in conjunction with the relevant sections of this Opinion.

(green) Positive statement	(red) Negative statement or significant issue	(yellow) Generally positive statement, but certain issues need to be considered

Description	Legal form(s)	Limitations
Banks / Credit Institutions	**"Banks"** means credit institutions (*kreditna institucija*)[66], as defined in Article 4 (1) of the ZBan-3 which are incorporated in Slovenia and which are organized as joint stock corporations (*delniška družba – d. d.*) or *Societas Europea* (*evropska delniška družba*)[67]. The term "Bank" when used in certain sections of this Opinion may refer also to credit institutions that are defined separately below. "Credit Institution" is a legal person, with its seat in the Republic of Slovenia, that can be established as bank (*banka*) or savings bank (*hranilnica*), pursuant to Article 4 (1) of ZBan-3.	Limitations due to possible application of resolution tools or exercise of resolution powers by the resolution authority; see at 1.2.5 of Appendix ./E.
<u>Corporations</u>	"**Corporations**" means corporations (*kapitalske družbe*) (*i.e.*, joint stock	

[65] In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

[66] Slovenian law has adopted the terminology of the EU banking directives which use the term "credit institution" instead of "bank". For the sake of terminological consistency with the assumptions and issues presented, however, the term "bank" shall be used throughout this Opinion.

[67] Article 26 of the ZBan-3 Subject to Article 4 of Slovenian Banking Act, the entity has to acquire the authorization of the regulator (Bank of Slovenia).

	corporation (*delniška družba – d.d.*) or limited liability company (*družba z omejeno* odgovornostjo – d.o.o.)) under Slovenian law having their corporate seat and their principal place of management in Slovenia. This does not include regulated entities (Banks, Insurance Undertakings, Investment Firms and Investment Fund Management Companies, for example), that are operated in the legal form of a Corporation and which are dealt with herein specifically.	
<u>Insurance Companies</u>	"**Insurance Undertakings**" (*zavarovalnica*) means legal person that conducts insurance operations based on the authorization of the supervisory authority, as defined in Article 8 (1) of ZZavar-1, which are organized as joint stock corporations (*delniška družba d. d.*), *Societas Europea* (*evropska delniška družba*) or mutual insurance association (družba za vzajemno zavarovanje)[68]. "**Re-Insurance Undertaking**" (*pozavarovalnica*) means Insurance Undertakings as legal entity that performs <u>solely</u> the operations of reinsurance based on the authorization of the supervisory authority.[69]	Limitations due to certain assets constituting separate estates and limitations on disposal over Allocated Assets; see at 9.4.1 above.
<u>Investment Services Providers / Investment Firms</u>	"**Investment Firms**" means investment firms (*investicijsko podjetje*), as defined in Article 20 (1) ZTFI-1, which are organized as corporations (*kapitalske družbe*) (joint stock corporations (*delniška družba d. d.*), *Societas Europea* (*evropska delniška družba*), or limited liability companies (*družba z omejeno odgovornostjo – d.o.o.*[70])) and which are incorporated in Slovenia and have obtained a license from the Slovenian	Limitations due to possible application of resolution tools or exercise of resolution powers by the resolution authority; see at 1.4 of Appendix ./E.

[68] Article 24 of ZZavar-1.
[69] Article 8 (2) of ZZavar-1.
[70] Article 174 ZTFI-1.

	Securities Market Agency (*Agencija za trg vrednostnih papirjev - ATVP*) for the investment services of (i) investment advice, (ii) portfolio management and/or (iii) reception and transmission of orders in relation to one or more financial instruments, (iv) execution of orders on behalf of clients, (v) dealing on own account; (vi) initial or subsequent sale of the financial instruments, with or without the purchasing obligation; management of Multilateral Trading Facility or management of Organized Trading Facility.[71]	
Investment Fund Management Companies	**"Investment Fund Management Companies"** means management companies (*družba za upravljanje*), as defined in Article 13 (1) of Slovenian Investment Funds and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*, ZISDU-3), which are incorporated in Slovenia and have obtained licenses from the ATVP pursuant to Article 13 ZISDU-3, and which are organized as joint stock corporations (*delniška družba – d.d.*), *Societas Europea* (*evropska delniška družba*) or limited liability companies (*družba z omejeno odgovornostjo – d.o.o.*).	
Municipalities	"**Municipalities**" (*občine*) as defined by the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije – URS*).	Limitations due to legislative power of the Republic of Slovenia and restrictions on enforcement; see at 9.5.2 and 9.5.3 above.
Other Financial Institutions	"**Pension Fund Management Company**" means pension fund management company (*upravljavec pokojninskega sklada*) as set out in Article 257 of the Slovenian Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju – ZPIZ-2*), according to which	Limitations due to pension funds constituting separate estates; see at 9.4.2 above.

[71] Article 11 of ZTFI-1.

	a pension fund (*pokojninski sklad*) may be formed and managed by (i) a pension company (*pokojninska družba*) or (ii) an Insurance Undertaking or (iii) a Bank in accordance with Article 257 ZPIZ-2 and have obtained a license from ATVP pursuant to Article 299 ZPIZ-2. Pension company has also obtained a license from AZN pursuant to Article 333 ZPIZ-2. Pension company is organised as a joint stock corporation (*delniška družba – d.d.*)	
Partnership	"**Partnerships**" means partnerships (*osebne družbe*) (*i.e.*, unlimited partnership (*družba z neomejeno odgovornostjo – d.n.o.*) or limited partnership (*komanditna družba – k.d.*)) under Slovenian law having their seat and their principal place of management in Slovenia. This does not include regulated entities that are operated in the legal form of a Partnership. Partnerships have legal personality (*status pravne osebe*). Both individuals and legal entities may become partner of a Partnership.	
Publicly-owned Corporations	"**SDH**" means Slovenian Sovereign Holding (*Slovenski državni holding*), which is organised as joint stock corporation (*delniška družba – d.d.*) and is wholly owned by the Republic of Slovenia. SDH is subject to the Slovenian Sovereign Holding Act (*Zakon o Slovenskem državnem holding*) which sets forth the statutory mandate of SDH that includes the management of certain shareholdings of the Republic of Slovenia. Corporations (majority-)owned by the Republic of Slovenia or any Municipality are, for purposes of this Opinion, considered Corporations.	
Quasi Governmental Entities	"**Bank of Slovenia**" means Banka Slovenije.	

	Bank of Slovenia is organised as legal person under public law and is wholly owned by the Republic of Slovenia. Bank of Slovenia performs the function of the central bank of the Republic of Slovenia and is as such an integral part of the European System of Central Banks (ESCB).	

Appendix ./B
Individual Contracts

IMPORTANT NOTICE: The below categorization of transactions is indicative only, does not constitute (or replace) legal advice, and is qualified in its entirety by the detailed explanations given in this Opinion. We recommend that readers review all relevant sections of this Opinion and satisfy themselves as to the conclusions reached prior to making any determinations and do not rely solely upon the information contained in this Appendix ./B. The information contained in this appendix must rather be read in conjunction with the relevant sections of this Opinion.

Legend for below table:

(green)	Positive statement
(red)	Negative statement or significant issue
(yellow)	Generally positive statement, but certain issues need to be considered

Description	**Underlying Commodity**	**Eligibility for close-out netting if Slovenian substantive insolvency law was to apply[72]**
Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a	Electricity / Natural gas[73]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

[72] See at above 7.1 for further details.
[73] As defined in Annex 1 to the EFET General Agreement Gas.

future date at an agreed price, and the other party agrees to pay a price for the same quantity to be set on a specified date in the future.	Emission allowances[74]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Green certificates[75] / capacity rights[76]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Commodity Option. 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 can be settled either by physically delivering the quantity of the commodity	Electricity / Natural gas	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Emission allowances	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

74 For purposes of this Opinion, "**Emission Allowance**" means a certificate that entitles the holder to emit one tonne of carbon dioxide equivalent in a specific trading period. This includes, for the avoidance of any doubt, emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC.

75 For purposes of this Opinion, "**Green Certificate**" means any allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, including, for the avoidance of any doubt, European Energy Certificates under the European Energy Certificate System.

76 For purposes of this Opinion, "**Capacity Right**" means any transmission or transportation capacity relating to commodities, whether cable, pipeline or other means. This does not include, however, transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity.

in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.	Green certificates / capacity rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Commodity Swap. 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, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.	Electricity / Natural gas	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Emission allowances	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Green certificates / capacity rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.	Electricity / Natural gas	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Emission allowances	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Green certificates / capacity rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

Appendix ./C
Article 24a ZFPPIPP and Article 24b ZFPPIPP

Article 24.a ZFPPIPP reads (in unofficial English translation) as follows:

"(1) ***qualified financial contract*** *(kvalificirana finančna pogodba) shall mean an agreement, a subject of which is financial instrument pursuant to ZTFI-1, and derivative financial instrument for commodity or emission rights as basic instrument, which maybe settled with transfer of the basic instrument;*

(2) ***netting agreement*** *(dogovor o izravnavi) shall mean:*

1. the contractual arrangement of the parties, included in the individual qualified financial agreement or concluded as a framework agreement in respect to certain specific types of qualified financial agreements that will be entered into between the netting agreement parties; and

2. which contains the following rules that shall apply in case of insolvency of the party or in case of breach of the netting agreement or qualified financial agreement (hereinafter: "case of breach"):

- *rules that in case of breach the qualified financial agreement shall be voided, or terminated by the other party or that all the obligations of the parties are accelerated;*
- *rules on calculation of netting, market, liquidation or replacement monetary value of bilateral obligations of the parties in case of termination of the agreement or acceleration in line with (a);*
- *rules on conversion of value in the same currency if the obligations are in different currencies;*
- *rules on determination of net value of the monetary obligation of the party and monetary obligation of the other party after the netting under (b) and converted under (c)";*

Article 24.b ZFPPIPP reads (in unofficial English translation) as follows:

"*(1)* ***other qualified contract*** *(druga kvalificirana pogodba) shall mean an individual or framework agreement against payment, a subject of which is trading with electricity or other energy products, in which the netting agreement from the Article 24.a forms a usual part in such type of trading.*

(2) For other qualified contracts the same rules of the ZFPPIPP apply mutatis mutandis as for qualified financial agreements and netting agreements."

Appendix ./D
Annex II to CRR

Types of derivatives

1. Interest-rate contracts:

(a) single-currency interest rate swaps;

(b) basis-swaps;

(c) forward rate agreements;

(d) interest-rate futures;

(e) interest-rate options purchased;

(f) other contracts of similar nature.

2. Foreign-exchange contracts and contracts concerning gold:

(a) cross-currency interest-rate swaps;

(b) forward foreign-exchange contracts;

(c) currency futures;

(d) currency options purchased;

(e) other contracts of a similar nature;

(f) contracts of a nature similar to (a) to (e) concerning gold.

Contracts of a nature similar to those in points 1(a) to (e) and 2(a) to (d) of this Annex concerning other reference items or indices. This includes as a minimum all instruments specified in points 4 to 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC not otherwise included in point 1 or 2 of this Annex.

Appendix ./E
Summary of Slovenian Regime in Respect of Netting

1 Types of proceedings under Slovenian law that may affect creditors' rights

1.1 Types of proceedings under Slovenian law that may affect creditors' rights in respect of Corporations and Partnerships

The central body of legislative provisions governing insolvency (and pre-insolvency) proceedings in respect of Slovenian entities are set out in the Slovenian Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (*Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*; "**ZFPPIPP**").[77]

1.1.1 Relevant types of proceedings under ZFPPIPP

The key forms of proceedings governed by ZFPPIPP – which, in our view, are relevant with respect to the matters discussed herein[78] – are:

(A) insolvency proceedings *stricto sensu (postopki zaradi insolventnosti)*, namely:

(i) **compulsory settlement proceedings** ('*postopek prisilne poravnave*');

(ii) **simplified compulsory settlement proceedings** ('*postopek poenostavljene prisilne poravnave*'); and

(iii) **bankruptcy proceedings** ('*stečajni postopek*'); and

(B) pre-insolvency proceedings, namely the **preventive restructuring proceedings** ('*postopek preventivnega prestrukturiranja*').

1.1.2 Insolvency proceedings

(A) Function:

- Compulsory settlement proceedings are formal reorganization proceedings enabling insolvent eligible debtors (see below) to regain solvency by way of a (court-sponsored) restructuring procedure. The aim of compulsory settlement is that (i) the current shareholders to only retain a share equal to the value of

[77] Official Gazette of the RS, no. 126/2007 et seq.
[78] For the sake completeness, we note that, in addition to these proceedings, ZFPPIPP also regulates the so-called (a) court-ordered liquidation ('*prisilna likvidacija*'), (b) deletion from the court register without liquidation ('*izbris iz sodnega registra brez likvidacije*') and (c) personal bankruptcy ('*postopek osebnega stečaja*'); however, in our view, these are not applicable with respect to the matters discussed herein.

residual assets they would receive in bankruptcy proceedings, (ii) creditors more favorable terms for the repayment of their claims than in the potential bankruptcy proceedings and (iii) the debtor's business, or viable part of it, is continued.

The compulsory settlement proceedings provide corporate debtors with several restructuring options, notably (i) reduction/adjustment of liabilities, (ii) debt-equity swaps and (iii) capital increase against new cash contributions. If the restructuring proposal is approved by the requisite majority of the affected creditors (and the formal conditions confirmed by the competent court), the compulsory settlement will result in a "**cram down**" over the rest (*i.e.*, the terms of the compulsory settlement will also be imposed on the dissenting minority of affected creditors). Unsuccessful compulsory settlement proceedings will result in the opening of bankruptcy proceedings against the debtor.

- Bankruptcy proceedings are formal insolvent liquidation proceedings aimed at the termination of the insolvent debtor, liquidation of its assets and a (pro rata) distribution of the resultant proceeds to the creditors.

(B) Eligible debtors:

- Compulsory settlement proceedings may be initiated against Corporations.[79] No compulsory settlement proceedings may be initiated against Banks, Investment Firms, Insurance Undertakings or Pension Fund Management Companies.
- Bankruptcy proceedings may be initiated against Corporations, Partnerships, Banks, Insurance Undertakings, Pension Fund Management Companies and Investment Firms.

(C) Conditions for opening: Insolvency proceedings (both compulsory settlement and bankruptcy) may be opened against **insolvent eligible debtors**.

Within the meaning of ZFPPIPP, a corporate debtor is deemed insolvent when it is either (i) **unable to pay all its debts as they fall due** within a longer period of time (*trajneje nelikviden*)[80] or

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[79] Certain (modified) forms of compulsory settlement proceedings are only available to certain corporate debtors, depending on their size.

[80] It is presumed that a corporate debtor is unable to pay its debts when they fall due within a longer period of time (*trajneje nelikviden*) in case the debtor is more than two months late with the fulfillment of one or

(ii) **over-indebted** in the meaning of the insolvency law (*dolgoročno plačilno nesposoben*).[81]

(D) Legal effects of opening[82] for creditors' claims:

(i) In terms of effects on creditors' claims, as a general rule, a duly opened (*začet*) insolvency proceeding will – as of the beginning of the day the decision on commencement of insolvency proceedings is published - result in, *inter alia*, the following:

- non-monetary claims are converted into monetary claims (at market value);
- periodic claims are transformed into one-off payment claims;
- adjustment of contractual or default interest rate so that creditors' claims which have accrued interest up to the commencement of insolvency proceedings shall – from the opening of proceedings onwards – accrue interest at the statutory rate;
- foreign currency claims are transformed into EUR claims;
- set-off (see in 3.4 Appendix ./E below) occurs *ex lege* for all eligible mutually reciprocal claims (despite not having fallen due); and
- (in bankruptcy only), certain transactions/acts of the insolvent debtor may be subject to bankruptcy avoidance rules (see Appendix ./F below).

(ii) The above general rules **do not apply** in respect of:

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more due payment obligations amounting, in aggregate, to more than 20% of its liabilities as set out in its annual statements for the preceding business year, (ii) the credit (positive balance) on the debtor's bank accounts does not suffice for the execution of a court order for enforcement of a claim (within an uninterrupted period of 60 days / any 60 days in a 90 day period) or (iii) the debtor is more than two months late with the payment of minimal wages to employees or with the prepayment of employees' income taxes and social contributions.

81 Over-indebtedness in the meaning of the insolvency law is presumed if (i) the debtors' liabilities exceed its assets, or (ii) the losses of the ongoing business year along with the losses carried forward reach 50% of the debtor's registered share capital and cannot be covered by profits carried forward or reserves (reduction of net assets to 50% of registered capital).

82 The consequences of opening (*začetek*) of insolvency proceedings generally arise on the beginning of the day when the competent court publicly notifies the creditors of the initiation thereof (i.e., publishes 'the call' (*oklic*)). For the sake of completeness, it should be noted that also filling for an insolvency proceeding (*uvedba postopka*) triggers certain consequences (e.g., debtor prohibited from operating 'outside ordinary course of business', competences of debtor's corporate bodies are limited, etc.).

- **mutually unfulfilled** (executory) **contracts**[83] which may be selectively terminated by the debtor (subject to court approval) – 'cherry-picking; and

- **netting arrangements** under financial collateral arrangement (pursuant to ZFZ) or qualified financial contracts (*kvalificirane finančne pogodbe*) or other qualified contracts (*druge kvalificirane pogodbe*) (pursuant to ZFPPIPP) – see Section 2 below.

(iii) Moreover, the opening of insolvency proceedings generally does not affect:

- **rights of separation** (*izločitvene pravice*)[84] and[85] **rights to priority repayment** (*ločitvene pravice*);[86] and

- **financial collateral arrangements**.

1.1.3 Pre-insolvency proceedings

(A) Function: Preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*) is an instrument aimed at enabling eligible distressed debtors (see (B) below) to avoid insolvency, by entering into a financial (debt) restructuring agreement with its financial creditors[87] outside formal, court-sponsored restructuring proceedings. If the requisite majority of affected creditors accedes to the financial restructuring agreement and the financial restructuring agreement is confirmed by the competent court (see below), dissenting financial creditors face "cram-down" (*i.e.*, the terms of the preventive restructuring will also be imposed on the dissenting minority of affected creditors).

(B) Conditions for opening: preventive restructuring may be opened against eligible Slovenian Corporations[88] who are **not insolvent** (at the time of the filing for the initiation of preventive restructuring

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83 Defined as contracts entered into by the insolvent debtor prior to the opening of insolvency proceedings and in respect of which neither the insolvent debtor nor the counterparty have fulfilled its obligations (in their entirety) prior to the opening of insolvency proceedings.

84 Notably, the right of the holder of ownership title over a particular thing or right to request its separation from the insolvent estate and return thereof into its possession.

85 Save for certain instances of compulsory settlement proceedings.

86 Notably, the right of the holder of a security interest over a particular thing or right (owned by the insolvent debtor) to receive priority.

87 Creditors holding financial claims, including, *inter alia*, claims arising from (i) loan agreements, bank guarantees, financial leasing agreements or any other agreements concluded with a bank / financial institution having a similar commercial effect; (ii) loan agreements with counterparties outside of the financial sector; (iii) guarantees undertaken by the debtor; and (iv) derivatives issued by the debtor.

88 *I.e.*, debtors which qualify as small, medium-sized or large companies in accordance with the Slovenian Companies Act, "**ZGD-1**".

proceedings) **but** are **likely to become insolvent** within one year.[89]

(C) Eligible debtors: preventive restructuring proceedings may be initiated against selected eligible Corporations. Partnerships, Banks, Insurance Undertakings and Investment Firms cannot be subject to such proceedings.

(D) Legal effects of opening for creditors' claims:

(i) while not producing effects for creditors' claims equivalent to those applicable in the event of insolvency proceedings (see above), duly opened preventive restructuring proceeding will result in, *inter alia*, the **statute of limitations** and **maturity of the principal of the claims** being suspended – "stand-still".

(ii) The above general rule **does not apply** with regards to financial claims **to the extent secured with financial collateral**.[90]

Moreover, the opening of preventive restructuring should not affect **netting arrangements** under financial collateral arrangement (pursuant to ZFZ) or qualified financial contracts (*kvalificirane finančne pogodbe*) or other qualified contracts (*druge kvalificirane pogodbe*) (pursuant to ZFPPIPP) – see Section 2 below.

An application for the opening of the preventive restructuring proceedings can only be filed by the eligible debtor. The proposal for initiation of the preventive restructuring proceedings must include a list of all financial claims (reviewed by an auditor) and notarised consent of the financial creditors representing at least 30% of all claims (75% in case of secured financial creditors). After the opening of preventive restructuring proceedings, the debtor has 3 (if it qualifies as a medium company under ZGD-1) or 5 (if it qualifies as a large company under ZGD-1) months, respectively,[91] to conclude an agreement on the financial restructuring (*sporazum o finančnem prestrukturiranju*) signed by the creditors representing 75% of all relevant claims.

1.2 Types of proceedings under Slovenian law that may affect creditors' rights in respect of Banks

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[89] This condition is presumed fulfilled if eligible creditors holding at least 30% of the value of all financial claims accede to the initiation of preventive restructuring proceedings.

[90] The letter of the law is somewhat ambiguous on the point but the better view (in court practice) is that this means that financial creditors holding financial collateral can enforce such collateral (subject only to contractual terms of such collateral) but are in standstill as regards (their ability to enforce on) other assets of the debtor.

[91] There is a possibility of extension up to 5 months or 8 months in total.

1.2.1 General

Insolvency proceedings with respect to Banks are governed by the Resolution and Compulsory Winding-Up of Banks Act (*Zakon o reševanju in prisilnem prenehanju bank*, "**ZRPPB-1**"),[92] which became effective on 23 June 2021. ZRPPB-1 is implementing, among others, the Directive 2014/59/EU ("**BRRD**").[93]

In addition to bankruptcy proceedings, ZRPPB-1 provides for resolution proceedings (*postopek reševanja*) that – although not necessarily triggered by the insolvency of a bank – could fall under § 10.5(c)(iv) of the EFET General Agreement, to the extent such regulatory measures are likely to prevent the relevant counterparty from performing its payment or delivery obligations under the EFET General Agreement when due, and / or § 10.5(c)(vi) of the EFET General Agreement and / or § 10.5(c)(viii) of the EFET General Agreement.

1.2.2 Scope of application and relevant types of proceedings under ZRPPB-1

In terms of **personal scope**, ZRPPB-1 applies to (Article 2 ZRPPB-1):

(i) Banks;

(ii) financial institutions that are established in the EU when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in point (c) or (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013;

(iii) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the EU;

(iv) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies;

(v) Union branches.

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[92] Official Gazette of the RS, no. 92/21.

[93] Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council including its latest amendment under Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalization capacity of credit institutions and investment firms and Directive 98/26/EC

In terms of the **types of proceedings**, the key forms of proceedings governed by ZRPPB-1 – which, in our view, are relevant with respect to matters discussed herein[94] - are:

(a) bankruptcy proceedings ('*stečajni postopek*'); and

(b) resolution proceedings ('*postopek reševanja*').

Bank of Slovenia acts as the resolution authority pursuant to ZRPPB-1.

1.2.3 Bankruptcy proceedings

Unless ZRPPB-1 provides otherwise, the provisions of ZFPPIPP also apply to bankruptcy proceedings of a Bank (see Article 224 ZRPPB-1).

Pursuant to Article 225 (1) ZRPPB-1, only Bank of Slovenia, in its capacity as banking supervisory authority, may file for the institution of bankruptcy proceedings against a Bank.

1.2.4 Regulatory measures

If, during supervision, the Bank of Slovenia determines that a Bank is in breach or is, within the next 12 months, likely to be in breach of relevant regulations (as set out in Article 9 ZBan-3) that, in each case, could have material effects on the secure and prudent governance of the Bank, it shall order the Bank to implement additional measures to rectify or prevent breaches. These additional measures may *inter alia* include prohibition or restriction of individual transactions or of a specific types of transactions, however, taking into account early termination rights in accordance with the Bank's contractual arrangements. The Bank of Slovenia may even take more far-reaching measures and prohibit the Bank from conducting its business in whole or in part (Article 293 ZBan-3). Please also refer to our answer under 1.2.5.3 below.

1.2.5 Resolution proceedings; application of resolution tools

Resolution proceedings are a type of restructuring proceedings with the objective to ensure continuity of critical functions carried out by a credit institution (Bank), avoid adverse effects on financial stability as well as to protect public funds by minimising reliance on extraordinary public financial support, deposits and client funds and client assets.

Conditions for opening of resolution proceedings (Article 68 ZRPPB-1):

[94] For the sake of completeness, we note that, in addition to these proceedings, ZRPPB-1 also regulates the so-called court-order liquidation proceedings (*'postopek prisilne likvidacije'*), however, in our view, this is not applicable with respect to matters discussed herein.

(i) the relevant Bank is failing or is likely to fail;

(ii) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments, would prevent the failure of the institution within a reasonable timeframe; and

(iii) resolution proceedings are necessary in the public interest.

Resolution measures which may be imposed on the relevant Bank in the context of resolution proceedings include:

(a) write down and conversion of capital instruments or eligible liabilities (known as 'bail-in' tool);

(b) sale of business tool;

(c) establishment of a bridge institution;

(d) asset separation.

In a Bank where conditions for resolution measures are met, the Bank of Slovenia may also take over the management of the Bank by appointing an extraordinary management board (*izredna uprava*), where the Bank of Slovenia exercises the powers of extraordinary administration directly or indirectly by appointing one or more extraordinary administrators (Article 139 et seq. ZRPPB-1).

Any resolution action must satisfy the following objectives (Article 27 (1) ZRPPB-1):

1. preservation of critical functions;

2. preventing significant adverse effects on the financial stability, in particular by preventing contagion, e.g. of market infrastructures, and by maintaining market discipline;

3. protection of public funds by minimising reliance on extraordinary public financial support;

4. protection of covered depositors; and

5. protection of client funds and assets.

As of 1 January 2016, the single resolution mechanism ("**SRM**") under Regulation (EU) No 806/2014 ("**SRM-Regulation**") entered into force. As outlined in greater detail in the SRM-Regulation, the Single Resolution Board will in certain instances take over the functions of the resolution authority under the BRRD and / or ZRPPB-1. The SRM does supplement the national law implementation of BRRD. According to Article 29 of the SRM-Regulation, the national resolution authorities shall take the necessary action to implement decisions of the Single Resolution Board referred to in the SRM-Regulation and shall exercise their powers under national law transposing BRRD (*e.g.*, ZRPPB-1) in accordance with the conditions laid down in national law (*i.e.*, ZRPPB-1). Any action they take shall comply with the Single Resolution Board's decisions pursuant to the SRM-Regulation. When implementing those decisions, the national resolution authorities shall ensure that the applicable safeguards provided for in BRRD are complied with. An analysis of the exact split of competences between the Single Resolution Board and the national resolution authorities (and accordingly an exact analysis of which legal ground (SRM-Regulation, BRRD or ZRPPB-1) will apply to a particular resolution action) is beyond the scope of this Opinion; accordingly, for the purposes of this Opinion, recovery and resolution measures are described solely by reference to the ZRPPB-1 or BRRD.

1.2.5.1 Recovery planning

Pursuant to Articles 207 and 208 of ZBan-3, implementing Article 5 BRRD, Banks that are not part of a group subject to consolidated supervision are required to adopt a recovery plan (*načrt sanacije*), describing measures to restore its financial position following a significant deterioration of its financial situation.

These recovery plans are subject to review by the Bank of Slovenia as the competent authority.

1.2.5.2 Resolution planning

Bank of Slovenia shall draw up a resolution plan (*načrt reševanja*) for each institution (Bank) that is not part of a group subject to consolidated supervision (see Article 42 ZRPPB-1). Resolution plans are aimed at identifying any material impediments to resolvability and lay out such resolution actions that the resolution authority may take.

The resolution authority assesses whether an institution or a group is resolvable either through normal insolvency proceedings or by applying resolution tools.

Furthermore, the resolution authority also assesses the extent to which institutions (Banks) are resolvable. If the resolution authority determines that there are significant impediments to the resolvability of an institution, it may, where necessary and proportionate, exercise certain powers (Article 34 ZRPPB-1). The Bank of Slovenia may require the institution to *inter alia*:

(i) limit exposures;

(ii) divest specific assets;

(iii) cease specific activities (e.g. arguably derivatives trading);

(iv) implement changes to their legal or operational structure.

We believe that none of the measures to safeguard the resolvability of an institution or a group appears predominantly focused on interfering with contractual obligations of an institution. However, if the resolution authority, *e.g.*, orders an institution to cease certain areas of business (*e.g.*, derivative business) this could trigger certain events of default / termination events or could leave the institution in a situation where it is forced by applicable law to terminate certain contracts.

1.2.5.3 Crisis prevention measures; early intervention

Pursuant to Article 283 ZBan-3, the Bank of Slovenia may, in the event of rapid deterioration of the Bank's financial position, in particular in the event of rapid deterioration of liquidity, an increase in the level of indebtedness, the volume of non-performing loans or a concentration of exposures, by way of a decree, require the bank or its management body to adopt early intervention measures (*ukrepe zgodnjega posredovanja*).

Early intervention measures with respect to Banks include, *inter alia*:

(i) requiring the management to take actions outlined in the recovery plan (within a certain period of time);

(ii) removal and replacement of management board members, supervisory board members or members of senior management;

(iii) requiring the management to draw up a plan for negotiations on a (voluntary) debt restructuring;

(iv) requiring changes in business strategy;

(v) requiring changes to legal or operational structure.

In case the removal and replacement of management board members, supervisory board members or members of senior management pursuant to Article 283 (1) no 5 ZBan-3 (see at (ii) above) was deemed insufficient so as to prevent a resolution and failure of an institution, Bank of Slovenia may appoint one (or more) special representative(s) (*posebnega pooblaščenca*) with powers as granted by the authority (up to all powers that management has under statutes) to act as replacement of, or to work together with, the Bank's management.

Pursuant to Article 283 (4) and (6) ZBan-3, implementing Article 68 BRRD, if, in the event of application of early intervention measures, substantive obligations under the contract entered into by a Bank, including payment and delivery obligations, and provision of collateral, continue to be performed, application of a crisis prevention measure shall not be, *per se*, considered as:

(i) an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise or appropriate financial collateral or a close-out netting under ZFZ;

(ii) insolvency proceedings or any other measures which excludes or restricts the execution of orders of a member of a payment system in accordance with the Payment Services, Services for Issuing Electronic Money and Payment Systems Act.[95]

In addition, application of such early intervention measures shall not, *per se*, make it possible for anyone to:

(i) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by a subsidiary, the obligations of which are guaranteed or otherwise supported by a group entity of any group entity which includes cross-default provisions;

(ii) affect any contractual rights of the institution subject to the early intervention measures or any group entity

[95] *Zakon o plačilnih storitvah, storitvah izdajanja elektronskega denarja in plačilnih sistemih* (Official Gazette of the RS, no. 7/18 et seq.

in relation to a contract which includes cross-default provisions;

(iii) affect any contractual rights of the institution subject to the early intervention measures or any group entity in relation to a contract which includes cross-default provisions.

1.2.5.4 Bail-in tool with respect to derivatives and other financial contracts

In case the conditions for opening of resolution proceedings are met, the Bank of Slovenia may apply the bail-in tool (*i.e.*, the write-down or conversion) to eligible obligations of an institution, subject to the safeguards set out below. Eligible obligations include also claims under Individual Contracts, to the extent that such claims are not secured liabilities as set out in Article 101 (2) ZRPPB-1 or Article 27 (3) SRM-Regulation.

Pursuant to Article 105 (1) ZRPPB-1 in conjunction with Article 105 (2) ZRPPB-1, Bank of Slovenia shall exercise the bail-in tool in relation to a liability arising from a derivative[96] or other financial contract[97] only upon or after closing-out the derivatives / other financial contracts.

For the purposes of applying Article 105 ZRPPB-1 Bank of Slovenia has the resolution power to close out and terminate derivatives contracts and other financial contracts. In case the resolution conditions are met, Bank of Slovenia should close-out derivatives and other financial contracts for the purpose of a bail-in (Article 105 (2) ZRPPB-1), unless claims under derivatives transactions or other financial contracts are excluded from bail-in pursuant to Article 102 ZRPPB-1.

Derivatives and other financial contracts that are entered into under a framework contract containing a netting agreement are subject to the protection of Article 105 ZRPPB-1.

In case that derivatives or other financial contracts are subject to a close-out netting arrangement, Bank of Slovenia or the independent valuer appointed by the Bank of Slovenia shall

[96] Defined by reference to point 5 Article 2 of Regulation (EU) No 648/2012, which in turn refers to financial instruments as set out in points 4 to 10 of Section C of Annex I MiFID II.

[97] We note that Article 105 (2) ZRPPB-1 uses the term other contracts on financial instruments, which is not a defined term under the ZRPPB-1. We believe that the term should be interpreted in accordance with the definition of financial contract provided Article 2 (1) no 100 BRRD, taking into account that ZRPPB-1 is the implementing act of BRRD. In addition, the same definition is provided in Article 7 (1) no 12 ZBan-3.

calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (Article 105 (3) ZRPPB-1). This net-amount should then be the basis for application of the bail-in tool. However, according to Article 105 (4) ZRPPB-1, Bank of Slovenia shall determine the value of liabilities arising from derivatives or other financial contracts in accordance with the following:

(A) appropriate methodologies for determining the value of classes of derivatives / other financial contracts, including transactions that are subject to netting agreements;

(B) principles for establishing the relevant point in time at which the value of a derivative position / position under another financial contract should be established; and

(C) appropriate methodologies for comparing the destruction in value that would arise from the close out and bail-in of derivatives / other financial contracts with the amount of losses that would be borne by derivatives / other financial contracts in a bail-in.

Article 105 ZRPPB-1 is supplemented by Regulatory Technical Standards (RTS) in form of a Commission Delegated Regulation supplementing Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms with regard to regulatory technical standards for methodologies and principles on the valuation of liabilities arising from derivatives (the "**Commission Delegated Regulation**") specifying methodologies and the principles referred to in points (A) to (C) above.

According to the Commission Delegated Regulation,

(i) as to (A) above: the RTS follow an approach whereby resolution authorities must respect the perimeter of the relevant netting arrangement (no "cherry picking") but apply a statutory valuation methodology laid down in the RTS without having to consider the methodology laid down in each and every contract. The close-out amount will be assessed as an early termination amount based on the costs (or gains) that would be incurred by a counterparty replacing the contract.

Once the decision has been taken to place a credit institution under resolution and to use the bail-in tool, the resolution authority will notify its decision to close-out contracts to the derivative counterparties and will give them a deadline to provide evidence of commercially reasonable replacement trades. Where evidence about such replacement trades has been provided within the deadline, they shall be endorsed by the resolution authority in determining the close-out amount.

In contrast, if no replacement trade or no commercially reasonable trade has been filed within the deadline, resolution authorities shall apply a valuation based on mid-prices and reasonable replacement costs calculated using bid-offer spreads adjusted to the exposure size and creditworthiness of the counterparty;

(ii) as to (B) above: resolution authorities will establish the value of derivative liabilities as at the close-out or as at the date when a price is available in the market for the contract or the underlying assets.

However, where resolution authorities decide under the prevailing circumstances to carry out a provisional valuation rather than a final one, the resolution authority or the valuer will be able to establish its valuation prior to the reference date mentioned above, based on estimates of replacement costs after taking into account the market conditions prevailing at that time. The valuation will subsequently be updated and may give rise, where justified, to either an adjustment to the creditors' treatment or creditor compensation pursuant to Article 74 of the BRRD; and

(iii) as to (C) above: before taking the decision to close-out derivative netting sets, authorities will need to consider whether the loss-absorption capacity which will be liberated from the derivative contracts being closed out and bailed in will be offset by additional costs that would result from the decision to close-out. If that is the case they may consider activating the option provided for in Article 44 (3)(d) of the BRRD and exempt the contracts from close-out and bail-in on the ground that "the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in".

The RTS specify the terms of this comparison and, in particular, list a number of elements to be considered as a source of destruction in value, such as the replacement costs which are incurred by the counterparty, re-hedging costs for the firm under resolution, or a deteriorated franchise value for the firm under resolution.

1.2.5.5 Protection in case of partial transfer of assets

Article 154 ZRPPB-1, implementing Article 77 BRRD, provides certain safeguards with respect to resolution measures adopted by the Bank of Slovenia in order to protect netting agreements.

This provision shall prevent cherry picking by the Bank of Slovenia that could potentially lead to situations where an Individual Contract (from the institution's point of view) "in the money" would be transferred to a new entity whereas Individual Contracts (from the institution's point of view) "out of the money" would remain with the remainder of the institution intended to be liquidated or be transferred to a "bad bank" / wind down unit.

Pursuant to Article 154 ZRPPB-1, the purpose of an appropriate protection of a title transfer financial collateral arrangement, a set-off arrangement or a netting agreement, is to prevent

(i) the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution under resolution and another person; and

(ii) the modification or termination of rights and liabilities that are protected under such a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement through the use of ancillary powers.

We note, for the sake of completeness, that Article 154 of ZRPPB-1 *prima facie* appears to be more restrictive in its provision of safeguards in case of partial transfer of assets when compared to Article 77 of BRRD. While Article 77 of BRRD provides protection for title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement from modification or termination of rights and liabilities through the use of ancillary powers, ZRPPB-1 appears to limit the scope of the safeguards to the ancillary power to cancel or modify the terms of a contract or to substitute its recipient (see Article 146 (6) ZRPPB-1). We believe, however (albeit without any judicial practice) that ZRPPB-1 should be interpreted in accordance with the provisions and principles of BRRD and that limitations upon the scope of safeguards for netting arrangements were not the intention of the Slovenian legislator when adopting the ZRPPB-1.[98]

1.2.5.6 Resolution powers

In order to be able to exercise the rights mentioned above, Bank of Slovenia has been granted certain resolution powers as outlined in Articles 149 to 151 ZRPPB-1.

Such additional powers may, in connection with Individual Contracts, include the powers to:

(i) suspend any payment or delivery obligations pursuant to any contract to which an institution is a party (Article 149 ZRPPB-1);

(ii) restrict creditors of an institution from enforcing security interests in relation to any assets of that institution (Article 150 ZRPPB-1); or

(iii) suspend the termination rights of any party to a contract with an institution, provided that the payment and delivery obligations and the provision of collateral continue to be performed Article 151 ZRPPB-1),

in each case, from the publication of a notice of the suspension until midnight at the end of the business day following that publication.

With regard to the power set out in (ii) above, we note that Article 150 ZRPPB-1 transposes Article 70 BRRD, however, BRRD appears narrower and stipulates that resolution authorities shall have the power to restrict secured creditors from enforcing security interests, whereas the text of Article 150

[98] We believe such interpretation is supported by the explanatory notes of the ZRPPB-1, according to which Section 154 implements Articles 76 – 79 of BRRD, without mentioning any deviations or addressing seemingly more limited scope of implementation (see Predlog zakona o reševanju in prisilnem prenehanju bank from 25 February 2021, explanatory notes regarding Section 154, p. 230)

ZRPPB-1 stipulates that Bank of Slovenia may restrict the creditors' right of enforcement of their claims as regards the assets of the Bank, without limiting such power to security arrangements. We note that previous version of ZRPPB (implementing Article 70 BRRD in Article 128; Official Gazette of the RS, no. 44/16 et seq.) referred 'only' to enforcement of security interest (*dogovorov o jamstvu*), in accordance with BRRD. It is unclear whether the Bank of Slovenia and/or Slovenian courts would consider Article 150 ZRPPB-1 as extending beyond the scope of the BRRD and would apply it within the text of BRRD, or if a broader (literal) interpretation would prevail. We believe that Article 150 ZRPPB-1 should be interpreted within the limitations stipulated by BRRD (nothing, however, that this is expressed in the absence of any judicial practice to support our position). We base this view on Articles 137, 149 and 151 ZRPPB-1, which already regulate netting arrangements in accordance with BRRD. Therefore, it should follow that Bank of Slovenia could exercise its powers under said Articles if it wanted to influence netting arrangements and/or termination provisions and, from the perspective of logical interpretation, no provision deviating from BRRD would be required in order to achieve this end. There is, however, a risk that this interpretation would not prevail and the Bank of Slovenia and/or Slovenian courts would, with reference to the said provision, restrict enforcement of early termination and close-out netting provisions of the EFET General Agreement.

In addition, with regard to the power set out in (iii) above, we note that Article 151 ZRPPB-1, transposing Article 71 BRRD, does not contain a pre-condition that the payment and delivery obligations and the provision of collateral continue to be performed. This power of the Bank of Slovenia would prevail over the provisions of the EFET General Agreement, irrespective of the law applicable to it.

1.3 Types of proceedings under Slovenian law that may affect creditors' rights in respect of Insurance Undertakings

1.3.1 General

The rules governing insolvency of Insurance Undertakings (other than Re-Insurance Undertakings) are set forth in Articles 410 to 426 of the Insurance Act (*Zakon o zavarovalništu*, "**ZZavar-1**").[99] Pursuant to Article 410 of ZZavar-1, only bankruptcy proceedings (*stečajni postopek*), but not

[99] Official Gazette of the RS, no. 93/15 et seq.

compulsory settlement proceedings (*postopek prisilne poravnave*) under ZFPPIPP may be instituted against an Insurance Undertaking (other than Re-Insurance Undertaking).

In addition to bankruptcy proceedings, ZZavar-1 provides for certain reorganization measures, namely extraordinary administration (*izredna uprava*) that – although not constituting insolvency proceedings – could fall under § 10.5(c)(iv) of the EFET General Agreement, to the extent such regulatory measures are likely to prevent the relevant counterparty from performing its payment or delivery obligations under the EFET General Agreement when due, and / or § 10.5(c)(vi) of the EFET General Agreement and / or § 10.5(c)(viii) of the EFET General Agreement.

1.3.2 Bankruptcy proceedings

Unless ZZavar-1 provides otherwise, the provisions of ZFPPIPP also apply to bankruptcy proceedings of Insurance Undertakings.

Pursuant to Article 413 of ZZavar-1 only the Insurance Supervision Agency (*Agencija za zavarovalni nadzor*, "**AZN**"), as the insurance supervisory authority, may file for the institution of bankruptcy proceedings against an Insurance Undertaking (other than a Re-Insurance Undertaking).

1.3.3 Extraordinary administration

AZN may issue a decision on extraordinary administration under Chapter 7.7 ZZavar-1 (or a decision to increase the share capital, or both measures by the same decision) in case there is a significant breach of the rules on risk management of Insurance Undertakings, or where the capital adequacy or liquidity of an Insurance Undertaking is jeopardised, in particular if:

(i) the relevant Insurance Undertaking failed to implement additional measures to ensure appropriate system of governance within the time limits set by AZN;

(ii) the relevant Insurance Undertaking does not meet the solvency capital requirement, despite additional measures;

(iii) the continuation of Insurance Undertaking's business could jeopardise its liquidity or capital adequacy or safety of its policy holders, insured persons or other beneficiaries.

As of the date of issuance of the decision on the extraordinary administration, all powers of the management board, the supervisory board and the general meeting cease (except the power of the general meeting to adopt the decision on the increase of share capital pursuant to Article 325 ZZavar-1) and AZN appoints two or more extraordinary administrators (*izredni upravitelji*) that are member of the extraordinary management board of the

Insurance Undertaking under extraordinary administration. AZN exercises the powers of the Insurance Undertakings supervisory board and powers of the general meeting. AZN is also authorized to give binding instructions to the extraordinary administrators (Article 321 ZZavar-1).

Duration of extraordinary administration is determined by AZN and may generally not exceed the period of one year (Article 316 ZZavar-1). AZN may extend extraordinary administration for additional 6 months, if it believes that the Insurance Undertaking will be able to achieve the solvency capital requirement, safety of its policyholders, insured persons and other beneficiaries and provided that the Insurance Undertaking does not meet the conditions for opening of bankruptcy proceedings.

If AZN assesses that the extraordinary administration did not improve the financial situation of the Insurance Undertaking to the extent that the Insurance Undertaking would meet the solvency capital requirement and become able to pay all its debts as they fall due, it issues a decision on the commencement of court ordered liquidation (*prisilna likvidacija*) or a decision that conditions for initiation of bankruptcy proceedings are met.

1.4 Types of proceedings under Slovenian law that may affect creditors' rights in respect of Investment Firms / Brokerage Companies

The rules governing insolvency of a brokerage company (*borznoposredniška družba*) are set forth in the ZTFI-1. Pursuant to ZTFI-1, only bankruptcy proceedings (*stečajni postopek*), but not compulsory settlement proceedings (*postopek prisilne poravnave*) under ZFPPIPP may be instituted against a brokerage company (see Articles 188 and 189 ZTFI-1).

Unless ZTFI-1 provides otherwise, the provisions of ZFPPIPP also apply to bankruptcy proceedings of brokerage companies.

Special rules are provided in Articles 190 to 193 of ZTFI-1. ATVP as the brokerage company supervisory authority, may *inter alia* file for the institution of bankruptcy proceedings against a brokerage company and refer to the court the bankruptcy administrator. Pursuant to Article 192 ZTFI-1, notwithstanding the provisions of ZFPPIPP, the rights of separation (*izločitvene pravice*) and legitimate claims of investors pursuant to ZTFI-1 shall be deemed to have been registered in the insolvency proceedings on the date on which ATVP submits to the court the certified record pursuant to Article 457 ZTFI-1, which shall be treated in the subsequent proceedings as the initial list of the tested claims (*osnovni seznam preizkušenih terjatev*) within the meaning of ZFPPIPP.

In addition to bankruptcy proceedings, ZTFI-1 provides for certain additional regulatory measures. Notably, ATVP is authorized to remove and replace members of the management board and appoint one (or more) special representative(s) (*posebnega pooblaščenca*) with powers as granted by the ATVP (up to all powers that management has under statutes) to act as replacement of, or to work together with, the management, generally maximum for the period of one year.[100]

Furthermore, pursuant to Article 293 ZRPPB-1, the General and Resolution chapters of the ZRPPB-1 are by analogy also applicable to the reorganization of Investment Firms. ATVP acts the competent resolution authority with respect to Investment Firms. This analogous regime is supposedly only temporary, until a specific act is adopted for resolution of Investment Firms. We note that under the present legal framework resolution measures in respect of Investment Firms are underregulated and it is unclear how would be applied in practice. In the absence of any conclusive regulatory or judicial guidance we however believe that resolution tools (*i.e.*, write-down and conversion of capital instruments or qualified liabilities or capital instruments, sale of business, establishment of a bridge institution and asset separation tool) also apply to Investment Firms.

1.5 Types of Proceedings under Slovenian Law that may affect creditors' rights in respect of Pension Fund Management Company

Pursuant to the Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*, "**ZPIZ-2**"), Pension Fund Management Company (*upravljavci pokojninskega sklada*) may be either Banks, Insurance Undertakings or pension companies (*pokojninska družba*). With respect to Banks please refer to our considerations in 1.2 above of this Appendix ./E and with respect to Insurance Undertakings to 1.3 above of Appendix ./E for types of proceedings under Slovenian law that may affect creditors' rights. With respect to pension companies Article 338 ZPIZ-2 explicitly provides that the winding-up of pension companies is subject to application of provisions of ZZavar-1 on bankruptcy (and winding-up). Accordingly, applying Article 410 ZZavar-1, only bankruptcy proceedings (*stečajni postopek*), but not compulsory settlement proceedings (*postopek prisilne poravnave*) may not be initiated against pension companies.

Pursuant to Article 329 (2) ZPIZ-2 analogous application of provisions of ZZavar-1 on matters of supervision over Insurance Undertakings is excluded (*i.e.,* Chapter 7 of ZZavar-1), therefore, provisions on extraordinary administration (*izredna uprava*) are excluded in case of pension companies.

1.6 Types of Proceedings under Slovenian Law that may affect creditors' rights in respect of Bank of Slovenia

The Bank of Slovenia Act (*Zakon o banki Slovenije*, "**ZBS-1**") does not contain any provisions regarding the question of whether insolvency proceedings can be opened against the Bank of Slovenia.

[100] Pursuant to Article 347 (3) ZTFI-1, ATVP may when applying its supervisory powers under Article 340 (4) ZTFI-1 apply provisions of Articles 264 to 295 ZBan-3 (and 307 to 311 ZBan-3) *mutatis mutandis*.

We believe that the current insolvency legislation does not apply to the Bank of Slovenia. While ZFPPIPP in principle applies to all legal entities (unless expressly excluded) and Bank of Slovenia is a *sui generis* legal entity of public law[101] (regarding insolvency of which no specific provisions can be found in Slovenian legislation), we nevertheless believe that Slovenian insolvency legislation does not apply to the Bank of Slovenia. We base this conclusion on the following considerations. First, as noted in 1.1.2 above, purpose of bankruptcy proceedings is the termination of the insolvent debtor, liquidation of its assets and a (pro rata) distribution of the resultant proceeds to the creditors. Therefore, application of general insolvency rules could mean termination of Bank of Slovenia which, in our view, would be fundamentally contrary to the Slovenian sovereignty and the order set out by the Constitution of the Republic of Slovenia which stipulates that Republic of Slovenia shall have a central bank. The Constitution contains no provisions on termination of said central bank. Secondly, ZBS-1 stipulates that any deficit (of Bank of Slovenia) of income over expenditures shall be covered from the general reserves of the Bank of Slovenia. To the extent that the general reserves are not sufficient to cover such deficit, the deficit shall be covered from the budget of the republic of Slovenia (Article 51 ZBS-1). Therefore, obligations of Bank of Slovenia that cannot be covered from its assets shall be covered by the Republic of Slovenia and consequently no insolvency of Bank of Slovenia could occur, unless Republic of Slovenia itself was insolvent. We however believe that current insolvency legislation does not apply to the Republic of Slovenia and any future proceedings would most likely be subject to specific legislation that has not yet been adopted.

1.7 Types of Proceedings under Slovenian Law that may affect creditors' rights in respect of SDH

The Slovenian Sovereign Holding Act (*Zakon o Slovenskem državnem holding*, "**ZSDH-1**") does not contain any specific provisions on the opening of insolvency proceedings against SDH.

In the absence of any specific provisions in respect of the opening of insolvency proceedings, restructuring or reorganisation proceedings against SDH, we believe, noting absence of any jurisprudence on the matter, that the general rules on insolvency proceedings, restructuring proceedings and reorganisation proceedings against Corporations as set out in the ZFPPIPP should apply *mutatis mutandis* to SDH. We note that ZSDH-1 explicitly excludes only the application of Slovenian Financial Conglomerates Act (*Zakon o finančnih konglomeratih*). It further stipulates that provisions of ZGD-1 are applicable, unless expressly excluded in regards to individual matters. Since SDH is organised as a joint stock corporation, provisions of ZFPPIPP should in our view generally apply. Therefore, please refer to the statements made under 1.1 above. However, specific rules apply in relation to assets, rights and obligations transferred from the Bank Asset Management Company (*Družba za upravljanje terjatev bank*), to SDH, as its legal successor, at the end of

[101] Article 1 (2) ZBS-1.

2022. In this respect, Article 36.a ZSDH-1 excludes the application of certain provisions of ZFPPIPP for all transferred assets (primarily relating to exemptions on restrictions on affiliated entities, *e.g.*, membership in creditors committee (*upniški odbor*), voting on compulsory settlement proceedings) and further provides that in relation to certain specific types of assets, certain rules of ZFPPIPP, OZ or ZGD-1 do not apply.

1.8 Types of Proceedings under Slovenian Law that may affect creditors' rights in respect of Republic of Slovenia and Municipalities

There are no specific provisions on the insolvency proceedings for the Republic of Slovenia and its Municipalities in Slovenian law.

We believe that current insolvency legislation does not apply to the Republic of Slovenia and its Municipalities. While ZFPPIPP in principle applies to all legal entities (unless expressly excluded by the law regulating such entity) – and the Republic of Slovenia and its Municipalities are legal entities of public law (and the Constitution of the Republic of Slovenia does not expressly exclude the application of ZFPPIPP (nor does any other law) with respect thereto) –, we nevertheless believe that Slovenian insolvency legislation does not apply to the Republic of Slovenian and its Municipalities. As noted in 1.1.2 above, the purpose (and ultimate consequence) of bankruptcy proceedings is the termination of the insolvent debtor, liquidation of its assets and a (pro rata) distribution of the resultant proceeds to the creditors. Therefore, the application of general insolvency rules would logically result in the termination of Republic of Slovenia which is, in our view, deeply at odds with the concept of sovereignty of the Republic of Slovenia and its constitutional order. We believe that the Republic of Slovenia would most likely seek to make use of its legislative powers to amend (or introduce) legislative protections (see also at 9.5.2 below) – if and when those are needed.

2 Specific provisions governing Close-out Netting Provisions

In this Section 2, we analyse the Slovenian law rules relevant in respect of enforceability (in the context of insolvency proceedings) of Close-out Netting Provisions (as defined in Section 7.1 above).

Under Slovenian law, the subject-matter is governed by (i) generally, the provisions of ZFPPIPP (see 2.2 below), (ii) with respect to specific counterparties (and in the context of financial collateral arrangements), by ZFZ (see 2.3 below) and (iii) with respect to credit institutions (as set out in Article 2 ZRPPB-1) by ZRPPB-1 (see 1.2 above and 3.2.4 below Appendix ./E)

2.1 Close-out netting provisions from the perspective of Slovenian law - generalities

2.1.1 Early Termination / Automatic Termination

The general Slovenian insolvency regime (as set out in ZFPPIPP) does not expressly regulate (the consequences of opening of insolvency proceedings on) early termination rights. In our view, the correct interpretation of ZFPPIPP is that, to the extent not modified by virtue of legal effects of opening of insolvency proceedings[102] (which will override any contractual arrangements to the contrary), contractual provisions – including contractually agreed **rights to unilaterally terminate** a contract or contractual provisions stipulating **automatic termination** of a contract upon occurrence of certain events – **will remain in force** notwithstanding the opening of (Slovenian) insolvency proceedings against a party.

In particular, the above conclusion (*i.e.*, that contractual early termination provisions should generally not be affected by the opening of insolvency proceedings against a party) applies in respect of **mutually unfulfilled (executory) contracts**[103] to which, by virtue of an express provision of ZFPPIPP, the general consequences of opening of insolvency proceedings do not apply. In such constellations, the opening of insolvency proceedings will result in a special unilateral termination right of the insolvent debtor[104] (*i.e.*, applicable also in cases where no such right was agreed in the relevant contract). However, it follows – both from the wording of ZFPPIPP[105] as well as from the Slovenian judicial practice[106] – that such statutory termination right does not affect a termination right of the counterparty to the insolvent debtor (to the extent agreed in the relevant contract).

Lastly, it is in our view clear that early termination rights (vesting with the counterparty of the insolvent debtor) and automatic termination provisions will be recognized (*i.e.*, not affected by the opening of insolvency proceedings) in the context of arrangements fulfilling the criteria of "netting arrangements" within the meaning of ZFPPIPP (see 2.2.1 of this Appendix ./E below and 7.1 and 7.2 above). This follows, in particular, from (i) the wording of the relevant provisions (where early termination rights / automatic termination provisions are expressed to form an integral part of a "netting arrangement") and (ii) the legislative purpose behind the relevant

[102] See 1.1 of this Appendix ./E.

[103] In our view, the EFET General Agreements (in a typical constellation where Early Termination would apply) would – in the absence of the netting safe harbour within the meaning of ZFPPIPP – qualify as executory contracts within the meaning of ZFPPIPP.

[104] This right can be exercised, in the context of compulsory settlement proceedings, within one month, and, in the context of bankruptcy proceedings, within three months from the date of opening; the termination right is subject to court approval – the court will approve such termination if (a) in the context of compulsory settlement proceedings, this is in line with the compulsory settlement/reorganisation plan) and (b) in the context of bankruptcy, if this will result in an increase (or prevent a decrease) of bankruptcy estate).

[105] E.g., pursuant to Article 268(7), the general consequences of termination of an executory contract (by the insolvent debtor) will also apply in the event of termination "*by the counterparty based on general rules of civil law*" (which, in our view, also includes termination based on contractual pre-agreement).

[106] See, *e.g.*, judgment of the High Court in Ljubljana No. I Cpg 1343/2013.

provisions[107] (which was clearly to enable the functioning of early termination – being one of the key features of netting arrangements).

2.1.2 Netting provisions

As discussed in Section 1.1.2 of this Appendix ./E, Slovenian insolvency regime provides for a specific set of rules which govern the set-off of mutual receivables existing as between the insolvent debtor and its counterparty as at the date of opening of insolvency proceedings against the former. However, as noted, these rules do not apply in respect of arrangements benefitting from the 'netting safe harbour' (see 2.2.1 of this Appendix ./E below and 7.1 and 7.2 above); given that 'netting' (*i.e.*, calculation, in accordance with pre-defined rules, of a single termination amount payable by one party to the other) is central to the definition of a 'netting arrangement' within the meaning of ZFPPIPP, we believe that the Netting Provisions (insofar as providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount) should be enforceable under the laws of Slovenia, subject to section 2.2.2 of this Appendix ./E and 7.4.2 above.

2.2 Insolvency exemption in respect of netting arrangements – ZFPPIPP

2.2.1 Beyond the scope of the Provisions on Netting Agreements

2.2.1.1 General insolvency exemption

In the context of netting arrangements in contractual constellations where the Parties have chosen Slovenian law as the law governing the EFET General Agreement (or in cases where no international element is present, exceptions from the general effects of opening of insolvency (and pre-insolvency) proceedings are provided in relation to "netting arrangements" (*dogovori o izravnavi*) governing either (a) "qualified financial contracts" (*kvalificirane finančne pogodbe*) or (b) "other qualified contracts" (*druge kvalificirane pogodbe*) (all as defined under Articles 24a and 24b of ZFPPIPP, respectively).[108]

Specifically, Article 164a ZFPPIPP (regarding compulsory settlement) and Article 264a ZFPPIPP (regarding bankruptcy proceeding) provide that, in relation to such netting arrangements:

[107] See, *e.g.*, explanatory notes of the Slovenian legislator (Predlog zakona o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP-C, 15 April 2010, p. 6, 36).

[108] Broadly, the ZFPPIPP close-out netting provisions are based on the ISA Model Netting Act 2006.

(i) neither the commencement of an insolvency proceedings nor an approved compulsory settlement shall have any effect;

(ii) rules set out in such netting arrangement shall apply;[109] and

(iii) general rules of insolvency proceeding regarding the set-off (see 1.1.2 above and possibility of the insolvent debtor to unilaterally "cherry-pick" (*i.e.*, selectively terminate) unperformed (executory) contracts (*vzajemno neizpolnjene dvostranske pogodbe*), are explicitly excluded.

By virtue of Article 44.l ZFPPIPP, the same applies in respect of preventive restructuring proceedings.

2.2.1.2 Elements of a netting arrangement qualifying for insolvency exemption

(a) Netting arrangements

In order to qualify as a "netting arrangement" within the meaning of ZFPPIPP, a contractual arrangement must (i) be incorporated in a qualified financial contract or other qualified contract or in a master agreement entered into between the parties in relation to 'qualified financial contracts' (see (b) below) or 'other qualified contract' (see (c) below) and (ii) contain the following rules that shall apply in case of insolvency or other events qualifying as an event of default under such netting arrangements or qualified financial contracts with regard to the contractual party:

(i) Rules under which the agreement is deemed terminated or under which the non-defaulting party holds the right to terminate the agreement or under which the obligations of the parties shall accelerate with occurrence of such event;

(ii) Rules on calculation of netting, market, liquidation or replacement monetary value of

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[109] For the sake of completeness, if, after the netting of mutual rights and obligations in accordance with the rules as set out in the netting arrangement, a net monetary claim would arise against the insolvent debtor from the other party to the contract, the approved compulsory settlement / bankruptcy proceeding shall have effect in respect of that claim.

counterclaims at the moment of termination or acceleration of maturity as provided in the preceding subparagraph;

(iii) Rules on conversion of amounts due into single currency, if such obligations are denominated in difference currencies; and

(iv) Rules on the determination of a net monetary amount owing between the contractual parties, upon netting of the obligations of the contractual parties, valued in accordance with the second and third indent above.

Notably, both pursuant to the grammatical interpretation of Article 24a ZFPPIPP and according to Slovenian court practice,[110] <u>all (and not only some of) the above elements</u> must be present in a particular arrangement in order for it to qualify as a 'netting arrangement' within the meaning of ZFPPIPP.

(b) Qualified financial contracts

Pursuant to Article 24a (1) ZFPPIPP, a "qualified financial contract" is a contract referring to (i) financial instruments, as defined under the ZTFI-1 - which is broadly equivalent to the definition MiFID II, or (ii) derivative financial instruments relating to either commodities or emission rights as their underlying instrument, which may be settled by delivery of the underlying instrument.

(c) Other qualified contracts

Under Article 24b ZFPPIPP, other qualified contracts are (i) individual or framework agreements against consideration *(odplačne pogodbe*), (ii) referring to energy trading or trading with other energy sources (*energenti*), with (iii) netting arrangements being customary for respective types of trading.

2.2.2 Rome I Regulation

Irrespective of 2.1.1 above:

[110] E.g., High Court in Ljubljana No. I Cpg 1343/2013.

(i) Under Rome I, enforceability of any contractual provisions may nonetheless be refused, provided that these are manifestly incompatible with the public policy (Article 21 of Rome I), or override mandatory provisions of the law, regarded as crucial by a country for safeguarding its public interests (Section 9 of Rome I). In relation to matters where Rome I does not apply: pursuant to Section 5 of the ZMZPP, the law governing a contract shall not be applied in case the effect of its application would be incompatible with the public policy (*ordre public*) of the Republic of Slovenia.

(ii) In in instances referred to in Article 3 (3) Rome I, in cases where all other elements relevant to the situation at the time of the choice of law are located in a country other than the country whose law has been chosen, the choice of law of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

It follows, in our view, that, in cases where Slovenian counterparties to a netting arrangement have chosen foreign law as the law governing their arrangement, we cannot rule out that a Slovenian court – if competent to assess the matter (*e.g.*, in the context of insolvency proceedings opened against one of the counterparties in Slovenia) – would assess such an arrangement against all mandatory rules of Slovenian law.

2.3 ZFZ

In the context financial collateral arrangements within the meaning of the Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements ("**Financial Collateral Directive**"), close-out netting is governed by the Slovenian Financial Collateral Act (*Zakon o finančnih zavarovanjih*, "**ZFZ**").[111] In terms of personal scope, ZFZ only applies in respect of arrangements between specific eligible counterparties.[112]

ZFZ defines close-out netting[113] as an arrangement whereby "upon the occurrence of a collateral enforcement event (*nastanek pogojev za izvršitev zavarovanja*), all non-matured secured obligations are deemed to mature, all non-monetary obligations are converted into monetary obligations and may be mutually set-off at their current values".

According to Article 12 ZFZ, "close-out set-off" arrangements "shall remain valid notwithstanding any judicial or other attachment or the commencement or

[111] Official Gazette of the RS, no. 47/2004 et seq.
[112] See Appendix ./G below.
[113] We note that ZFZ uses the term "close-out *set-off*" (*dogovor o pobotu zaradi predčasnega prenehanja*) – this is inconsistent with the relevant term used by ZFPPIPP (*dogovor o izravnavi – netting arrangement*) in order to differentiate netting from (statutory) set-off. However, this does not impact our analysis.

continuation of compulsory settlement, bankruptcy or compulsory liquidation proceedings in respect of the collateral provider and/or the collateral taker; or any assignment, encumbrance or otherwise disposition by the collateral taker in respect of the secured claim."

It follows that, to the extent entered into between eligible counterparties, arrangements containing provisions regarding (i) deemed maturity of non-matured mutual obligations, (ii) conversion of non-monetary claims into monetary claims and (iii) set-off of resulting amounts (all upon the occurrence of a collateral enforcement event) should be subject to safe harbour in respect of (Slovenia) insolvency and enforcement proceedings.

2.4 Note on interplay between ZFZ and ZFPPIPP

The interplay between the regulation of close-out netting arrangements under ZFZ and ZFPPIPP as well as scope of the respective exemption pursuant to ZFZ are not entirely clear. Notably, the wording of ZFZ (i) does not expressly stipulate that the netting arrangement needs to be included in a financial collateral arrangement (within the meaning of ZFZ) to be eligible for an exemption under Article 12 ZFZ; and (ii) appears not to require that all elements of a 'netting arrangement' within the meaning of ZFPPIPP (see 2.2.1.2 of this Appendix ./E above) need to be present in order for an arrangement to qualify for an insolvency safe harbour under Slovenian law.

We believe that good arguments can be made in support of an interpretation under which close-out netting arrangements are exempt from certain general rules in insolvency proceedings (i) under ZFZ – to the extent included in a financial collateral arrangement and (ii) under ZFPPIPP – to the extent specified in Article 164a and Article 264a (in connection with Articles 24a and 24b ZFPPIPP); this would also appear to be consistent with the *ratione materiae* scope of each of the respective acts. However, such an interpretation has not been confirmed by Slovenian courts and we cannot rule out that, in the event of a dispute, the courts would (in all instances when faced with an assessment of a netting arrangement in the context of insolvency (or pre-insolvency) proceedings under Slovenian law), apply the general requirements set out in ZFPPIPP (*e.g.*, by testing whether a particular arrangement meets the criteria for a netting arrangement within the meaning of ZFPPIPP – see 2.2.1.2 above) also in respect of arrangements (purported to be) governed by ZFZ.

3 Applicable insolvency law

Slovenian international insolvency law is governed by the Regulation and the provisions on international insolvency law set out in Chapter 8 ZFPPIPP (the "**Provisions on International Insolvency Law**").

A prerequisite for the application of the Regulation or the Provisions on International Insolvency Law is that insolvency proceedings have a cross-border element. Insolvency proceedings without a cross-border element are solely governed by Slovenian substantive insolvency law excluding the Regulation and the Provisions on International Insolvency Law.

3.1 The Regulation

3.1.1 Scope of application of the Regulation

The Regulation is directly applicable in Slovenia and throughout the European Union except for Denmark (each such State, a "**Regulation State**").

It applies to collective insolvency proceedings (as defined in Annex A of the Regulation) that are opened against a debtor, which has its COMI situated within a Regulation State. In the case of a company or legal person, it is refutably presumed that the place of the registered office is the COMI (Article 3 (1) of the Regulation).

The Regulation shall not apply to insolvency proceedings concerning (a) insurance undertakings, (b) credit institutions (see below), (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of banks ("**Directive 2001/24/EC**"), or (d) collective investment undertakings (Article 1 (2) of the Regulation).

Directive 2001/24/EC also applies to investment firms pursuant to Article 4 (1) no 2 CRR and their branches located in Member States other than those in which they have their head offices (Article 1 (3) of Directive 2001/24/EC). It follows from this that investment firms pursuant to Article 4 (1) no 2 CRR are covered by Directive 2001/24/EC and thus not subject to the Regulation.

Since certain Investment Firms – in contrast to investment firms pursuant to Article 4 (1) no 2 CRR – are not covered by Directive 2001/24/EC, the Regulation applies to Investment Firms as far as they do not qualify as investment firms pursuant to Article 4 (1) no 2 CRR. Further, the Regulation does not expressly exclude Pension Fund Management Companies from its scope of application (see Article 1 (2) of the Regulation).

In respect of this Opinion, the Regulation applies to insolvency proceedings opened in Slovenia against Corporations, Financial Institutions, Investment Firms, Partnerships, Pension Fund Management Companies and Re-Insurance Undertakings, which have their COMI situated in a Regulation State.

3.1.2 International jurisdiction

Pursuant to Article 3 (1) of the Regulation, the courts of the Regulation State within the territory of which the debtor's COMI is situated shall have jurisdiction to open so-called main insolvency proceedings. The conditions for the opening of such proceedings shall be determined by the law of that

Regulation State. The effects of main insolvency proceedings generally cover all of the debtor's assets located in Regulation States. Any judgement opening insolvency proceedings handed down by a court of a Regulation State which has jurisdiction shall be recognized in all other Regulation States from the time it becomes effective in the State of the opening of proceedings. As a basic principle, main insolvency proceedings shall, with no further formalities, produce the same effects in any other Regulation State as under the law of the Regulation State of the opening of proceedings (Articles 19 and 20 of the Regulation). Article 33 of the Regulation contains an *ordre public* reservation.

Before the opening of main insolvency proceedings, territorial insolvency proceedings may be opened in another Regulation State if the debtor has an establishment in the territory of that other Regulation State and the conditions laid down by Article 3 (4) of the Regulation are met. For purposes of the Regulation, an "establishment" is any place of operations where the debtor carries out, or has carried out during the last three months prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets (Article 2 no 10 of the Regulation) The effects of those territorial insolvency proceedings shall be restricted to the assets of the debtor located in the territory of the latter Regulation State (Article 3 (2) of the Regulation). When main insolvency proceedings are opened, territorial insolvency proceedings become secondary insolvency proceedings (see below).

Article 34 of the Regulation provides that, after the opening of main insolvency proceedings, secondary insolvency proceedings may be initiated in another Regulation State in addition to / aside from the main proceedings, if the debtor has an establishment in that Regulation State. In this case, the debtor's insolvency does not have to be re-examined in respect of the secondary insolvency proceedings. The effects of secondary insolvency proceedings are restricted to the assets located in the Regulation State of the establishment.

The liquidator in the main proceedings has the right to request the opening of secondary proceedings. However, any other person or authority empowered to request the opening of insolvency proceedings under the law of the Regulation State within the territory of which the opening of secondary proceedings is requested, also has the right to request the opening of secondary proceedings (Article 37 (1) of the Regulation).

3.1.3 Substantive law in respect of close-out netting

The Regulation contains conflict of law rules in respect of insolvency proceedings having a cross-border element in a Regulation State.

Pursuant to Article 7 (1) of the Regulation, as a general rule, the effects of insolvency proceedings opened in a Regulation State shall be subject to the law of the Regulation State in which such proceedings are opened (*lex fori concursus*). This general rule applies to main insolvency proceedings and particular insolvency proceedings (Article 7 of the Regulation) as well as to secondary insolvency proceedings (Article 35 of the Regulation).

According to Article 7 (2) lit d and Article 7 (2) lit e of the Regulation, the law of the Regulation State in which such proceedings are opened shall determine in particular the conditions under which set-off may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

Hence, as an interim result, as far as the Regulation applies (see at 3.1.1 above), the termination of the EFET General Agreement and the *set-off* of all transactions entered into thereunder are governed by the law of the State in which proceedings are opened.

Article 8 to Article 18 of the Regulation contain special conflict of law rules that provide exemptions to the general rule set out in Article 7 and Article 35 of the Regulation.

Pursuant to Article 9 (1) of the Regulation, the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim. As with all other special conflict of law rules of the Regulation (Article 8 to Article 18), Article 9 of the Regulation is limited to Regulation States. For this reason, the law applicable to the debtor's claim must be the law of another Regulation State. If so, as far as mere set-off is concerned, the solvent party may also set off its claims if this is admissible under the law of the other Regulation State applicable to the insolvent debtor's claim.

The results of close-out netting are arguably economically equivalent to the results of set-off, but there is a technical difference in the contractual mechanism. Close-out netting is a process involving (i) the termination of open transactions on the occurrence of a pre-defined event, (ii) the liquidation of those transactions so as to attribute to them a value (usually either by reference to their market value or to the cost of replacing them) and (iii) the aggregation of the values attributed to those transactions, giving rise to a single net debt owed by one party to the other.

Article 9 (1) of the Regulation does not cover the termination and liquidation of the transactions. It only applies to the mere set-off after the termination and valuation of the transactions. Therefore, we believe that Article 9 (1) of the Regulation protects close-out netting only insofar as the claims resulting from the termination and liquidation of the transactions were already in a position to be set off at the time of the opening of the insolvency proceedings. This interpretation of Article 9 (1) of the Regulation is supported by the fact, that – contrary to Directive 2001/24/EC – the Regulation does not contain a specific rule in respect of netting agreements. It only deals with netting agreements in connection with payment or settlement systems and financial markets (Article 12 of the Regulation in connection with recital 71 of the Regulation).

In addition, a prerequisite for the application of Article 9 of the Regulation is that the claims were already in a position to be set off at the time of the opening of the insolvency proceedings, since Article 9 stipulates that the opening of insolvency proceedings shall not affect the (already existing) right of creditors to demand set-off.

In conclusion, as far as the Regulation applies (see at 3.1.1 above) and insolvency proceedings are opened in Slovenia, apart from mere set-off, Slovenian insolvency law (including the Conflict Rules (as defined at 3.2.1 and 3.3 below) as the *lex fori concursus* is to be applied to the Close-out Netting Provisions (as defined at 7.1 above) of the EFET General Agreement.

3.2 Slovenian law provisions on International Insolvency Law

3.2.1 General

The Provisions on International Insolvency Law shall only apply to insolvency proceedings having a cross-border element ("**International Insolvency Proceedings** ") insofar as the Regulation or international law does not provide otherwise (Article 449 ZFPPIPP). This means that the provisions of the Regulation shall take precedence over the Provisions on International Insolvency Law where the Regulation applies (see at 3.1.1 of this Appendix ./E above) and where the Regulation contains relevant conflict of law rules. Where the Regulation does not provide for a specific conflict of law rule (as is the case with close-out netting arrangements; see at 3.1.3 above), the *lex fori concursus* and thus the relevant Conflict Rules (as defined below) comprised in the Provisions on International Insolvency Law will apply. Insolvency proceedings without a cross-border element are solely governed by Slovenian substantive insolvency law excluding the Regulation and the Provisions on International Insolvency Law.

The level of international element that needs to be present in order to apply the Provisions on International Insolvency Law, however, remains yet to be clarified by the Slovenian courts. In the various scenarios that are conceivable (ranging from a "true" cross-border environment in transactions between an entity having its head or home office abroad and a Slovenian entity, via scenarios where the foreign entity would operate via its Slovenian Branch, scenarios where two Slovenian entities contract but one of them has at least one foreign branch (that may or may not be involved in the transactions under the relevant EFET General Agreement) to scenarios where the only foreign element is to be seen in some of the assets underlying the Individual Contracts, for example) it is difficult to predict where the line will finally be drawn by the Slovenian courts. The stronger the nexus to Slovenia (and, conversely, the more remote the international element) gets on the aforementioned sliding scale, the higher the likelihood that Slovenian courts will finally not resort to the law applicable by virtue of the Conflict Rules (as defined below), and Slovenian private international law, but will apply Slovenian substantive insolvency law (including the substantive netting privileges set out in Articles 24a and 24b ZFPPIPP; see at 7.3 for further details).

According to Article 479 ZFPPIPP, as a general principle, Slovenian substantive insolvency law shall be applicable to International Insolvency Proceedings and their effects, if insolvency proceedings are opened in Slovenia (*lex fori concursus*). In respect of these proceedings Slovenian substantive insolvency law shall determine in particular:

1. debtors against which insolvency proceedings may be brought on account of their capacity;

2. the assets which form part of the estate and the treatment of assets acquired by the debtor after the opening of the insolvency proceedings;

3. the respective powers of the debtor and the liquidator;

4. the conditions under which set-offs may be invoked;

5. the effects of insolvency proceedings on current contracts to which the debtor is party;

6. the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

7. the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

8. the rules governing the lodging, verification and admission of claims;

9. the rules governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;

10. the conditions for and the effects of closure of insolvency proceedings;

11. creditors' rights after the closure of insolvency proceedings;

12. who is to bear the costs and expenses incurred in the insolvency proceedings; and

13. the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Articles 480 to 484 ZFPPIPP contain exemptions to that general principle (*lex fori concursus*) by providing conflict of law rules that are in part mirroring those set out in the Regulation ("**Conflict Rules**").

For example, according to Article 480 ZFPPIPP (see also Article 11 (1) of the Regulation), the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the country within the territory of which the immoveable property is situated.

Notably, pursuant to Article 483 (1) ZFPPIPP, the legal consequences of insolvency proceedings for mutual rights and obligations in relation to contractual arrangements containing an international element and qualifying as "netting arrangements" within the meaning of ZFPPIPP, shall be governed by the law that applies to such contractual arrangements – even if not relating to contracts fulfilling the requirements of "qualified financial contracts" or "other qualified contracts" (see also 3.2.2 immediately below).

The Conflict Rules applicable to close-out netting are further discussed under 3.3 below.

In addition, Articles 459 to 470 ZFPPIPP contain provisions that govern the recognition of foreign insolvency proceedings in Slovenia (see at 3.2.4.2 below).

According to Article 485 ZFPPIPP specific rules regarding international insolvency proceedings also apply in regard to banks, other credit institutions and insurance undertakings, unless provided otherwise in ZBan-3 or ZZavar-1.

The Provisions on International Insolvency Law also implement Directive 2001/24/EC into Slovenian law. The legislator adopted special provisions in Articles 269 to 281 ZRPPB-1, which apply to credit institutions ("**Special Provisions for Credit Institutions**").

3.2.2 Specific rules on netting provisions

As mentioned in 3.2.1 immediately above, Article 483 (1) ZFPPIPP stipulates that legal consequences of insolvency proceedings in relation to contractual arrangements containing an international element and qualifying as "netting arrangements" within the meaning of ZFPPIPP (cf. 2.2.1.2 Appendix ./E), shall be governed by the law that applies to such contractual arrangements – even if not relating to contracts fulfilling the requirements of "qualified financial contracts" or "other qualified contracts" (cf. 7.3 above). Consequently, provided that (a) an international element is available and (b) the contractual arrangements contain the rules set out in Article 24a of ZFPPIPP (cf. 2.2.1.2 Appendix ./E above), the legal consequences of insolvency proceedings with respect to the parties' rights and obligations thereunder shall be governed by the law governing such netting arrangements.

As discussed under 3.1.3 of this Appendix ./E above, the Regulation is silent on close-out netting arrangements,[114] therefore, the law of the Member State where insolvency proceedings are opened (*lex concursus*) shall apply in respect of effects of the applicable insolvency proceedings (Article 7 of the Regulation).[115] It follows that Article 483 (1) ZFPPIPP – to the extent the insolvency proceeding were opened in Slovenia – may be considered as the applicable rule under the *lex concursus*.[116]

Moreover, in our view, - albeit Article 483 (1) ZFPPIPP *verbatim* only refers to insolvency proceedings *stricto sensu* – the above conclusions should apply also in respect of preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*) with an international element. This is based on, *inter alia*, (i) the consideration that exceptions to the general *pari passu* principle (which Article 483 (1) ZFPPIPP constitutes) should apply all the more in the context of a restructuring proceeding which is less intrusive to the general body of creditors (of the affected debtor); and (ii) the fact that the Slovenian preventive restructuring proceedings are listed in Annex A of the Regulation (plausibly leading to a conclusion that the absence of an express reference to a preventive restructuring proceeding from the wording of Article 483 (1) ZFPPIPP is merely a redactional omission on the part of the legislator and that the application thereof should be sensibly interpreted as extending to preventive restructuring proceedings as well).

3.2.3 Scope of the Provisions on International Insolvency Law

[114] While there are specific rules on law applicable to certain types of rights and contracts, (unlike in Directive 2001/24/EC governing reorganisation and winding up of credit institutions) there are no specific rules on close-out netting arrangements contained in the Insolvency Regulation (cf. Articles 5-15 Insolvency Regulation).

[115] See Jan De Corte, Enforcement of Close-Out Netting, 15 May 2014, pg. 30 (available here; 10 October 2022).

[116] Noting that the case law on the point remains absent.

The Provisions on International Insolvency Law, in particular the Conflict Rules, apply to International Insolvency Proceedings where the Regulation does not apply, *i.e.*, if:

(i) The Slovenian party is a Bank; or

(ii) the Slovenian party is an Insurance Undertaking (other than a Re-Insurance Undertaking); or

(iii) the Slovenian party is an investment firm pursuant to Article 4 (1) no 2 CRR; or

(iv) the Slovenian party is neither a Bank, an Investment Firm nor an Insurance Undertaking (other than a Re-Insurance Undertaking) and the counterparty is established in a Regulation State, but only as far as the Regulation does not provide otherwise; or

(v) the Slovenian party is neither a Bank, an Investment Firm nor an Insurance Undertaking (other than a Re-Insurance Undertaking) and the counterparty is established in a State which is not a Regulation State, but only as far as international law does not provide otherwise.

In respect of (iv), the legislator has adopted Article 483 (1) ZFPPIPP, introducing the same rules as implemented pursuant to Article 25 of Directive 2001/24/EC (through Article 278 ZRPPB-1) concerning netting agreements within the Conflict Rules that are applicable to Banks and Investment Firms but also to Corporations, Pension Fund Management Companies, Insurance Undertakings and Re-Insurance Undertakings.

In respect of (v), there are currently no relevant international regulations in place that would provide otherwise.

3.2.4 International jurisdiction in respect of Corporations, Partnerships, Financial Institutions, Pension Fund Management Companies, Insurance and Re-Insurance Undertakings

Where the Regulation does not apply in respect of a Corporation, Financial Institution, Pension Fund, Insurance Undertaking and Re-Insurance Undertaking, Slovenian courts have jurisdiction to open insolvency proceedings against such debtor if there are at least assets of that debtor located in Slovenia (Article 52 (3) no 2 ZFPPIPP). Payment claims of an insolvent party to an EFET General Agreement are deemed located in Slovenia if the insolvent party's debtor is domiciled in Slovenia. In this case, insolvency proceedings might be opened against this insolvent party in Slovenia.

3.2.4.1 Effect of Slovenian insolvency proceedings

Pursuant to Article 224 ZFPPIPP, the bankruptcy estate of the insolvent debtor shall consist of all assets of the bankrupt debtor. ZFPPIPP does not provide a limitation that certain effects of insolvency proceedings would not cover assets located abroad. Article 451 ZFPPIPP further provides that Slovenian insolvency administrator is authorized to represent the insolvent debtor and to conduct other business for the purposes of the insolvency proceedings in a foreign country.

3.2.4.2 Recognition of foreign insolvency proceedings

Pursuant to Chapter 8.3 ZFPPIPP (Articles 459 to 470 ZFPPIPP), the effects of insolvency proceedings opened in another State and the decisions issued in these proceedings are recognized in Slovenia if:

(i) all the required documents are submitted[117];

(ii) the proceedings subject to recognition proceedings have the characteristics of foreign insolvency proceedings in accordance with Article 446 (2) ZFPPIPP[118];

(iii) the foreign insolvency administrator is authorized to administer or supervise the financial restructuring of the debtor / realisation of its assets or act as the representative of the foreign insolvency proceedings; and

(iv) the debtor's COMI is in that other State.

The court may recognize foreign insolvency proceedings either as main insolvency proceedings or as ancillary insolvency proceedings.

Pursuant to Article 452 ZFPPIPP, insolvency proceedings conducted abroad are not recognized in Slovenia if the recognition of insolvency proceedings could adversely affect sovereignty, security or public interest of the Republic of Slovenia.

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[117] Pursuant to Article 460 ZFPPIPP, the request for recognition needs to be accompanied with (i) a certified copy of the decision of the foreign court opening the insolvency proceedings, (ii) a declaration by the foreign court confirming that foreign insolvency proceedings have been opened and foreign administrator appointed and (iii) statement by the foreign insolvency administrator indicating all pending foreign insolvency proceedings against the debtor.

[118] Article 446 (2) ZFPPIPP defines foreign insolvency proceedings as any judicial or administrative proceedings held in a foreign country for the joint account of all creditors of the debtor as a result of the financial restructuring or liquidation of the debtor and in which the realisation of the assets and the conduct of the affairs of the debtor are supervised by a foreign court or by a court appointed administrator.

According to ZFPPIPP, if foreign (main) insolvency proceedings have been recognized in Slovenia, insolvency proceedings may only be opened and conducted in Slovenia as ancillary insolvency proceedings (Article 474 (1) ZFPPIPP). The legal effects of such insolvency proceedings are limited to (i) the assets of the insolvent debtor in Slovenia and (ii) may extend to other assets to the extent required to give effect to provisions cooperation with foreign courts / insolvency administrators.[119]

3.2.5 International jurisdiction in respect of Banks

3.2.5.1 Bankruptcy proceedings

Article 263 ZRRPB-1 provides that the administrative or judicial authorities of the home Member State are exclusively authorized to implement one or more resolution measures or to decide on initiation of compulsory termination proceedings, including also bankruptcy, with respect to a Bank. Such authority applies also with respect to the branches of such Bank in an EEC State.

Pursuant to Article 269 ZRPPB-1, the decision of a court or other administrative authority in a Member State to open proceedings in order to liquidate a Bank (or reorganise it) will be recognized in Slovenia without the need for special recognition and enforcement proceedings. Such proceedings take effect in Slovenia as soon as they become effective in the State in which the proceedings were opened.

As mentioned in 1.2.3 of this Appendix ./E above, for questions not regulated by ZRPPB-1, the provisions of ZFPPIPP also apply by analogy to bankruptcy proceedings of a Bank (Article 224 ZRPPB-1). Accordingly, the general rules of ZFPPIPP on bankruptcy estate apply and the bankruptcy estate of the insolvent debtor shall consist of all assets of the bankrupt debtor, including assets situated abroad (Article 224 ZFPPIPP).

Resolution or compulsory termination proceedings (including bankruptcy proceedings) initiated by the competent authorities of third countries shall be subject to special recognition proceedings in Slovenia under Article 273 of the ZRPPB-1[120].

3.2.5.2 Resolution measures pursuant to ZRPPB-1

[119] As set out in Chapter 4 ZFPPIPP.
[120] Implementing Articles 94 and 95 BRRD.

Resolution proceedings pursuant to Article 26 et seq. ZRPPB-1 constitute reorganisation measures as defined in Article 2 of Directive 2001/24/EC (Article 26 (3) ZRPPB-1).

The ZRPPB-1 transposed the provisions of the Directive 2001/24/EC according to which the administrative and judicial authorities of the Member State in which a Bank is authorized are authorized to implement reorganization measures or winding-up proceedings in respect to that Bank. The competence of the authorities of the home Member State also includes measures in respect of branches of that Bank established in other Member States (Article 263 ZRPPB-1).

Pursuant to Article 269 ZRPPB-1, the decision of a court or other administrative authority in a Member State to open proceedings in order to liquidate a Bank (or reorganise it) will be recognized in Slovenia without the need for special recognition and enforcement proceedings. Such proceedings take effect in Slovenia as soon as they become effective in the State in which the proceedings were opened.

3.2.6 International jurisdiction in respect of Insurance Undertakings (other than Re-Insurance Undertakings)

3.2.6.1 Bankruptcy proceedings

In respect of Insurance Undertakings, provisions of ZFPPIPP apply to bankruptcy proceedings of Insurance Undertakings, unless explicitly provided otherwise by ZZavar-1 (Article 411 ZZavar-1).

Pursuant to Article 485 ZFPPIPP, rules set out in Articles 479 to 484 ZFPPIPP also apply to Insurance Undertakings, unless ZZavar-1 provides otherwise. No specific provisions on international jurisdiction can be found in ZZavar-1, therefore said provisions – as well as our considerations under 3.2.4 above – apply *mutatis mutandis*.

We note that if AZN would issue a decision on initiation of bankruptcy proceedings and an Insurance Undertaking has a branch in another Member State, AZN shall notify the relevant regulatory authority in said Member State (Article 335 in conjunction with Article 414 ZZavar-1).

3.2.6.2 Extraordinary administration

Extraordinary administration of an Insurance Undertaking pursuant to Article 315 ZZavar-1 in our view constitutes a reorganisation measure as defined in Article 268 (1)(c) of Directive 2009/138/EEC.

Extraordinary administration forms part of AZN's supervisory powers (set out in Chapter 7 ZZavar-1). Pursuant to Articles 272 to 274 ZZavar-1, AZN is competent (and responsible) for the supervision of (i) Slovenian Insurance Undertakings, including the business they pursue through branches or on the basis of passport, (ii) Insurance Undertaking of a Member State in respect of services and business it carries in the territory of the Republic of Slovenia or its Slovenian Branch, and (iii) branches of third-country insurance undertakings established in the Republic of Slovenia.

3.2.7 International jurisdiction in respect of Investment Firms

3.2.7.1 Bankruptcy proceedings

The explanations at 3.2.4 above apply to Investment Firms *mutatis mutandis*.

The effects of Slovenian bankruptcy proceedings opened against an Investment Firm will be determined pursuant to Article 224 ZFPPIPP (see at 3.2.4.1 above). Insolvency proceedings to liquidate an Investment Firm domiciled outside of Slovenia shall be recognized within the scope of Chapter 8.3 ZFPPIPP (please see at 3.2.4.2 above).

3.2.7.2 Resolution proceedings pursuant to ZRPPB-1

The General and Resolution chapters of the ZRPPB-1 are by analogy also applicable to the reorganization of Investment Firms (Article 293 ZRPPB-1). Therefore, our considerations under 3.2.5.2 of this Appendix ./E above apply to Investment Firms *mutatis mutandis*.

3.3 Slovenian conflict of law in respect of close-out netting

3.3.1 Banks

In case of bankruptcy proceedings against a Bank, ZRPPB-1 provides an exemption for netting arrangements from application of ZFPPIPP's general rule on set-off (Article 228 ZRPPB-1), applying to bankruptcy proceedings opened in Slovenia against Banks or Slovenian Branches of institutions domiciled outside the EEA. We note that there is a degree of uncertainty about the scope of Article 228 ZRPPB-1, specifically, as regards whether it could be construed as broadening the scope of the netting exemption (compared to ZFPPIPP) also to transactions not meeting the requirements of "qualified financial contract" or "other qualified contract" (as discussed in 7.3 above); however, we see – in particular, absent jurisprudence on the subject – a risk that such an interpretation would not be accepted by competent authorities. We believe the better interpretation is that, in constellations governed by Article 228 ZRPPB-1, provisions of ZFPPIPP on close-out netting should in our view be applicable in their entirety (*mutatis mutandis*), including the requirements of a "qualified financial contract" or "other qualified contract" (as discussed in 7.3 above).

Article 154 ZRPPB-1 applies to resolution proceedings initiated by the Bank of Slovenia in respect of Banks and Investment Firms established in Slovenia or Slovenian Branches of institutions domiciled outside the EEA and provides certain safeguards with respect to (partial transfer) resolution measures adopted by the Bank of Slovenia in order to protect netting agreements.

Pursuant to Article 278 (1) ZRPPB-1 (implementing *inter alia* Article 25 Directive 2001/24/EC) legal effects of reorganisation and compulsory termination proceedings (including also bankruptcy proceedings) and mutual rights and obligations of the parties of the netting agreement shall be governed solely by the law of the contract which governs such agreements (unless provided otherwise in Article 137[121] or Article 151[122] ZRRPB-1).

The ZRPPB-1, implementing BRRD into Slovenian law, contains a definition of "netting agreement (*dogovor o izravnavi*)" (in Article 5 (1) no 7) which reads (in English translation) as follows:

"*netting agreement: an agreement which forms part of the underlying contract or is concluded as a framework agreement for several underlying contracts between the parties, including an early termination agreement, as defined in the law governing financial collateral, and contains the following rules:*

- *that upon occurrence of insolvency or other situation that constitutes a breach of an obligation of a party under the agreement, the agreement shall be deemed terminated or under which the non-defaulting party holds the right to terminate the agreement or under which the obligations of the parties shall accelerate with occurrence of such event;*

- *on calculation of netting, market, liquidation or replacement monetary value of counterclaims at the moment of termination or acceleration of maturity as provided in the preceding indent;*

[121] Implementing Article 68 BRRD (Exclusion of certain contractual terms in early intervention and resolution).
[122] Implementing Article 71 BRRD (Power to temporarily suspend termination rights).

- *on conversion of amounts due into single currency, if such obligations are denominated in difference currencies; and*

- *on the determination of a net monetary amount owing between the contractual parties, upon netting of the obligations of the contractual parties, valued in accordance with the second and third indent above.*

We note that the above definition is in essence the same as under Article 24a ZFPPIPP (see 7.2 above). Based upon this definition, we believe that the Close-out Netting Provisions constitute a netting agreement within the meaning of Article 278 (1) ZRPBB-1 and Article 5 (1) no 7 ZRPPB-1.

3.3.2 Corporations, Partnerships, Insurance Undertakings, Investment Firms and Pension Fund Management Companies

In respect of Corporations, Partnerships, Insurance Undertakings (subject to the specific limitations set out at 9.4.1 above), Pension Fund Management Companies), Article 483 (1) ZFPPIPP applies, providing an exemption in respect of set-off and netting agreements to the general principle that Slovenian substantive insolvency law shall apply to insolvency proceedings and their effects if insolvency proceedings are opened in Slovenia (*lex fori concursus*).

According to Article 483 (1) of ZFPPIPP, legal consequences of insolvency proceedings in relation to contractual arrangements containing an international element and qualifying as "netting arrangements" within the meaning of ZFPPIPP (cf. 2.2.1 of this Appendix ./E above), shall be governed by the law that applies to such contractual arrangements – even if not relating to contracts fulfilling the requirements of "qualified financial contracts" or "other qualified contracts" (cf. 2.2.1.2 (b) and (c)).

In respect of Insurance Undertakings, provisions of ZFPPIPP apply to bankruptcy proceedings of Insurance Undertakings, unless explicitly provided otherwise by ZZavar-1 (Article 411 ZZavar-1). No specific provisions in respect of netting agreement or set-off are provided by ZZavar-1, therefore provisions of ZFPPIPP apply.[123]

If (i) in respect of insolvency proceedings and preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*), Article 483 (1) ZFPPIPP and (ii) in respect of reorganization proceedings and compulsory termination proceedings against Banks, Article 278 (1) ZRPPB-1 apply ("**Provisions on Netting Agreements**"), it is a matter of the law governing the EFET General Agreement (i.e. the *lex contractus*) whether close-out

[123] This is further reaffirmed by explanatory notes of ZZavar-1 to Article 411 which provide that Article 288 of Directive 2009/138/EC is implemented by way of this provision (see Predlog zakona o zavarovalništvu from 26 June 2015, p. 369-370).

netting is enforceable in insolvency proceedings, preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*), reorganization proceedings and compulsory termination proceedings (as applicable) opened against the relevant Slovenian counterparty.[124]

3.3.3 Scope of application of the Provisions on Netting Agreements

The Provisions on Netting Agreements apply to the following proceedings:

(A) Article 483 (1) ZFPPIPP in respect of:

(i) insolvency proceedings opened in Slovenia against the assets of Corporations and Partnerships;

(ii) bankruptcy proceedings opened in Slovenia against the assets of Insurance Undertakings; and

(iii) bankruptcy proceedings opened in Slovenia against the assets of Pension Fund Management Companies; and

(iv) preventive restructuring proceedings (*postopek preventivnega prestrukturiranja*).

provided that the above-mentioned proceedings have a cross-border element (see at 3.2.1 above as to the level of international element that needs to be present in order for the Provisions on International Insolvency Law, including Article 483 (1) ZFPPIPP, to apply).

(B) Article 278 ZRPPB-1 in respect of:

(i) bankruptcy proceedings opened in Slovenia against the assets of credit institutions;

(ii) resolution proceedings instituted in Slovenia against credit institutions; and

(iii) resolution proceedings instituted in Slovenia against Investment Firms.

[124] In insolvency proceedings, this interpretation has also been confirmed by the German Federal Court of Justice (in regards to § 340 of the German Insolvency Code, which implements Article 25 of Directive 2001/24/EC; see BGH IX ZR 314/14) in a case involving an entity being part of the Lehman group having its corporate seat in London and the German Master Agreement for Financial Derivative Transactions. While not binding precedent for Slovenian courts, this is a useful reference supporting this interpretation.

provided that such special receivership proceedings or regulatory measures have a cross-border element[125].

The Provisions on Netting Agreements do not apply:

(i) if the above-mentioned insolvency proceedings, resolution proceedings or preventive restructuring proceedings (see under (A) and (B) above) have no cross-border element; and

(ii) to regulatory measures in respect of Insurance Undertakings.

3.4 Set-off under Slovenian law

3.4.1 Set-off in a non insolvency-related scenario

Contractual bilateral set-off arrangements subject to Slovenian law do not need to observe specific formal requirements. Such arrangements are, in principle, subject to the contractual freedom (*pogodbena svoboda*) and, respectively, the private autonomy (*avtonomija*) of the parties involved. In particular, a contractual (*i.e.*, consensual) set-off of claims does not require compliance with the requirements set out in Articles 311 et seq. OZ for unilateral set-off of claims[126] to be enforceable and valid.

In this respect, it should be noted that, generally, unilateral set-off of claims stemming from contracts based on mutual trust is not permissible under Slovenian law (Article 316 (1) no 2 OZ). Although the law specifically mentions only escrow (*hramba*), case-law also considers certain banking transactions to be among transactions based on mutual trust, including a cash deposit agreement or a credit balance on a transaction account (positive balance).[127]

Moreover, based on the established case law (*i.e.*, the High Court of Ljubljana[128] just recently reiterated a 25-year-old stance of the Slovenian Supreme Court[129] on the point), claims in different currencies are not considered homogeneous and as such cannot be subject to unilateral set-off.

3.4.2 Set-off in an insolvency-related scenario

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[125] As with Article 483 (1) ZFPPIPP (see at 3.3.2 above), we believe that the stronger the international nexus (and, conversely, the more remote the nexus to Slovenia), the higher the likelihood that a Slovenian court will resort to the law applicable by virtue of Article 278 ZRPPB-1.

[126] Under Slovenian law, any unilateral set-off requires that the claims to be set off are in a position to be set off (*i.e.* reciprocal (*vzajemne*), even if conditional), due (*zapadle*) and congeneric (*istovrstne*), *e.g.*, claims for payment of money can only be set off against counterclaims for payment of money. In addition, the counterclaim to be set off must be recoverable (*iztožljiva*) and liquid (*likvidna*).

[127] See Decision of the Supreme Court III Ips 18/2010 and Decision of the Supreme Court II Ips 310/2011.

[128] See High Court in Ljubljana I Cpg 15/2020 from 23 June 2020.

[129] See Decision of the Supreme Court III Ips 13/96.

According to Article 7 (2) lit d of the Regulation and Article 479 ZFPPIPP, respectively, the conditions under which set-offs may be invoked following the opening of insolvency proceedings are, generally, subject to the law of the *forum concursus, i.e.*, Slovenian law in case of opening of local insolvency proceedings over the assets of a Slovenian counterparty.

As discussed in 1.1.2 above, eligible mutual claims (of the insolvent debtor against a particular creditor and vice versa) will be subject to automatic set-off upon the opening of insolvency proceedings against the debtor (unless forming part of an (open) executory contract or qualifying netting arrangement). This is subject to the following:

(i) The above effects extend to the creditors' claims vis-à-vis insolvent debtor which arose prior to the opening of the relevant proceedings (and are, as such, deemed affected by the insolvency proceedings) – and, in turn, generally do not apply to claims arising after the opening of the insolvency proceedings.

(ii) Specifically with respect to bankruptcy proceedings: the law prohibits set-off of: (a) claims arising prior to the opening of bankruptcy proceeding which were assigned to a creditor by way of assignment (*cesija*) after the opening of bankruptcy proceeding (against a counter-claim of insolvent debtor vis-à-vis this creditor arising prior to the opening of bankruptcy proceeding) and (b) claims arising prior to the opening of bankruptcy proceedings against a counter-claim of insolvent debtor vis-à-vis this creditor arising after the opening of bankruptcy proceeding.

In respect of contractual (close-out) netting agreements, the Slovenian substantive netting privilege in Articles 24a and 24b ZFPPIPP is, however, to be considered as *lex specialis* to Articles 164 and 261 ZFPPIPP.

If set-off was held to be unenforceable in accordance with the above, the creditor of the insolvent party might, however, still be able to resort to Article 9 (1) of the Regulation and Article 479 ZFPPIPP, respectively, to preserve the enforceability of set-off, as in accordance with Article 17 Rome I, set-off shall be – absent contractual regulation – governed by the law applicable to the claim against which the right to set-off is asserted: Pursuant to Article 9 (1) of the Regulation the opening of insolvency proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the insolvent debtor, where such a set-off is enforceable under the law applicable to the insolvent debtor's claim[130], *i.e.*, the law

[130] The rationale for such provision is explained in Recital 70 of the Insolvency Regulation: "*If a set-off of claims is not permitted under the law of the State of the opening of proceedings, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.*"

governing the agreement under which the relevant claim has arisen. Article 479 ZFPPIPP, in contrast to Article 9 (1) of the Regulation, does not explicitly regulate set-off, however, we believe that, in the absence of specific provisions, its general rule of application of *lex concursus* could be relied upon to the same effect.

Article 9 (1) of the Regulation / Article 479 ZFPPIPP do not preclude actions for voidance, voidability or unenforceability under the law of the *forum concursus*.[131] Therefore, claims for avoidance (see Appendix ./F for further details) remain possible under Slovenian law, even if Article 9 (1) of the Regulation / Article 479 ZFPPIPP was resorted to in an attempt to preserve the enforceability of set-off.

Notwithstanding, Article 7 (1)(d) of the Regulation provides that the law of the Member State where the insolvency proceedings are opened (*lex concursus*) shall determine the *conditions under which set-off may be invoked*. The extent/import of the respective provision is not entirely clear and appears to be unresolved on EU level. By way of simplification:

- Certain legal scholars argue that, in case of conflict between (a) the respective provisions subjecting the set-off to the *lex concursus* (e.g. Article 7 (1)(d) of the Regulation), on the one hand, and (b) provisions/rules subjecting the set-off to the *law applicable to the debtor's claim* (*e.g.*, Article 17 Rome I), the law which is <u>more favourable to the set-off should be applied</u>.[132]

- According to the second interpretation, the existence of the *right of set-off* is a preliminary question, governed by the law applicable to the main claim (Article 17 Rome I), and *lex concursus* then only applies to the procedural possibility of invoking set-off in the insolvency/winding up proceedings.

- In accordance with a third view, <u>whenever the *lex concursus* establishes that insolvency *produces some effects on set-offs*, those effects are governed by it</u>. As a result, in national systems where set-off operates as an effect of insolvency/winding up itself, it will fall, as such, under the provision subjecting it to the *lex concursus* (*e.g.*, Article 7 (1)(d) of the Regulation). This view appears to be closest to the advocate general M. Bobek who issued an opinion in the matter.[133]

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131 See Article 9 (2) of the Regulation / 479 ZFPPIPP.

132 See e.g., A. Bělohlávek, EU and international insolvency proceedings: Regulation (EU) 2015/848 on insolvency proceedings. Commentary (2020), pg. 308 and Set-offs of Claims in Insolvency Proceedings and the Principle of Proportional Satisfaction of Creditors, author unknown, pg. 14: "*First, it may be that the law applicable to the debtor's claim does not allow for set-off, but such set-off is possible under the law applicable to insolvency proceedings (Article 7). In the event of such a conflict**, the law which is more favorable to the set-off should be applied, i.e., the right allowing setoff***."

133 See in particular Opinion of advocate general M. Bobek of 30 April 2019 in Case C-198/18, CeDe Group AB v KAN Sp. z o. o. (in insolvency), para. 60 and 62 and the legal literature cited therein.

The case law/ECJ is yet to finally resolve the respective question.

While the matter is unclear, based on the above, we believe that good arguments can be made that automatic (statutory) set-off at the initiation of the insolvency proceeding pursuant to the rules set out by ZFPPIPP will apply (on the basis that these rules *produce some effects on set-offs*), whereas the law applicable to the claim against which the right to set-off is asserted (Article 17 Rome I) will govern any other form of set-off within the insolvency proceeding.

Article 16 of the Regulation and Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1 (where applicable) impose, however, a restriction on the ability of a Slovenian insolvency administrator to set aside set-off. Article 16 of the Regulation and Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1 limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (*e.g.*, set-off), if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case. We note, for the avoidance of doubt, that the respective exception in the ZFPPIPP is available (only) to the extent that the Regulation applies in a particular instance. As a result, in instances where the Regulation is applicable, provided that the detrimental act is governed by the law of (another) Member State, the existence of risk of successful avoidance actions would depend entirely upon the provisions of such governing law.

Please note that the above explanations are limited to bilateral set-off between two Parties and are not to be understood as expanding to multi-party set-off.

Appendix ./F
Summary of Slovenian Avoidance Rules

1 Right of avoidance within bankruptcy proceedings - ZFPPIPP

1.1 Pursuant to Article 269 *et seq*. of ZFPPIPP, a transaction, (legal) act or omission *of the bankrupt debtor* may be challenged / voided upon the opening of bankruptcy proceedings, pursuant to an action of the **bankruptcy administrator** (acting on behalf of the debtor) or a **creditor** (acting on his own behalf and for the account of the debtor).

The debtor's legal acts may be successfully challenged under the following conditions:

(A) The challenged legal act took place within the "**suspect period**", starting 12 months before the motion for the initiation of the bankruptcy proceeding and ending with the formal initiation of bankruptcy proceedings over the debtor. In relation to transactions at (significant) undervalue (transactions where the debtor received no consideration or only received consideration of a (relatively) low value), the applicable suspect period is 36 months. If the bankruptcy proceedings were opened within the compulsory settlement proceedings,[134] the suspect period starts to run 12 months before the application for the initiation of compulsory settlement proceedings and ends with the commencement of bankruptcy proceedings.

(B) The consequence of the legal act was either (a) the **decrease of the net value** (*čista vrednost*) of the debtor's assets, or (b) **unfair preferential treatment** of a creditor vis-à-vis other creditors (so-called "objective criterion");[135] and

(C) The person to the benefit of which the act was performed **knew or should have known** that the debtor is insolvent at the time when the transaction/legal act took place (so-called "subjective criterion").[136] [137]

1.2 In case of (successful) avoidance, the primary legal consequence is the cessation of *legal* effects of the avoided transaction as between the debtor and the counterparty.

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[134] E.g., due to the creditors of the insolvent debtor not approving the restructuring proposal, see 1.1.2 of Appendix ./E above.

[135] The fulfilment of the objective criterion is presumed if (*inter alia*): (i) the act was performed due to the fulfilment of a bilateral contract (*dvostranska pogodba*) to the benefit of the creditor who has fulfilled its part of the contract prior to the fulfilment of the contract on the part of the debtor; or (ii) on the basis of the debtor's act, the creditor has acquired a preferential claim (such as a pledge over an asset) with respect to the receivable created prior to the performance of the respective act.

[136] Transactions at (significant) undervalue may be challenged irrespective of whether or not the subjective criterion is fulfilled.

[137] It is presumed that a person knew or should have known of debtors insolvency if the creditor's claim was settled before it was mature, or settled in a manner which is not customary, or the legal act took place within last 3 months before the motion for the initiation of bankruptcy proceedings was brought.

1.3 If the person to the benefit of which the challenged act was performed received *performance* of its claim it must reimburse the bankrupt debtor for what it received as the result of the avoided transaction or, if this is no longer possible, pay compensation at the prices at the time of the judgement.

1.4 If, as a result of the challenged act, the claim of a person to the benefit of which the challenged act was performed has been satisfied, that claim shall be re-established and shall be paid out of the bankruptcy estate, if duly lodged pursuant to Article 59 (3) or Article 59 (4) of ZFPPIPP.

2 Right of avoidance outside bankruptcy proceedings

2.1 Under Slovenian law, a transaction may be challenged even in the absence of a debtor's bankruptcy if willingly entered into to the detriment of such debtor's creditors (*Actio Pauliana*).

2.2 More specifically, a transaction may be subject to a successful challenge only if (i) the challenge is made by a creditor holding a due claim against the debtor, (ii) the transaction resulted in the debtor's inability to pay such creditor (insufficiency of assets), (ii) the challenge is made within the suspect periods (ranging from 1 year for transactions against consideration to 3 years for transactions with *familia suspecta* and/or transactions without consideration) and (iv) both the debtor and the counterparty knew (or ought to have known) that the transaction would result in the detriment to creditors.

3 Insolvency Regulation

3.1 Pursuant to Article 7(m) of the Regulation the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors shall be determined by the State of the opening of insolvency proceedings.

3.2 Irrespective of the above, pursuant to Article 13 of the Regulation, implemented in Slovenian law in Article 488 (1) ZFPPIPP / Article 281 ZRPPB-1, Article 7(m) of the Insolvency Regulation shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(i) The said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

(ii) That law does not allow any means of challenging that act in the relevant case.

3.3 We note, for the avoidance of doubt, that the respective exception in the ZFPPIPP is available (only) to the extent that the Insolvency Regulation applies in a particular instance.

3.4 As a result, in instances where the Insolvency Regulation is applicable, provided that the detrimental act is governed by the law of (another) Member State, the existence of risk of successful avoidance actions would depend entirely upon the provisions of such governing law.

Appendix ./G
Summary of Relevant Aspects in Relation to Collateral

1 General regime as regards security interests – SPZ

1.1 Within the Slovenian legal framework, the general rules on secured transactions are set out in the Slovenian Rights in Rem Act (*Stvarnopravni zakonik*, "**SPZ**"). The principal forms of collateral arrangements (applicable to movables and property rights as forms of collateral) within the meaning of SPZ are:

(i) the pledge (*zastavna pravica*) – a form of security interest-based collateral arrangement whereby the title to the pledged movable/right remains with the collateral provider and the collateral taker has, upon maturity of the secured obligation, a right to realise the collateral by way of sale (or, in the event of pledged rights, enforcement of such rights) and the application of monetary proceeds towards the settlement of the secured obligation; notably, the collateral taker may, as a general rule, not retain the object of collateral and any surplus over the secured amount (received upon realisation of the collateral) must be returned to the collateral provider.

(ii) the security assignment/transfer (*prenos/odstop v zavarovanje*) – a form of title transfer-based collateral arrangement whereby the title to the relevant object of collateral (movable or property right) transfers to the collateral taker (with the collateral provider remaining the holder of (physical) possession thereof) and the collateral taker has a right to, upon maturity of the secured obligation, realise or retain (against a fair price) the object of the collateral; any surplus over the secured amount must be returned to the collateral provider.

1.2 In order to create a security interest, effective against third parties, the following conditions need to be met (cumulatively):

(a) valid contractual commitment/obligation to transfer title (*titulus*) (*zavezovalni pravni posel*);

(b) valid legal act of disposal (*modus*) (*razpolagalni pravni posel*);

(c) capacity of a security provider to create contemplated security interest; and

(d) publicity / form requirements – generally consisting of registrations in relevant registers (*e.g.*, central registry of book entry securities).

Under the principle of causality (*kavzalnost*), there is no valid act of disposal (*razpolagalni pravni posel*) if there is no valid contractual commitment/obligation to transfer title (*zavezovalni pravni posel*) and no valid security interest may be established.

1.3 As a general rule under SPZ, only monetary obligations may be secured by security interests pursuant to SPZ.

2 Scope of application of the Financial Collateral Act

2.1 General

Slovenia has implemented the Financial Collateral Directive in the Slovenian national legislation primarily by means of ZFZ. ZFZ *inter alia* governs certain specifics in relation to financial collateral arrangements, mostly with a view to enabling efficient creation and enforcement thereof, in particular (i) specific (looser) rules for enforcement of financial collateral, (ii) possibility of disposal with the collateralized financial instruments during the period between establishment of financial collateral and its maturity, (iii) possibility of appropriation (*prilastitev*) of the object of collateral by the collateral taker and (iv) exemption of financial collateral arrangements and financial collateral/netting arrangements established thereby from the regime generally applicable within the insolvency proceedings.

2.2 Personal scope

In accordance with ZFZ, financial collateral arrangements will, subject to the below, be recognized if entered into between collateral takers and collateral providers mentioned in Article 1 (2) points (a) to (d) of the Directive.

Notably, ZFZ requires that, in order to qualify as an eligible collateral provider, the relevant person (to the extent not mentioned in Art 1(2) points (a) to (d) of the Directive) must be a commercial corporation (*gospodarska družba*) meeting the criteria for a small, medium or large undertaking (thus micro sized undertakings are excluded).

2.3 Type of collateral arrangements covered

ZFZ covers financial collateral arrangements in the form of:

(i) security financial collateral arrangements having the form of a pledge on financial instrument or cash or credit claims (*zastavna pravica na finančnem instrument, gotovini ali bančnem posojilu*) under which the collateral is provided as security interest being a limited in rem right (i.e. the ownership title to the object of collateral remains with the collateral provider); and

(ii) title transfer financial collateral arrangements on financial instrument or cash or credit claims (*prenos finančnega instrumenta, gotovine ali bančnega posojila v zavarovanje*) including repurchase agreements under which full ownership of a financial collateral is transferred to the collateral taker.

2.4 Type of collateral covered

Only "financial collateral" as defined in the ZFZ will be covered by the ZFZ:

(i) Cash (*gotovina*), defined as money credited to an account in any currency, or similar claims for the re-payment of money, such as money market deposits;

(ii) Financial instruments (*finančni instrumenti*), defined as shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing;

(iii) Bank loans (*bančno posojilo*), defined as pecuniary claims arising out of an agreement in which an eligible credit institution, as defined in Section 2 ZFZ, grants pecuniary funds in form of a loan. Bank loans where the debtor is a consumer as defined in Article 3(a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, save where the collateral taker or the collateral provider of such bank loans is one of the entities listed in Article 2 (1) no 2 ZFZ may not be subject of financial collateral pursuant to ZFZ.

2.5 Further requirements under the ZFZ

2.5.1 Evidence in writing

Any financial collateral arrangement under ZFZ must be evidenced in writing (including recording by electronic means and any other durable medium) and must be sufficiently clear as to identify the financial collateral. For this purpose, it will suffice when cash collateral (*gotovina*) is credited to, or forms a credit in, a designated account.

2.5.2 Collateralization of the relevant financial obligations

According to the ZFZ, the financial collateral arrangement to be established must serve the purpose of securing "the relevant financial obligations" owed by a collateral provider to a collateral taker.

"Relevant financial obligations" are defined as obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments. Relevant financial obligations may consist of or include (i) present or future, (ii) conditional or unconditional, (iii) actual or prospective obligations (including such obligations arising under a EFET General Agreement or similar arrangement), (iv) obligations owed to the collateral taker by a person other than the collateral provider, or (v) obligations of a general or specified class or kind arising from time to time (Article 3 (1) no 11 ZFZ).

The purpose of the EFET Credit Support Annex is to collateralize outstanding obligations of a party under or in connection with a related EFET General Agreement (see first paragraph of the EFET Credit Support Annex). Based on the foregoing, we believe that such obligations should fall within the definition of "relevant financial obligations" under the ZFZ.

2.5.3 Possession or control over the financial collateral

Further, any collateral provided must be in the possession or under the control of the collateral taker, or of a person acting on the collateral taker's behalf, in order to qualify as financial collateral under the ZFZ. Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider shall, however, not prejudice the collateral taker being considered as having possession of, or control over, the collateral provided.[138] In this context, the European Court of Justice ("**ECJ**")[139] ruled that the collateral taker (or any person acting on the collateral taker's behalf) must actually be in a position to dispose of the collateral when an enforcement event occurs in order to be considered as having possession of, or control over, the collateral provided. As the ECJ made clear, this prerequisite will only be fulfilled if the collateral provider is contractually and factually prevented from disposing of the collateral. Lastly, the ECJ held that the relevant collateral must have been provided to the collateral taker before the opening of insolvency proceedings in respect of the collateral provider (or on the day of opening of insolvency proceedings, if the collateral taker was not aware and could not have been aware of those proceedings) in order to qualify as financial collateral arrangement under the ZFZ.

As we are not in a position to verify whether the factual aspects of the above-mentioned requirements will be fulfilled, we have, for purposes of this Opinion, assumed that (i) the required "possession or control" test will, in each case, be factually satisfied and (ii) the relevant Eligible Credit Support will have been provided to Party B before the opening of insolvency proceedings over Party A.

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[138] We note that ZFZ omits the second sentence of the definition of Article 2 (2) of the Financial Collateral Directive (while first sentence is transposed through Article 3 (1) no 8 ZFZ), however, we believe that ZFZ should be interpreted in accordance with the Financial Collateral Directive, taking into account its purpose and accordingly the purpose of ZFZ. We have no reason to believe that the omission would be intended by the legislator as a way of deviation from the rules of the Financial Collateral Directive.

[139] ECJ 10 November 2016, C-156/15 (*Private Equity Insurance Group*).