WOLF THEISS

LEGAL OPINION

REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF NATURAL GAS AND ITS COLLATERAL ARRANGEMENTS

AUSTRIA

January 1, 2019

To:
European Federation of Energy Traders ("**EFET**")
Amstelveenseweg 998
1081 JS Amsterdam
The Netherlands

(the "**Addressee/s**")

January 1, 2019

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas and its Collateral Arrangements

Dear Sirs,

We, Wolf Theiss Faludi Erős Ügyvédi Iroda, Kálvin tér 12-13, Kálvin Center, 4th floor, H-1085 Budapest, ("**WOLF THEISS**") have been asked to render this opinion together with our Vienna Office (WOLF THEISS Rechtsanwälte GmbH & Co KG) on

(i) the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (the "**EFET General Agreement**"); and

(ii) the validity and enforceability of collateral (the "**Collateral**") provided under the EFET Credit Support Annex to the EFET General Agreement (the "**EFET Credit Support Annex**");

as outlined in your instruction letter (the "EFET **Instruction Letter**").

These issues include the validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**"), the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**"), the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**"), the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"), and the existence of specific licensing requirements or currency exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**").

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1. INTRODUCTION

For the purpose of this opinion, we have reviewed the documents (the Documents) as specified and set out in SCHEDULE 1 (List of Documents).

We have not been involved in the preparation and/or negotiation of the Documents and no searches or other inquiries were conducted by us unless explicitly stated otherwise herein. In particular, we have not made any due diligence with regard to any specific party to the Documents (as defined in SCHEDULE 1 (List of Documents)) or any of their assets or agreements.

This opinion is solely given in connection with the Documents. It 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 Documents or on any of the agreements, deeds or instruments referred to in the Documents but not expressly opined on herein and the effects such referenced documents and agreements may have on the capacity, authority, validity and/or binding effect of the Documents.

For the purpose of this opinion, we have relied upon circumstances, matters of fact and assumptions disclosed to us and existing as of the date of this opinion and we have based our opinion on the assumptions as set out in SCHEDULE 2 (Assumptions) which we have not verified.

Headings in this opinion are for the ease of reference only and shall not be used in the interpretation of this opinion. Terms defined at the beginning of this opinion shall have the meaning set out above.

This opinion discusses analyses and opines in point 3 following part C structure of the EFET Instruction Letter whereby general discussions of terms and concepts as well as a brief overview of the general legal Austrian concepts can be found in ANNEX 3.

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

2. EXECUTIVE SUMMARY

This summary provides an overview of the main conclusions and is for convenience purposes only.

We note that due to the complexity of the matters discussed the summary compromises certain aspects in order to facilitate a simplified overview, but only the analysis in point 3 together with the understanding of the general principles of law (ANNEX 3) provide for a true and detailed view of the matter.

2.1 Enforceability of Automatic/Early Termination, Close-out Netting and Set-off for Insolvency related Material Reasons

The point in time when an insolvency proceeding is opened is the most relevant nexus under Austrian law.

Given that the parties agree on an automatic termination and wordings which make use of the scenarios under Section 20 para 4 Austrian Insolvency Act and regulate that the termination and set-off occurs before the opening of the insolvency proceeding Automatic/Early Termination, Close-out Netting and Set- off under § 10.5.c in connection with § 10.3. and § 11 EFET General Agreement is enforceable under Austrian law and in Austria.

We strongly advise to make use of the automatic termination clause (§ 10.4). If not selected there would be a difference under Austrian law which results in Material Reasons (outside of the scope of Section 20 para 4 of the Austrian Insolvency Act) being enforceable only if having occurred prior to the opening of an insolvency proceeding.

The procedure resulting in the calculation of the Termination Amount according to § 11 of the EFET General Agreement is enforceable under Austrian law and in Austria.

We note that due to the variety of potential situations and the complex set of instruments and measures we have only opined on the specific situations mentioned herein but do not provide and do not purport to provide a comprehensive opinion on any and all potential constellations and facts with respect to the insolvency of Financial Market Companies or any other company on which other rules in addition to the Austrian Insolvency Act are applicable. We note that measures other than the described measures under this opinion might influence the enforceability and close-out netting of claims.

2.2 Enforceability of Automatic/Early Termination, Close-out Netting and Set-off for Non-Insolvency related Material Reasons

Automatic/Early Termination, Close-out Netting and Set- off under § 10.5.a,b,d,e and f in connection with § 10.3. and § 11 EFET General Agreement is enforceable under Austrian law and in Austria.

2.3 Muitibranch Parties

Insolvency proceedings could be opened in Austria in respect of assets of Party A's branch located in the territory of Austria irrespective of the place where Party A has its registered seat.

There are no changes in our conclusions based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to Party A's insolvency.

2.4 Collateral

The EFET Credit Support Annex is an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

Under Austrian law many rights under different circumstances exist which allow avoidance actions to challenge collateral in case of an insolvency scenario, in the suspect period between 6 months to 10 years prior to the opening of the insolvency proceeding and where detrimental acts for other creditors are intended/caused/triggered.

Whenever collateral is provided in form of or similar to a guarantee the parties should involve Austrian legal counsel to make sure that no sureties or other forms can be interpreted which would trigger Austrian stamp duty.

2.5 Force Majeure, Non-Performance Remedies and Limitation of Liability

§ 7, § 8 and § 12 of the EFET General Agreement are enforceable under Austrian law and in Austria.

2.6 Confirmation Practices

Under Austrian Law the conclusion of Individual Contracts under the EFET General Agreement does not require a specific form. Oral agreements are valid and binding. We strongly recommend to confirm oral agreements in writing.

In order to avoid frictions with respect to consequence of incorrect or missing confirmations we strongly recommend to adapt § 3.2 and 3.3 to the individual procedure of the parties.

2.7 Core Provisions

The following provisions are to be considered as Core Provisions:

EFET General Agreement

(a) Subject of the Agreement (§ 1.1);

(b) Confirmations and Objections (in the proposed wording form or reflecting the guidance above) (§ 3.2; §3.3);

(c) Delivery and Acceptance (§ 4.1);

(d) Force Majeure (§ 7.1);

(e) Remedies for Failure to Deliver and Accept (§ 8.1 and 8.2);

(f) Term and Termination Rights (§ 10.1, § 10.3 (a-c; d; f), § 10.4 (in the proposed wording form or reflecting the guidance above), § 10.5 (c) (in the proposed wording form or reflecting the guidance above);

(g) Calculation of the Termination Amount (§ 11);

(h) Limitation of Liability (§ 12.2; § 12.4)

(i) Governing law and Arbitration (§ 22).

Changes and selections which target a Core Provision might change the substance of conclusions in this opinion and we suggest to request separate legal support for any change of Core Provisions.

2.8 Governing Law, Arbitration and Jurisdiction

The EFET General Agreement under Austrian law is enforceable under Austrian law. The review has not revealed any violations of *ordre public* or mandatory Austrian insolvency law.

The EFET General Agreement under law other than Austrian law is enforceable under Austrian law if the EFET General Agreement is enforceable under law other than Austrian law and the Agreement (EFET General Agreement plus any Individual Contract thereunder) has been entered into in valid and binding form under the law other than Austrian law.

Austrian courts recognize and uphold the choice of law, choice of a place of jurisdiction or the choice of arbitration, in all cases under this opinion also if other law than Austrian law or other places of jurisdiction than Austria are chosen.

2.9 Regulatory Requirements

There are no exchange control laws, other than sanction laws or laws which secure the national security, which hinder the enforceability of the EFET General Agreement under Austrian law and in Austria.

If activities are conducted with respect to instruments, in most cases financial instruments, which require a banking license, without such license, than such entity would face severe administrative fines and would lose its claim for fees against the contract partner.

Financial instruments under MiFID II are of course emission allowances but could also be products on the natural gas markets which do not allow to apply the REMIT Carve out. Trading such financial instruments is a regulated activity under Austrian law and requires a banking license. Please note that this is the general rule whereas there are several exemptions available for market participants which have to be carefully analysed in each individual case.

3. OPINION /ANALYSIS FOLLOWING THE STRUCTURE OF PART C – EFET INSTRUCTION LETTER

Based on the assumptions (SCHEDULE 2) and subject to the qualifications and reservations set out in SCHEDULE 3 (Qualifications) / ANNEX 3 (Summary of Concepts and Austrian law) we are of the following opinion based on the following analysis.

3.1 C. I. ENFORCEABILITY OF CLOSE-OUT NETTING

3.1.1 Brief Overview over Austrian law provisions with respect to insolvency law

Provided in the separate annex (ANNEX 3) as instructed in the EFET Instruction Letter.

3.1.2 C. I. 1. Enforceability of close-out netting where termination and close-out are based on an event that constitutes a Winding-up, Insolvency or Attachment (as defined in § 10.5(c) of the EFET General Agreement)

(a) <u>EFET General Agreement and Individual Contracts under Austrian law</u>

Constellation summary: Party A - after entering into the Individual Contracts and prior to the maturity thereof - becomes the subject of a voluntary or involuntary case under the insolvency laws of Austria 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. Party A is a debtor and its main interest lies in Austria.

We note that we <u>recommend to apply automatic termination (§10.4.)</u> with respect to all insolvency related scenarios (10.5. (c)). We conclude that although there might be certain scenarios where it could be discussed whether or not it is absolutely necessary to have an automatic termination applicable, the majority of cases seems to be better protected if the termination is the ultimately following consequence of an insolvency proceeding and the effect should take place before the insolvency proceeding is opened. This argument is based on the reason that the entity which has information asymmetry to its detriment, has more legitimate interest in being protected (schutzwürdig) than its counterparty. However, we note that there seem to be also industry counterarguments, which comprise of arguments relating to the discussion of whether or not a too generic automatic termination trigger could lead to situations, where the point in time is not exactly clear (or becomes clear only in the future by determination by court). We note that where the counterparties adhere to such position it would be more recommendable to apply automatic termination only with respect to point 10.5. (c) (iv) and not with respect all matters under point 10.5. (c).

In case the parties would consider to apply automatic termination also with respect to non-insolvency related matters in order to change the general qualification of the transactions as fixed term transactions (Fixgeschäft) the parties would have to change § 10.4. according to the specifics set forth under point 1.3.3(b) in ANNEX 3. Such changes would be uncommon due to our experience and would normally not reflect market practice which is why we would rather advice to be reluctant to such changes.

Please see the proposal below which determines the most recommendable point in time (being before the opening of the insolvency scenario) and provides for a wording proposal for automatic termination (§10.4.) adaption.

(i) Party A being a Non-Financial-Market Company

(a) § 10.5 (c) no. (i) EFET General Agreement - Party A being dissolved (other than pursuant to a consolidation, amalgamation or merger);

Dissolvement (Auflösung) of Party A would fall under Austrian corporate law under the rules of liquidation, winding-up; as such standard corporate law rules do not foresee mandatory provisions which would not allow to agree in the EFET General Agreement on a close-out netting based on dissolvement (Auflösung) (as specified under § 10.5 (c) no. (i) EFET General Agreement). Austrian corporate law has different nexi with respect to dissolvement, for example for limited liability companies where Section 84 para 1 no. 4 Austrian Limited Liability Company Act foresees that in case of the opening of an insolvency proceeding or in case of a rejection of the opening of a proceeding (lack of coverage of insolvency procedure cost by the assets) the company is dissolved (aufgelöst) and as a consequence liquidated (e.g. Section 89 para 1 Austrian Limited Liability Company Act for limited liability companies).

However, a dissolvement could also have other nexi than insolvency reasons. In the context of an insolvency scenario it only makes partially sense to have the dissolvement as trigger for a termination as this is timewise already covered by § 10.5 (c) no. (iv) EFET General Agreement for a scenario where an insolvency proceeding is opened (whereas it is not yet covered by § 10.5 (c) no. (iv) EFET General Agreement for a scenario where an insolvency proceeding is not opened because of a lack of assets to cover cost); where there is no nexus to an insolvency scenario, meaning situations where a dissolvement is instituted for example by the companies shareholders' resolution or other reasons – depending on the applicable corporate law – it would make sense to be covered as termination trigger but this is already covered timewise by by § 10.5 (c) no. (v) EFET General Agreement. In summary, there are situations which should be covered by point (i) and respectively it is advisable to include also point (i) as trigger for close-out netting.

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (i) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.</u>

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (i) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.</u>

(b) § 10.5 (c) no. (ii) EFET General Agreement - Party A becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due (but insolvency proceeding is not opened yet)

The status of becoming insolvent would be practically relevant with respect to questions of avoidance rights of the administrator (Anfechtungsrechte des Insolvenzverwalters) in the following insolvency proceedings. If none of the specifics triggering avoidance rights (Anfechtungsrechte) are concerned (for example: if other creditors of the insolvent Party A are effectively disadvantaged, and the intention of insolvent Party A to disadvantage its other creditors should have been known by the respective other party benefitting from the actions of Party A, this would be an example for specifics triggering avoidance rights;) then no mandatory provisions which would not allow to agree in the EFET General Agreement on a close-out netting based on becoming insolvent (as specified under § 10.5 (c) no. (ii) EFET General Agreement)

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (ii) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.</u>

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (ii) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.</u>

(c) § 10.5 (c) no. (iii) EFET General Agreement - Party A makes a general assignment, arrangement or composition with or for the benefits of its creditors

Under Austrian law it would have to be specified what it is meant by the terms "general assignment, arrangement or composition with or for the benefits of its creditors".

If these terms would refer to the recapitalization proceedings (*Sanierungsverfahren*) under which a specific quota and other requirements have to be fulfilled under Austrian insolvency law such "general assignment, arrangement or composition with or for the benefits of its creditors" would lie timewise after the opening of an insolvency proceeding and in practice it would rather make no sense to refer to such point in time, as (a) such point in time would be covered by point § 10.5 (c) no. (iv) EFET General Agreement already and (b) the main purpose of such recapitalization proceedings (*Sanierungsverfahren*) is that the creditor repays a quota of at least 20% (in certain proceedings 30%) in order to be released from all other debt, which would contradict the concept of set-off/netting.

If these terms refer to a "general assignment or arrangement" which is not regulated under Austrian insolvency laws, but is rather a mutual contractual agreement between Party A and its creditors (implicitly it is a fact that such agreement would be before the opening of an insolvency proceeding in Austria) it could make sense to have such scenario covered by a termination and netting clause (where a Party A assigns major parts of its assets to another party/creditor). Respectively we recommend to make clear between the parties that such mutual contractual agreement is meant by these terms by adding in the Election Sheet:

"*General assignment, arrangement or composition with or for the benefits of its creditors means any mutual contractual agreement which a Party agrees on with other creditors than the other Party with respect to the assignment, arrangement or composition[with respect to major parts of its assets to another party/creditor // claims of such other creditors in the total amount of xx EUR] before the opening of an insolvency scenario or the rejection of an insolvency scenario due to the lack of assets to cover cost.*"

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (iii) EFET General Agreement where it has been made clear between the Parties that these provision refers to a mutual contractual agreement with other creditors and where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.</u>

<u>Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (iii) EFET General Agreement where it has been made clear between the Parties that these provision refers to a mutual contractual agreement with other</u>

creditors and where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.

(d) § 10.5 (c) no. (iv) EFET General Agreement - Party A institutes or has instituted against it a proceeding seeking a judgement of insolvency or a petition is presented for its winding-up or liquidation and is not withdrawn, dismissed, discharged, stayed or restrained within a given period of time

This point covers two different scenarios under Austria law: (a) an insolvency scenario and (b) a winding-up scenario.

Insolvency Scenario

According to Section 20 para 4 in conjunction with Section 25b para 2 of the Austrian Insolvency Act set-off/ netting with respect to claims out of contracts,

- which have been terminated because of the opening of an insolvency, where such termination is based on the contractual agreement that in case of an insolvency opening is terminated or could be terminated by the other party, and that all reciprocal receivables are to be netted; and
- which are
    - (Section 20 para 4 no. 1 Austrian Insolvency Act) specific off-balance sheet finance agreements, including derivative instruments for credit risk transfer; specified in Annex II of the CRR; which are
        - 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.

- 3. 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. Points 4-7, 9 and 10 are:

  - (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;
  - (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 default or other termination event;
  - (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, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;
  - (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;
  - (9) Financial contracts for differences;

- (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 default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, 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;

  - (Section 20 para 4 no. 2 Austrian Insolvency Act) sold interest rate options, currency options, precious metal options, commodity options (*Rohstoffoptionen*), share options and other security options as well as options on indices;

  - (Section 20 para 4 no. 2a Austrian Insolvency Act) trading transactions with listed goods and commodities in the meaning of Section 1 no 3 Austrian Stock Exchange Act, if such trades are pure trading transactions and are not entered into to cover own use ("**Own Use**"; Eigenverbrauch).

  - (Section 20 para 4 no. 3 Austrian Insolvency Act) pension trades (Pensionsgeschäfte) (Section 50 para 1 Austrian Banking Act and Article 4 para 1 no. 83 Regulation (EU) 575/2013);

  - (Section 20 para 4 no. 4 Austrian Insolvency Act) securities lending and borrowing transactions

is allowed.

We note that in the event the EFET General Agreement is used for transactions within the meaning of Section 20 Paragraph 4 Austrian Insolvency Act and for transactions outside the meaning of Section 20 Paragraph 4 Austrian Insolvency Act an Austrian Court might take the approach to differentiate within the scope of enforceability between financial and non-financial transactions by assessing the telos of Section 20 Paragraph 4 Austrian Insolvency Act, which could lead to another opinion than the opinion provided herein. In the absence of specific court cases dealing with exactly this question there are in our understanding sustainable arguments that based on the explaining remarks (Erläuternde Bemerkungen) to the Austrian Insolvency Act the Austrian legislator intended to protect all forms of trading under EFET General Agreements.

Therefore we suggest to include the following wordings into the Election Sheet:

§ 10.4

"§ 10.4 shall apply to Party A, with termination effective generally upon occurrence of a [Material Reason described in § 10.5 (c)"] [Material Reason described in § 10.5 (c) (iv) and (viii)"]. In the case of a Material Reason described in § 10.5 (c) (iv) or – to the extent analogous thereto – § 10.5 (c)(viii) – termination shall be effective as of 11.59 pm on the day before the occurrence of such Material Reason described in § 10.5 (c) (iv) or – to the extent analogous thereto – § 10.5 (c)(viii)."

10.5.

"§ 10.5(c)(iv) shall be replaced by the following wording:

- has instituted against it by a third party (other than the Party itself, an Affiliate of the Party, the Party's Credit Support Provider or the Party's Controlling Party (if any)), a proceeding seeking a judgement of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights or a petition is presented by such third party for a Party's winding-up or liquidation. The applicable grace period in such cases is 10 Business Days provided that such period shall immediately be reduced to 0 days in the event that such proceeding results in a judgement or opening of an insolvency or a bankruptcy of the Party or such petition results in the winding-up or liquidation of the Party; or

- institutes itself, or has instituted against it by an Affiliate of the Party, its Credit Support Provider or its Controlling Party (if any), a proceeding seeking a judgement of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights or a petition is presented by the Party, an Affiliate of the Party, its Credit Support Provider or its Controlling Party (if any) for the Party's winding-up or liquidation. The applicable time period in such case is 0 Business Days without any grace period."

Additionally we suggest to include the following wordings into the Election Sheet with respect to § 21 of the General Agreement, <u>if such wording is factually correct</u> with respect to Party A:

"Party A represents and warrants that

- it does not use and does not intend to use any of the natural gas delivered to it under this Agreement to cover own use

("Eigenbedarf") and any transaction entered into by it shall constitute a pure trading transaction ("reines Handelsgeschaft") with listed goods and commodities (as defined in Section 1 no 3 Austrian Stock Exchange Act) within the meaning of Section 20 para 4 no. 2a of the Austrian Insolvency Act."

or more generally:

"Party A represents and warrants that any transaction under any Individual Contract qualifies as a transaction under Section 20 para 4 Austrian Insolvency Act."

We note that in cases where a party comes to the conclusion of having the need for "own use" transactions and where the need to mitigate risk is given, such party could e.g. consider to use a separate EFET GA for "own use" business.

Winding-Up Scenario

The winding-up scenario part refers to "a petition for its winding-up or liquidation is presented" which refers to the wording under Austrian corporate laws most likely to the point in time when an application for winding-up is filed with the court (*Antrag auf Auflösung)* and not to the point in time when for example the shareholders have passed the resolution for the winding-up. Timewise such point in time would be covered in many cases already by § 10.5 (c) no. (v) EFET General Agreement, which for example with respect to Austrian limited liability companies takes place at the point in time when the shareholders have passed the resolution. However, no adaptions seem to be necessary based on the current status of this provision with respect to its winding-up part under Austrian law.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (iv) EFET General Agreement where insertions clarifying the specific time of effectiveness in the form done above are inserted into the Election Sheet and where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (iv) EFET General Agreement where insertions clarifying the specific time of effectiveness in the form done above are inserted into the Election Sheet and where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A. However, please note that it is clearly recommended to use an automatic termination clause in order to fulfill all requirements set forth under Section 20 para 4 Austrian Insolvency Act.

(e) § 10.5 (c) no. (v) EFET General Agreement - Party A has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger)

Winding-up, official management or liquidation of a legal entity would fall under Austrian corporate law under the rules of liquidation, winding-up with respect to standard corporate law rules which do not foresee mandatory provisions which would not allow to agree in the EFET General Agreement on a close-out netting based on dissolvement (as specified under § 10.5 (c) no. (v) EFET General Agreement).

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (v) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (v) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A.

(f) § 10.5 (c) no. (vi) EFET General Agreement - Party A seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;

Under Austrian insolvency law these terms would refer to the insolvency administrator (*Insolvenzverwalter; Sanierungsverwalter, Masseverwalter*) or trustee (*Treuhänder*) and such " appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official" would lie timewise after the opening of an insolvency proceeding. In practice it would rather make very limited sense to refer to such point in time, as such point in time would be covered by point § 10.5 (c) no. (iv) EFET General Agreement already.

However, if the parties would like to take a very risk averse position with respect to the potential of avoiding misunderstandings of terms under Austrian law, the parties could add in the Election Sheet:

"Any administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official in the meaning of § 10.5 (c) no. (vi) EFET General Agreement shall be the persons/functions as determined by the respective provisions under Austrian Insolvency Act and – if relevant – under the Austria Corporate Act."

Secondly, Section 20 para 4 Austrian Insolvency Acts provide for certain requirements and as the appointment of an administrator falls timewise after the opening of an insolvency scenario, to which Section 20 para 4 Austrian Insolvency Act specifically refers ("auf Grund der Eröffnung des Insolvenzverfahrens aufgelöst") it could be argued that such scenario is not covered by Section 20 para 4 Austrian Insolvency Act and therefore such does not provide for an enforceable clause. <u>However, we note that it seems that in practice there should be no additional need under Austrian law for this point (vi) as it is timewise already covered by § 10.5 (c) no. (iv) EFET General Agreement.</u>

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (vi) EFET General Agreement or only on with § 10.5 (c) no. (vi) EFET General Agreement where Party A is a Non-Financial-Market Company <u>bears a high risk of not being enforceable</u> under Austrian law against Party A.

(g) § 10.5 (c) no. (vii) EFET General Agreement - Party A has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets

Point vii covers different scenarios and – due to its position does seem to have a nexus to an insolvency proceeding -

- a secured party takes possession (Inbesitznahme) of all or substantially all its assets, which means under Austrian law for example that Party A would have pledged /security assigned substantially all its assets and hands over such assets to the secured party (right in rem: possession (Besitz; potentially also Inhaber) e.g. to comply with the necessary mode (Modus) to establish a valid pledge;

- distress enforced on or against all or substantially all of Party A's assets (Beschlagnahme) which means under Austrian law for example that in the course of a criminal proceeding substantially all its assets have been taken under a distress order and could be declared forfeited (verfallen) in the course of the proceeding;

- execution enforced on or against all or substantially all of Party A's assets (Exekution geführt) which means under Austrian law for example that as a consequence of a court decision (civil and criminal) or an administrative decision (administrative) which is binding, execution is conducted under the Austrian Execution Act which could be in form of attachment/seizure (Pfändung), sequestration (Zwangsverwaltung), judicial sale (Zwangsversteigerung) but always at a point in time after an insolvency proceeding has been opened.

In practice it would rather make very limited sense to refer to such point in time, as such point in time would be covered by point § 10.5 (c) no. (iv) EFET General Agreement already.

However, if the parties would like to take a very risk averse position with respect to the potential of avoiding misunderstandings of terms under Austrian law, the parties could add in the Election Sheet:

"Any constellation, action or situation referred to in § 10.5 (c) no. (vii) EFET General Agreement refers to a situation after the opening of an insolvency proceeding and in the context of such insolvency proceeding under the Austrian Insolvency Act or any other law with respect to similar proceedings under Austrian law."

Secondly, Section 20 para 4 Austrian Insolvency Act provide for certain requirements and as constellations, actions or situations referred to in § 10.5 (c) no. (vii) EFET General Agreement fall timewise after the opening of an insolvency scenario, to which Section 20 para 4 Austrian Insolvency Act specifically refers ("auf Grund der Eröffnung des Insolvenzverfahrens aufgelöst") it could be argued that such scenario is not covered by Section 20 para 4 Austrian Insolvency Act and therefore such constellations, actions or situations referred to in § 10.5 (c) no. (vii) EFET General Agreement does not provide for an enforceable act covered by Section 20 para 4 Austrian Insolvency Act. <u>However, we note that it seems that in practice there should be no additional need under Austrian law for this point (vi) as it is timewise already covered by § 10.5 (c) no. (iv) EFET General Agreement.</u>

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (vii) EFET General Agreement or only on with § 10.5 (c) no. (vii) EFET General Agreement where Party A is a Non-Financial-Market Company <u>bears a high risk of not being enforceable</u> under Austrian law against Party A.

(h) § 10.5 (c) no. (viii) EFET General Agreement - Party A causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (i) to (vii) (inclusive)

Such catch-it-all clause would only work with situations where no mandatory Austrian laws foresee specific provisions against its enforceability or rights to challenge it. So basically such clause would be enforceable as long as the specific requirements which have to be fulfilled for the points (i) to (vii) above would be also fulfilled in the respective analogue cases.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (v) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A if no mandatory provisions under applicable laws of jurisdictions, other than Austria, do not foresee any limitations thereto and if all requirements under Austrian insolvency law as outlined in this opinion are complied with.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on termination according to § 10.5 (c) no. (v) EFET General Agreement where Party A is a Non-Financial-Market Company is enforceable under Austrian law against Party A if no mandatory provisions under applicable laws of jurisdictions, other than Austria, do not foresee any limitations thereto and if all requirements under Austrian insolvency law as outlined in this opinion are complied with.

(i) § 10.5 (c) no. (ix) EFET General Agreement - Party A takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts referred to in this Section 10.5 (c)

From a mere practical point this clause is difficult to apply in practice and could lead to a very huge and undefined area of potential termination triggers. Especially in connection with an automatic termination right in the sphere of insolvency scenarios there is a high risk that such undefined clause is not enforceable under Austrian law.

Close-out netting following the termination of the EFET General Agreement and the Individual Contracts thereunder based on automatic termination (§ 10.4.) in conjunction with § 10.5 (c) no. (ix) EFET General Agreement where Party A is a Non-Financial-Market Company bears a high risk of not being enforceable under Austrian law against Party A.

We note that questions falling under national/international sanction laws are not discussed within this opinion, but have to be considered separately by each Addressee when dealing with a Non-Financial Market Company.

(ii) Party A being a Financial-Market Company

For some of the Financial-Market Companies specific rules apply in insolvency scenarios, which do have an effect of the enforceability of the netting provision and the wording. Please see also 1.5. of ANNEX 25.

According to Section 82 para 3 Austrian Banking Act only the Austrian Financial Market Authority (FMA) may apply for the opening of an insolvency proceeding of a credit institution.

According to Section 83 para 1 Austrian Banking Act the Austrian Financial Market Authority (FMA) or the credit institution may apply for business supervision (Geschäftsaufsicht) in case where over-indebtedness or insolvency can be overcome. The opening of an insolvency proceeding ends any business supervision (Geschäftsaufsicht) according to Section 90 para 1 Austrian Banking Act.

With respect to cross border scenarios with respect to the specific business supervision measure (Geschäftsaufsichtsmaßnahme) Section 81c Austrian Banking Act foresees that a creditors right to set-off/net (aufrechnen) ac claim against a claim of the credit institution is not affected by the opening of measure under Article 2 Directive 2001/24/EG (including the business supervision measure (Geschäftsaufsichtsmaßnahme)), if such right to set-off/net (aufrechnen) is valid under the law applicable to the claim of the credit institution.

Section 119 of the Austrian Act on Recovery and Resolution of Banks (implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms) foresees that in case a petition for the opening of an insolvency proceeding for:

1. CRR financial institutions which is a (a) subsidiary of (i) a CRR credit institution or (ii) a CRR investment firm or (iii) financial holding companies, mixed financial holding companies and mixed-activity holding companies or (iv) parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed financial holding companies in a Member State, EU parent mixed financial holding companies, and (b) 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; (Section 1 para 1 no.2 Austrian Act on Recovery and Resolution of Banks)

2. financial holding companies, mixed financial holding companies and mixed-activity holding companies (Section 1 para 1 no.3 Austrian Act on Recovery and Resolution of Banks)

3. parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed financial holding companies in a Member State, EU parent mixed financial holding companies (Section 1 para 1 no.4 Austrian Act on Recovery and Resolution of Banks)

(together the "**BRRD Financial Market Companies**")

is filed, the Austrian Financial Markets Authority has a seven days period after either (i) the Austrian Financial Markets Authority has been informed about the petition or (ii) the Austrian Financial Markets Authority has filed the petition itself, to inform the competent insolvency court on whether or not the Austrian Financial Markets Authority plans a resolution measure. An insolvency proceeding may be opened only if the Austrian Financial Markets Authority (as the resolution authority (Abwicklungsbehörde)) does not inform the insolvency court about plans on resolution measures.

Respectively, if one of the Financial Market Companies is qualified as BRRD Financial Market Companies, and

- the Austrian Financial Markets Authority does not inform the insolvency court about resolution measures within seven days, then the same applies as specified above with respect to Non-Financial Market Companies under (a)(i) above;

- the Austrian Financial Markets Authority does inform the insolvency court about resolution measures within seven days, then it depends on which measures are used by the Austrian Financial Markets Authority (as the resolution authority (Abwicklungsbehörde); most relevant would be the bail-in instrument (Section 74 para 2 no. 4 Austrian Act on Recovery and Resolution of Banks), which foresees the right to bail-in under specific circumstances (resolution prerequisites of Section 49 or Section 52 of the Austrian Act on Recovery and Resolution of Banks) certain receivables of the BRRD Financial Market Companies (write down and conversion powers). It is to be noted that with respect to derivatives Section 91 Austrian Act on Recovery and Resolution of Banks (transposing Article 49 of Directive 49/2014/EU) foresees specific rules which safeguards netting provisions and allows the bail-in only with respect the net amount resulting from the netting provision after closing out (Glattstellung). Section 91 para 5 Austrian Act on Recovery and Resolution of Banks also foresees that financial contracts under framework agreement (including netting agreements), in particular transactions under Section 20 para 4 no. 1 – 4 Austrian Insolvency Act, are also covered by the provisions for derivatives. Financial contracts includes the following contracts and agreements:

(a) securities contracts, including:

- contracts for the purchase, sale or loan of a security, a group or index of securities;
- options on a security or group or index of securities;
- repurchase or reverse repurchase transactions on any such security, group or index;

(b) commodities contracts, including:

- contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;
- options on a commodity or group or index of commodities;
- repurchase or reverse repurchase transactions on any such commodity, group or index;

(c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;

(d) swap agreements, including:

- swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;
- total return, credit spread or credit swaps;
- any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

(e) inter-bank borrowing agreements where the term of the borrowing is three months or less;

(f) master agreements for any of the contracts or agreements referred to in points (a) to (e);

Respectively, transaction as specified under ANNEX 2 (Annex B – Transactions under EFET General Agreement), are covered by this definition of derivatives and financial contracts.

As consequence netting agreements are enforceable also with respect to the Financial Market Companies, including the BRRD Financial Market Companies. In a resolution proceeding under the Austrian Act on Recovery and Resolution of Banks all points of § 10.5. EFET General Agreement are enforceable (also in conjunction with an automatic termination right) and if alternatively or after such resolution proceeding an insolvency proceeding is opened the same (including limitations to enforceability as specified under (a)(i) above) applies as specified above with respect to Non-Financial Market Companies under (a)(i) above.

We note that we do not opine on any crisis prevention measures specifically but please note that according to Section 63 para 6 Austrian Act on Recovery and Resolution of Banks any contractual provisions which allow the termination of contracts triggered by crisis prevention measures are void as long as the main duties are continuously fulfilled (Section 63 para 4 Austrian Act on Recovery and Resolution of Banks).

We note that due to the variety of potential situation and the complex set of instruments and measure we have only opined and the specific situations mentioned herein but do not provide and do not purport to provide a comprehensive opinion on any and all potential constellations and facts with respect to the insolvency of Financial Market Companies or any other company on which other rules in addition to the Austrian Insolvency Act are applicable. We note that measures other than the described measures under this opinion might influence the enforceability and close-out netting of claims.

We note that questions falling under national/international sanction laws are not discussed within this opinion, but have to be considered separately by each Addressee when dealing with a Financial Market Company.

With respect to the scope of this opinion where only a scenario with two parties (Party A and Party B) is given, scenarios with a system of more than two parties are excluded. However, we strongly advice the parties to request separate external legal advice with respect to constellation where the parties enter into transactions where the settlement is covered by a system falling under Article 2 lit (a) Settlement Finality Directive[1] or where the settlement is done in a financial market environment with respect to at least a clearing system with respect to the term "financial market" under Article 12 EU Insolvency Regulation.

(iii) Party A being a Governmental Entity

If Party A enters into transactions as specified under ANNEX 2 (Annex B – Transactions under EFET General Agreement) and is a governmental entity, it would act under the frame of the private (meaning non-governmental) business administration (Privatwirtschaftsverwaltung) which foresees that all legal persons of public law (juristische Personen des öffentlichen Rechts) are to be treated like entrepreneurs (Section 343 Austrian Trade Act). Respectively, with respect to question of enforceability the same applies as specified above with respect to Non-Financial Market Companies under (a)(i) above.

We note that questions falling under national procurement law and/ or national/international sanction laws are not discussed within this opinion, but have to be considered separately by each Addressee when dealing with a Governmental Entity and/or entities which have to comply with national procurement law and/or national/international sanction laws.

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[1] Bundesgesetz über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und -abrechnungssystemen (Finalitätsgesetz) as being transposed from the Settlement Finality Directive into Austrian law.

(iv) Risks for all entities

We note that although the above said measures and wordings are drafted in order to mitigate the risk of being challenged, the risk of a successful challenge by an insolvency administrator can never be fully excluded, because there are no court cases with respect determining which contracts exactly fall under the protection of Section 20 para 4 Austrian Insolvency Act and secondly most cases are to be considered on a case-by-case approach, which in particular would take into consideration specific individual factors like "what can be proven as the parties' intention when entering the contract".

(b) EFET General Agreement and Individual Contracts under foreign law (law other than Austrian law)

The following is based on the assumption that the choice of law (other than Austrian law) is legal, valid, binding and enforceable under the law specified as governing law (§ 22.1 of the EFET General Agreement; other than Austrian Law).

(i) Party A being a Non-Financial-Market Company

Party A is not excluded from the scope of applicability of the EU Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of May 2015).

With respect to the commencement of proceedings Article 3 of the EU Insolvency Regulation foresees that Austrian courts have jurisdiction to open the main insolvency proceedings as the main interest lies in Austria; the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

Article 7 para 2 EU Insolvency Regulation states that the law of the state opening the proceedings, which is in this constellation Austria, determines - amongst other provisions - the conditions under which set-offs may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

Article 9 para 1 EU Insolvency Regulation states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Respectively, Article 9 as a collision norm provides that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law (*Kindler* in *MüKoBGBl* EUInsVO Art 9 Rn 6-8; *Liersch* in *Kommentar EUInsVO (Vallender)* Art 9 Rn 6-7).

In practice this could result in two potential courses of action: either the parties to the EFET General Agreement (i) check in addition whether the law chosen by the parties (other than Austrian law) permits close-out netting and set-off arrangements under the respective law (other than Austrian law) or (ii) they agree with respect to Party A / the parties on Austrian law with respect to only the two paragraphs (or specific sub-paragraphs of) § 10.4. and § 10.5. Although it is permitted and enforceable under Austrian law to chose different laws for different clauses it could cause a very complex situation to have different laws applicable for different contracts and we would strongly recommend to use such option only if the check of the other law provides for a result of non-enforceability under such law (other than Austrian law).

(ii) Party A being a Financial-Market Company

- Party A is excluded from the scope of applicability of the EU Insolvency Regulation

The third main chapter (Drittes Hauptstück) of the Austrian Insolvency Act foresees provisions for proceedings not falling under the EU Insolvency Regulation.

Section 233 Austrian Insolvency Act foresees that netting arrangements ("*Saldierungsvereinbarungen*") shall be exclusively subject to the law applicable to the agreement.

Section 223 Austrian Insolvency Act foresees that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law. The reference to "chosen law" refers to the law applicable on the contract and not the foreign general law (other than Austrian law) on insolvency proceedings. We note that in the legal literature there are controversy discussion with respect to this point as whether the reference is only to the material law applying to the contract or to any and all legal provisions in a jurisdiction including its insolvency laws and that a court might follow the latter opinion coming to a different conclusion.

As a consequence, if under the law (other than Austrian law) governing the EFET General Agreement, the contractual close-out netting provision is valid and enforceable, it is also enforceable under Austrian law against Party A.

(iii) Party A being a Governmental Entity

If Party A enters into transactions as specified under ANNEX 2 (Annex B – Transactions under EFET General Agreement) and is a governmental entity, it would act under the frame of the private (meaning non-governmental) business administration (Privatwirtschaftsverwaltung) which foresees that all legal persons of public law (juristische Personen des öffentlichen Rechts) are to be treated like entrepreneurs (Section 343 Austrian Trade Act). Respectively, with respect to question of enforceability the same applies as specified above with respect to Non-Financial Market Companies under (b)(i) above.

(iv) Risks for all entities

We note that although the above said measures and wordings are drafted in order to mitigate the risk of being challenged, the risk of a successful challenge by an insolvency administrator can never be fully excluded, because there are no court cases with respect determining which contracts exactly fall under the protection of Section 20 para 4 Austrian Insolvency Act and secondly most cases are to be considered on a case-by-case approach, which in particular would take into consideration specific individual factors like "what can be proven as the parties' intention when entering the contract".

(c) Payment Claims in Foreign Currency

Section 14 Austrian Insolvency Act foresees that receivables (claims for payment) in foreign currency against Party A shall be converted into and filed in Euro (EUR) at the exchange rate on the date of the opening of the insolvency proceedings.

3.1.3 C. I. 2. Enforceability of close-out netting where termination and close-out are based on an event that constitutes not a Winding-up, Insolvency or Attachment (as defined in § 10.5 (a), (b), (d) and (e) of the EFET General Agreement)

§ 10.5 of the EFET General Agreement lists *non-insolvency-related* Material Reasons upon their occurrence the other Party has an Early Termination right: (i) non-performance (§ 10.5. (a)), cross default and acceleration (§ 10.5 (b)), failure to deliver or accept (§ 10.5. (d)), Force Majeure (period excess) (§ 10.5. (e)) representation and warranty (breach) (§10.5. (f)).

As a consequence the close-out netting, meaning the termination of all Individual Contracts and the EFET General Agreement and the Calculation of the Termination Amount take place, following the procedure specified under § 10.3. in conjunction with § 11 EFET General Agreement.

Under Austrian law there are no mandatory provisions which hinder such close-out netting and such close out netting, meaning the termination of all Individual Contracts and the EFET General Agreement and the Calculation of the Termination Amount as specified in § 10.5 (a), (b), (d), (e) and (f) of the EFET General Agreement in conjunction with § 11 EFET General Agreement is enforceable with respect to Party A (either being a Non-Financial Market Company, or a Financial Market Company or a Governmental Entity).

3.2 C. II. MULTIBRANCH PARTIES

3.2.1 Brief Overview over Austrian law provisions with respect to branches under Austrian law

Provided in the separate annex (ANNEX 3).

3.2.2 C. II. 1. Austrian Multibranch Party

Under Austrian corporate law a party which conducts activities not at its seat but through an office on a not only temporary basis has to register a branch. Such branch not only has to be registered under corporate law in the Austrian companies register, but also under the Austrian Trade Act with the Austrian commercial register. Financial Market Companies would have to comply with their specific registration/notification proceedings under their specific laws (passporting).

Under Austrian corporate law a branch is always part of the main entity and in any case a branch is not a separate legal entity. Whenever the branch conducts activities, the main entity/company is bound by such activities.

Respectively, where Party A, being an Austrian entity, has entered into Individual Contracts through its Austrian branches or its foreign (non-Austrian) branches under an Austrian law or foreign law (non-Austrian law) EFET General Agreement, there are no changes to our conclusion stated above under point 3.1.2.

With respect to an Austrian law EFET General Agreement all Individual Contracts together with the General Agreement would be treated as single agreement in an Austrian insolvency proceeding as concluded above under point 3.1.2. We note that with respect to EFET General Agreement governed by foreign law (other than Austrian law) the parties should also consider in a multibranch constellation the conclusions under point 3.1.2(b).

3.2.3 C. II. 2. Foreign Multibranch Party

Under Austrian corporate law a foreign party (non-Austrian entity) which conducts activities not at its seat (outside Austria) but through an office on a not only temporary basis in Austria has to register a branch. Such branch not only has to be registered under corporate law in the Austrian companies register, but also under the Austrian Trade Act with the Austrian commercial register. Financial Market Companies would have to comply with their specific registration/notification proceedings under their specific laws (passporting).

Under Austrian corporate law a branch of a foreign entity is always seen as part of the main entity and therefore never treated as a separate legal entity. Whenever the branch conducts activities, the main entity/company is bound by such activities.

Respectively, where Party A, being a foreign entity, and

(i) being a <u>Non-Financial Market Company/ Governmental Entity,</u> has entered into Individual Contracts through its Austrian branches or its foreign (non-Austrian) branches under an Austrian law or foreign law (non-Austrian law) EFET General Agreement, there are no changes to our conclusion stated above under point 3.1.2. Please note that where Party A is a foreign entity located in a Member State Austrian insolvency courts may open a separate secondary insolvency proceeding under Article 3 para 2 and 4 European Insolvency Regulation under the requirements listed thereunder. In fact Austrian creditors could initiate separate local insolvency proceedings in Austria with respect to a claim arising from or in connection with the operation of an establishment situated within

Austria. With respect to an Austrian law EFET General Agreement all Individual Contracts together with the General Agreement would be treated as single agreement in an Austrian insolvency proceeding as concluded above under point 3.1.2. We note that with respect to EFET General Agreement governed by foreign law (other than Austrian law) the parties should also consider in a Multibranch constellation the conclusions under point 3.1.2(b). Please note that where Party A is a foreign entity located not in a Member State Austrian insolvency courts would have to check the respective bi-lateral treaties (if any) plus the national Austrian rules Section 221 et seq. Austrian Insolvency Act for International Private Law insolvency proceedings would allow Austrian proceedings as well as foreign proceedings. In fact Austrian creditors could initiate separate local insolvency proceedings in Austria with respect to a claim arising from or is in connection with the operation of an establishment situated within Austria.

(ii) being a Financial Market Company, has entered into Individual Contracts through its Austrian branches or its foreign (non-Austrian) branches under an Austrian law or foreign law (non-Austrian law) EFET General Agreement, there are no changes to our conclusion stated above under point 3.1.2. Following Sections 243 et seq. Austrian Insolvency Act Austrian creditors could initiate separate local insolvency proceedings in Austria. Please note that where Party A is a foreign entity located in a Member State or outside changes the way the insolvency courts may allow Austrian / foreign law proceedings as well as the how the insolvency courts would have to recognize foreign insolvency proceeding decisions. In fact Austrian creditors could initiate separate local insolvency proceedings in Austria. With respect to an Austrian law EFET General Agreement all Individual Contracts together with the General Agreement would be treated as single agreement in an Austrian insolvency proceeding as concluded above under point 3.1.2. We note that with respect to EFET General Agreement governed by foreign law (other than Austrian law) the parties should also consider in a multibranch constellation the conclusions under point 3.1.2(b).

Although based on different legal rules in both constellations Austrian insolvency law including EU Insolvency Regulation foresees the concept of cooperation with foreign (non-Austrian) insolvency administrators and foreign (non-Austrian) insolvency courts, which basically contradicts a situation where in one proceeding a net value is claimed and accepted and in the other proceeding a mark-to-market single contract value is claimed and accepted. However, we note that the risk itself for such constellation (contradicting claims in different proceedings) could never be excluded fully, as long as it is possible to have different proceedings in different countries.

Please note that all the above said only applies with respect to branches in Austria. If only assets lie in Austria, there would be not enough nexus for the above specified provisions to have separate proceedings in Austria and such proceedings would have to opened in the Member State/ country where the main interest of such company (which owns such asset) lies.

3.3 C. III. Collateral

3.3.1 Brief Overview over Austrian law provisions with respect to collateral under Austrian law

Provided in the separate annex (ANNEX 3).

As a prenotice please note that for all cases of drafting guarantees, letters of credit, sureties or other document having similar affects, it needs to be taken into account that Austrian courts, in particular also Austrian tax authorities, have developed a very fragmented decision practice which results in a situation that each such document has to be analysed by assessing the parties intention and the prevailing aspects of such document (e.g. wordings which foresee accessory nexus might attach the qualification as a surety to such document even in cases where waiver of defences (Einwendungsverzicht aus dem Grundgeschäft) have been agreed, etc.). Please make sure that – in practice to mitigate additional stamp duty risks – to coordinate with your local counsel.

3.3.2 C. III. 1. Cash Transfer

Under the EFET Credit Support Annex, becoming part of the EFET General Agreement by agreement of the parties, Party A would transfer a certain amount of money to the bank account of Party B (account under control of Party B).

§ 7 para 1 of the EFET Credit Support Annex foresees a full title transfer (Eigentumsübertragung) of such cash.

(a) <u>Cash as eligible credit support – under the Austrian Financial Collateral Act[2]</u>

If either Party A or Party B or both is/are a financial market participant in the meaning of the Austrian Financial Collateral Act, meaning a Financial Market Company or an Investment Fund Management Company in the meaning of this opinion, then Austrian Financial Collateral Act is applicable.

The EFET Credit Support Annex as such and specifically the § 7 para 1 of the EFET Credit Support Annex are to be qualified as title transfer financial collateral arrangement under Section 3 para 1 no. 2 Austrian Financial Collateral Act (Article 2 para 1 lit. b) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements; Financial Collateral Arrangements Directive).

With respect to this constellation § 7 para 3 EFET Credit Support Annex could lead to a problematic interpretation as it generally excludes any form of security interest, whereas under Austrian law the transfer of title in cash (Sicherungsübereignung; vollständige

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[2] Bundesgesetz über Sicherheiten auf den Finanzmärkten (Finanzsicherheiten-Gesetz – FinSG) (implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements into Austrian law)

Übereignung einer Barsicherheit) as a collateral is clearly seen as a sort of security interest and also follows the same rules of interpretation and perfection.

Therefore we suggest to add in this constellation the following wording at the end of § 7 para 3 EFET Credit Support Annex: " ... other than the title transfer of cash under this Agreement (vollständige Übereignung als Basicherheit) under the Austrian Financial Collateral Act (implementing Directive 2002/47/EC into Austrian law).

Based on the aforesaid, the transfer of cash as Eligible Credit Support in connection with the valuation procedure by the Valuation Agent provides in our view such a strong nexus to the Individual Contracts that consequently such cash transfer clearly qualifies as collateral/security interest which is also the basic intention and interest of the involved parties (that such cash (cash deposit) is used as collateral in connection with the supply of natural gas) due to our experience.

In our view the qualification of such cash transfer as collateral under Directive 2002/47/EC is actually beneficial as the Directive 2002/47/EC harmonizes also the protection of close-out netting in this context under Article 7 Directive 2002/47/EC (Section 9 Austrian Financial Collateral Act).

Party B – after having received the cash on Party B's account does not have to take any action thereafter to ensure that its title therein continues. There are no 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.

§ 6 of the EFET Credit Support Annex foresees a right of substitution of Credit Support by the Transferor. Although Austrian law only foresees provisions for the substitution of collateral by the Transferee (and not the Transferor; e.g. Section 7 Austrian Financial Collateral Act), Austrian law upholds § 6 EFET Credit Support Annex also with respect to the right of the Transferor.

§ 11 of the EFET Credit Support Annex foresees that amounts under Letters of Credit are not to be calculated being part of the Base Currency Equivalent but shall be recognized - if drawn – as other amounts payable under § 11 of the EFET General Agreement. Austrian law only foresees a special right in case of a scenario where the same collateral would have to be retransferred by the Transferee (Section 8 para 2 Austrian Financial Collateral Act) explicitly which does not cover explicitly the calculation under § 11 EFET Credit Support Annex. However, as long as the Transferee returns any hyperocha/surplus after having used the Letter of Credit, Austrian law upholds § 11 EFET Credit Support Annex.

Party B's rights are enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, in Austria according to Section 11 Austrian Financial Collateral Act.

Party A (or the insolvency administrator) would be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency proceeding opening, based on the standard avoidance rules, which apply to all insolvency scenarios with respect to any claims and any collateral. Please refer to ANNEX 3 (Brief Summary Austrian LEGAL SYSTEM) point 1.4 (Avoidance of transactions under Austrian law).

The EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

(b) <u>Cash as eligible credit support – outside the Austrian Financial Collateral Act</u>

If neither Party A nor Party B is/are a financial market participant in the meaning of the Austrian Financial Collateral Act, meaning neither a Financial Market Company nor an Investment Fund Management Company in the meaning of this opinion, than the Austrian Financial Collateral Act is not applicable and the general provisions of Austrian law (Austrian Trade Act (UGB); Austrian Civil Law Act (AGB); and Austrian Insolvency Act) with respect to title transfers (Sicherungsübereignungen) is applicable.

The EFET Credit Support Annex as such and specifically the § 7 para 1 of the EFET Credit Support Annex are to be qualified as title transfer financial collateral arrangement, which – in the absence of the applicability of the Austrian Financial Collateral Act - is to be assessed and qualified under general Austrian Civil Law Act.

Austrian civil law recognizes as title transfer collateral arrangements but treats them under the same principles as pledges[3] and applies basically the same rules.

With respect to this constellation § 7 para 3 EFET Credit Support Annex could lead to a problematic interpretation as it generally excludes any form of security interest/ pledges, whereas under Austrian law the transfer of title in cash (Sicherungsübereignung) as a collateral is clearly seen as a sort of security interest and also generally follows the same rules of interpretation and perfection. A major difference however is, that transfer of title in cash (Sicherungsübereignung) is not accessory, meaning the parties have to regulate contractually what happens after the collateralized claim is reduced, satisfied or falls away due to another reason.[4]

Therefore we suggest to add in this constellation the following wording at the end of § 7 para 3 EFET Credit Support Annex: " ... other than the title transfer of cash under this Agreement (Sicherungsübereignung) under the Austrian civil law.

Based on the aforesaid, the transfer of cash as Eligible Credit Support in connection with the valuation procedure by the Valuation Agent provides in our view such a strong nexus to the Individual Contracts that consequently such cash transfer clearly qualifies as collateral/security interest which is also the basic intention and interest of the involved

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3 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) I. Die Funktion der Sicherungsübereignung; Rz 4/3.

4 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) C. Zu sichernde Forderung; Rz 4/16.

parties (that such cash (cash deposit) is used as collateral in connection with the supply of natural gas) due to our experience.

Party B – after having received the cash on Party B's account does not have to take any action thereafter to ensure that its title therein continues. There are no 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.

§ 6 of the EFET Credit Support Annex foresees a right of substitution of Credit Support by the Transferor. Austrian civil law does not foresee explicit provisions for the substitution of collateral by the Transferor. However, Austrian law upholds § 6 EFET Credit Support Annex also with respect to the right of the Transferor.

§ 11 of the EFET Credit Support Annex foresees that amounts under Letters of Credit are not to be calculated being part of the Base Currency Equivalent but shall be recognized - if drawn – as other amounts payable under § 11 of the EFET General Agreement. Austrian law - as long as the Transferee returns any hyperocha/surplus after having used the Letter of Credit - upholds § 11 EFET Credit Support Annex.

Party B's rights are enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, in Austria but only in accordance with the general provision of Austrian insolvency law[5].

Party A (or the insolvency administrator) would be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency proceeding opening, based on the standard avoidance rules, which apply to all insolvency scenarios with respect to any claims and any collateral. Please refer to ANNEX 3 (Brief Summary Austrian LEGAL SYSTEM) point 1.4 (Avoidance of transactions under Austrian law).

The EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

3.3.3 C. III. 2. Letter of Credit- standby letter of credit

Under the EFET Credit Support Annex, becoming part of the EFET General Agreement by agreement of the parties, Party A would arrange that Party A's bank issues a standby letter of credit which foresees that in case Party B delivers certain documents to Party A's bank (e.g. declaration that Party A has not fulfilled it's obligations within a certain grace period) Party A's bank has to pay a specified amount of money to Party B.

§ 7 para 1 of the EFET Credit Support Annex foresees a full title transfer (Eigentumsübertragung) of such standby letter of credit.

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[5] Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) A. Vor Fälligkeit der zu sichernden Forderung; Rz 4/24.

(a) Standby letter of credit as eligible credit support – under the Austrian Financial Collateral Act

The Austrian Financial Collateral Act implements Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (Financial Collateral Arrangements Directive) into Austrian law.

Section 3 para 1 no. 1 Austrian Financial Collateral Act defines financial collateral as cash (Barsicherheiten), financial instruments (Finanzinstrumente) or credit claims (Kreditforderungen). Standby letters of credit (Haftungsübernahme in Akkreditivform)[6] are - like bank guarantees or letters of credit (Akkreditiv) – neither qualified as cash, nor as financial instrument, nor as credit claim under Austrian law. Respectively, Standby letters of credit (Haftungsübernahme in Akkreditivform) fall outside of the scope of the Austrian Financial Collateral Act.

(b) Standby letter of credit as eligible credit support – outside the scope of the Austrian Financial Collateral Act

General provisions of Austrian law (Austrian Trade Act (UGB); Austrian Civil Law Act (AGB); and Austrian Insolvency Act) with respect to title transfers (Sicherungsübereignungen) is applicable.

The EFET Credit Support Annex as such and specifically the § 7 para 1 of the EFET Credit Support Annex are to be qualified as title transfer financial collateral arrangement, which – in the absence of the applicability of the Austrian Financial Collateral Act (Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements; Financial Collateral Arrangements Directive) is to be assessed and qualified under general Austrian Civil Law Act.

Austrian civil law recognizes as title transfer collateral arrangements but treats them under the same principles as pledges[7] and applies basically the same rules.

Standby letters of credit (Haftungsübernahme in Akkreditivform)[8] are - like bank guarantees or letters of credit (Akkreditiv) – specific agreements which foresee a collateral in order to secure a major claim. For an Austrian law perspective the wording "title transfer" with respect to and in connection with a standby letter of credit (Haftungsübernahme in

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6 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz 1/2.

7 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) I. Die Funktion der Sicherungsübereignung; Rz 4/3.

8 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz 1/2.

Akkreditivform)[9] is a little bit weird as the standby letter of credit (Haftungsübernahme in Akkreditivform)[10] itself is already the instrument to protect the claim.

With respect to this constellation § 7 para 3 EFET Credit Support Annex could lead to a problematic interpretation as it generally excludes any form of security interest, whereas under Austrian law the provision of a standby letter of credit a collateral is clearly seen as a sort of providing security interest. The parties have to regulate contractually what happens after the collateralized claim is reduced, satisfied or falls away due to another reason, whereas generally UCP 600 is widely used for the form of standby letters of credit.

Therefore we suggest to add in this constellation the following wording at the end of § 7 para 3 EFET Credit Support Annex: " ... other than the provision of a standby letter of credit (UCP 600)."

Based on the aforesaid, the provision of a standby letter of credit as Eligible Credit Support in connection with the valuation procedure by the Valuation Agent provides in our view such a strong nexus to the Individual Contracts that consequently such provision of a standby letter clearly qualifies as collateral/security interest which is also the basic intention and interest of the involved parties (that such standby letter of credit is used as collateral in connection with the supply of natural gas) due to our experience.

Party B – after having received the standby letter of credit does not have to take any action thereafter to ensure that its title therein continues, other than the formal requirements of the standby letter of credit itself. There are no 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.

§ 6 of the EFET Credit Support Annex foresees a right of substitution of Credit Support by the Transferor. Austrian civil law does not foresee explicit provisions for the substitution of collateral by the Transferor. However, Austrian law upholds § 6 EFET Credit Support Annex also with respect to the right of the Transferor.

§ 11 of the EFET Credit Support Annex foresees that amounts under Letters of Credit (standby letters of credit) are not to be calculated being part of the Base Currency Equivalent but shall be recognized - if drawn – as other amounts payable under § 11 of the EFET General Agreement. Austrian law - as long as the Transferee returns any *hyperocha*/surplus after having used the Letter of Credit (standby letter of credit) - upholds § 11 EFET Credit Support Annex.

Party B's rights are enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, in Austria but only in accordance with the general provision of Austrian insolvency law.

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9 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz 1/2.

10 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz 1/2.

Party A (or the insolvency administrator) would be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency proceeding opening, based on the standard avoidance rules, which apply to all insolvency scenarios with respect to any claims and any collateral. Please refer to ANNEX 3 (Brief Summary Austrian LEGAL SYSTEM) point 1.4 (Avoidance of transactions under Austrian law).

The EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

3.3.4 C. III. 3. Letter of Credit- bank guarantee

Under the EFET Credit Support Annex, becoming part of the EFET General Agreement by agreement of the parties, Party A would arrange that Party A's bank issues a bank guarantee which foresees that in case Party B complies with certain specific requirements (e.g. declaration that Party A has not fulfilled it's obligations within a certain grace period) Party A's bank has to pay a specified amount of money to Party B.

§ 7 para 1 of the EFET Credit Support Annex foresees a full title transfer (Eigentumsübertragung) of such bank guarantee.

(a) Bank guarantee as eligible credit support – under the Austrian Financial Collateral Act

The Austrian Financial Collateral Act implements Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (Financial Collateral Arrangements Directive) into Austrian law.

Section 3 para 1 no. 1 Austrian Financial Collateral Act defines financial collateral as cash (Barsicherheiten), financial instruments (Finanzinstrumente) or credit claims (Kreditforderungen). Bank guarantees are - like letters of credit (Akkreditiv) – neither qualified as cash, nor as financial instrument, nor as credit claim under Austrian law. Respectively, bank guarantees fall outside of the scope of the Austrian Financial Collateral Act.

(b) Bank guarantee as eligible credit support – outside the scope of the Austrian Financial Collateral Act

General provisions of Austrian law (Austrian Trade Act (UGB); Austrian Civil Law Act (AGB); and Austrian Insolvency Act) with respect to title transfers (Sicherungsübereignungen) are applicable.

The EFET Credit Support Annex as such and specifically the § 7 para 1 of the EFET Credit Support Annex are to be qualified as title transfer financial collateral arrangement, which – in the absence of the applicability of the Austrian Financial Collateral Act (Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements; Financial Collateral Arrangements Directive) is to be assessed and qualified under general Austrian Civil Law Act. .

Austrian civil law recognizes as title transfer collateral arrangements but treats them under the same principles as pledges[11] and applies basically the same rules.

Bank guarantees are - like letters of credit (Akkreditiv) – specific agreements which foresee collateral in order to secure a major claim. For an Austrian law perspective the wording "title transfer" with respect to and in connection with bank guarantees is a little bit weird as the bank guarantee itself is already the instrument to protect the claim.

With respect to this constellation § 7 para 3 EFET Credit Support Annex could lead to a problematic interpretation as it generally excludes any form of security interest, whereas under Austrian law the provision of a bank guarantee as collateral is clearly seen as a sort of providing security interest. The parties have to regulate contractually what happens after the collateralized claim is reduced, satisfied or falls away due to another reason.

Therefore we suggest to add in this constellation the following wording at the end of § 7 para 3 EFET Credit Support Annex: " ... other than the provision of a bank guarantee under Austrian law (Section 880a, second part ABGB)".

Based on the aforesaid, the provision of a bank guarantee as Eligible Credit Support in connection with the valuation procedure by the Valuation Agent provides in our view such a strong nexus to the Individual Contracts that consequently such provision of a bank guarantee clearly qualifies as collateral/security interest which is also the basic intention and interest of the involved parties (that such bank guarantee is used as collateral in connection with the supply of natural gas) due to our experience.

Party B – after having received the bank guarantee - does not have to take any action thereafter to ensure that its title therein continues, other than the formal requirements of the bank guarantee itself. There are no 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.

§ 6 of the EFET Credit Support Annex foresees a right of substitution of Credit Support by the Transferor. Austrian civil law does not foresee explicit provisions for the substitution of collateral by the Transferor. However, Austrian law upholds § 6 EFET Credit Support Annex also with respect to the right of the Transferor.

§ 11 of the EFET Credit Support Annex foresees that amounts under Letters of Credit (bank guarantee) are not to be calculated being part of the Base Currency Equivalent but shall be recognized - if drawn – as other amounts payable under § 11 of the EFET General Agreement. Austrian law - as long as the Transferee returns any hyperocha/surplus after

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[11] Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) I. Die Funktion der Sicherungsübereignung; Rz 4/3.

having used the Letter of Credit (bank guarantee) - upholds § 11 EFET Credit Support Annex.

Party B's rights are enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, in Austria but only in accordance with the general provision of Austrian insolvency law.

Party A (or the insolvency administrator) would be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency proceeding opening, based on the standard avoidance rules, which apply to all insolvency scenarios with respect to any claims and any collateral. Please refer to ANNEX 3 (Brief Summary Austrian LEGAL SYSTEM) point 1.4 (Avoidance of transactions under Austrian law).

The EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

3.3.5 C. III. 4. Letter of Credit- similar documents

The definition of Letter of Credit includes also a reference to "similar documents in a format acceptable to the Transferee".

Due to the wide range of differences between such document, we cannot opine on such documents in this opinion, but the parties would have to consult their advisers with respect to any collaterals which deviate from standard cash collaterals, standard bank guarantees and standard letters of credit (all of them as defined and referred to above).

3.3.6 C. III. 5. Letter of Credit - parent company guarantees

Under the EFET Credit Support Annex, becoming part of the EFET General Agreement by agreement of the parties, Party A would arrange that Party A's parent company issues a parent company guarantee which foresees that in case Party B complies with certain specific requirements (e.g. declaration that Party A has not fulfilled it's obligations within a certain grace period) Party A's parent company has to pay a specified amount of money to Party B.

For the purpose of this opinion we assume that the parties would include the following wording at the end of the definition of "Letter of Credit" in Annex 1 to the EFET Credit Support Annex: " and a parent company guarantee issued by [the Transferor's parent company] which obliges [the Transferor's parent company] to pay the amount guaranteed therein upon first demand of the Transferee (Section 880a, second part ABGB)."

We note that there are many different forms of patronage wordings (e.g. harte oder weiche Patronatserklärung; Ausstattungszusagen; etc) and also other forms of security like sureties (Bürgschaften) on the market, but only the abstract guarantee of a parent company is covered by this opinion, as it is the most spread form of security <u>due to</u>

negative tax implications for the surety (Bürgschaft) because of the stamp duty risk (Rechtsgeschäftsgebühr) and the indirect claims risk (Ausstattungsanspruch zur Austattung des Schuldners statt direkter Erfüllung gegen den Gläubiger) for the patronage declaration (Patronatserklärung hart). Due to the wide range of differences between such documents (other than parent company guarantees as described above), we cannot opine on such documents in this opinion, but the parties would have to consult their advisers with respect to any collaterals which deviate from standard parent company guarantees and are provided in the form of patronage wordings (e.g. harte oder weiche Patronatserklärung; Ausstatungszusagen; etc.) and also other forms of security like sureties (Bürgschaften).

The inclusion of the term parent company guarantee in the definition of "Letter of Credit" in Annex 1 to the EFET Credit Support Annex would also have the effect that is is recognized under the § 11 EFET Credit Support Annex wording with respect to the calculation mechanism there.

§ 7 para 1 of the EFET Credit Support Annex foresees a full title transfer (Eigentumsübertragung) of such parent company guarantee.

For the purpose of this opinion we only assess parent company guarantees (abstract guarantee wording form).

(a) Parent company guarantee as eligible credit support – under the Austrian Financial Collateral Act

The Austrian Financial Collateral Act implements Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements; Financial Collateral Arrangements Directive into Austrian law.

Section 3 para 1 no. 1 Austrian Financial Collateral Act defines financial collateral as cash (Barsicherheiten), financial instruments (Finanzinstrumente) or credit claims (Kreditforderungen). Parent company guarantees are - like letters of credit (Akkreditiv) – neither qualified as cash, nor as financial instrument, nor as credit claim under Austrian law. Respectively, parent company guarantees fall outside of the scope of the Austrian Financial Collateral Act.

(b) Parent company guarantee as eligible credit support – outside the scope of the Austrian Financial Collateral Act

General provisions of Austrian law (Austrian Trade Act (UGB); Austrian Civil Law Act (AGB); and Austrian Insolvency Act) with respect to title transfers (Sicherungsübereignungen) are applicable.

The EFET Credit Support Annex as such and specifically the § 7 para 1 of the EFET Credit Support Annex are to be qualified as title transfer financial collateral arrangement, which – in the absence of the applicability of the Austrian Financial Collateral Act (Directive

2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements; (Financial Collateral Arrangements Directive) is to be assessed and qualified under general Austrian Civil Law Act.

Austrian civil law recognizes as title transfer collateral arrangements but treats them under the same principles as pledges[12] and applies basically the same rules.

Parent company guarantees are - like letters of credit (Akkreditiv) – specific agreements which foresee collateral in order to secure a major claim. For an Austrian law perspective the wording "title transfer" with respect to and in connection with parent company guarantees is a little bit weird as the guarantee itself is already the instrument to protect the claim.

With respect to this constellation § 7 para 3 EFET Credit Support Annex could lead to a problematic interpretation as it generally excludes any form of security interest, whereas under Austrian law the provision of a parent company guarantees as collateral is clearly seen as a sort of providing security interest. The parties have to regulate contractually what happens after the collateralized claim is reduced, satisfied or falls away due to another reason.

Therefore we suggest to add in this constellation the following wording at the end of § 7 para 3 EFET Credit Support Annex: " ... other than the provision of parent company guarantees under Austrian law".

Based on the aforesaid, the provision of parent company guarantees as Eligible Credit Support in connection with the valuation procedure by the Valuation Agent provides in our view such a strong nexus to the Individual Contracts that consequently such provision of a guarantee clearly qualifies as collateral/security interest which is also the basic intention and interest of the involved parties (that such parent company guarantee is used as collateral in connection with the supply of natural gas) due to our experience.

Party B – after having received the parent company guarantee does not have to take any action thereafter to ensure that its title therein continues, other than the formal requirements of the parent company guarantee itself. There are no 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.

§ 6 of the EFET Credit Support Annex foresees a right of substitution of Credit Support by the Transferor. Austrian civil law does not foresee explicit provisions for the substitution of collateral by the Transferor. However, Austrian law upholds § 6 EFET Credit Support Annex also with respect to the right of the Transferor.

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[12] Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2011) I. Die Funktion der Sicherungsübereignung; Rz 4/3.

§ 11 of the EFET Credit Support Annex foresees that amounts under Letters of Credit (parent company guarantee (if included in the definition)) are not to be calculated being part of the Base Currency Equivalent but shall be recognized - if drawn – as other amounts payable under § 11 of the EFET General Agreement. Austrian law - as long as the Transferee returns any hyperocha/surplus after having used the Letter of Credit (parent company guarantee (if included in the definition)) - upholds § 11 EFET Credit Support Annex.

Party B's rights are enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, in Austria but only in accordance with the general provision of Austrian insolvency law.

Party A (or the insolvency administrator) would be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency proceeding opening, based on the standard avoidance rules, which apply to all insolvency scenarios with respect to any claims and any collateral. Please refer to ANNEX 3 (Brief Summary Austrian LEGAL SYSTEM) point 1.4 (Avoidance of transactions under Austrian law).

The EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

3.4 C. IV. General Enforceability

3.4.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law.

Provided in the separate annex (ANNEX 3).

3.4.2 C. IV. 1. Force Majeure

Please see 2.2.3 of ANNEX 25.

The Austrian Civil Act contains similar provisions whereby Austrian law more generally refers to the concept of "coincidence" and to "incidental events without operational coherence, which cannot be expected, even with reasonable diligence" whereas § 7 of the EFET General Agreement foresees specific scenarios with specific consequences. However, Austrian law recognizes such clauses and § 7 of the EFET General Agreement is enforceable under Austrian law.

If German or English law is applied on the EFET General Agreement than Austrian courts would enforce this provision if under German or English law such provision is valid and enforceable.

3.4.3 C. IV. 2. Remedies for non-performance

Please see 2.2.5 of ANNEX 25.

Austrian law allows that parties agree on the consequences of non-performance. Respectively § 8 of the EFET General Agreement is enforceable under Austrian law.

If German or English law is applied on the EFET General Agreement than Austrian courts would enforce this provision if under German or English law such provision is valid and enforceable.

3.4.4 C. IV. 3. Limitation of liability

Please see 2.2.6 of ANNEX 25.

Under Austrian law § 12 of the EFET General Agreement is enforceable with the given wording. However, we note that the concept of fundamental contractual obligations ("Kardinalspflichten") is a concept under German law which has been not implemented under Austrian law. Consequently, in a court proceeding § 12.4.(c) EFET General Agreement might lead to frictions with respect to its interpretation, raising questions of whether the parties wanted to apply generally German law with respect to this paragraph or just a German law concept or neither German law nor concept but only a (new for Austrian law) provision. With respect to this potential for conflicts for Austrian law EFET General Agreement two courses of action seem to mitigate friction potential:

- to delete § 12.4 (c) EFET General Agreement to have a coherent Austrian law mechanism applicable on the concepts of limitation of liability;

  or

- to clearly state that exclusively with respect to § 12.4 (c) EFET General Agreement German law shall be applicable.

Please note that due to our experience split law clauses (meaning applying different material laws on one contract) generally cause more problems than help solving issues. Respectively, we recommend to delete § 12.4 (c) EFET General Agreement.

If German or English law is applied on the EFET General Agreement than Austrian courts would enforce this provision if under German or English law such provision is valid and enforceable.

Please refer to the discussion of other additional wording option to ANNEX 3.

3.4.5 C. IV. 4. Ordre Public

We are not aware of any Austrian Supreme Court decisions with respect to Individual Contracts under the EFET General Agreement which do argue that one of the provisions of the EFET General Agreement infringes *ordre public*.

3.5 C. V. Confirmation Practices

3.5.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law

Provided in the separate annex (ANNEX 3).

3.5.2 C. V. 1. Binding Individual Contract parts

(a) Formal requirements/ oral agreements

Under Austrian law generally no formal requirements are mandatorily necessary to conclude a binding contract. A contract generally becomes binding at the point in time when both parties agree on the essential parts of the contract (e.g. in a standard constellation the goods plus the price for the goods). It makes no difference whether the agreement is reached orally, in writing or implicit (by signs/actions).

Please note that when concluding contracts with companies, in particular including public entities, it should be made sure that the persons representing such entity have the capacity and authority to represent such entity, which as a matter of fact, requires in each individual situation a case-by-case check. No general rule covering any and all potential situations can be covered in this opinion. In order to provide for the most secure situation it is recommended to apply § 3.4 of the EFET General Agreement and make sure at the beginning of the business relationship to check such lists on a regular basis. This applies in particular to situations where persons are listed as authorized persons of public entities which cannot be found in the Austrian Companies Register listed as managing director (Vorstand / Geschäftsführer).

However, in daily practice the natural gas trading industry seems (in many cases known to us) to make not use of such § 3.4. option of providing authorized officers/traders lists; such situation could be covered by inserting a clause which identifies this practice, if so wished by the party. We have seen in many cases clauses which have the following or a similar wording included in § 3.4.:

"Absent prior notice to the contrary, each Party acknowledges and represents to the other Party that each of its employees purporting to represent, negotiate and enter into one ore more binding Individual Contracts on such Party's behalf, shall be deemed to be an authorised trader of that Party."

The positive aspect of such clause is that is clear that an employee purporting to represent the counterparty is deemed to bind such party in trading deals. The negative aspect is that even in extraordinary cases (e.g. deals which have a tenfold volume and double the price) a party is bound.

A party would have to consider which approach fits best to its business practice in connection with its risk mitigation duties, if any.

(b) Point in time of becoming binding

An Individual Contract agreed upon orally becomes legally binding at the moment when the parties agree on the essential parts of the contract in such oral negotiation. Any confirmation later on in writing is just a confirmation but does not change the point in time when the contract has been entered into with binding effect.

(c) Failure to object

Under Austrian law a failure to object to incorrect terms in a received Confirmation would constitute only "acceptance" if such incorrect terms are not material/essential terms of the contract. Otherwise it would be generally seen as a different offer, which again triggers the necessity of an approval/denial act. We note that the principles of German law and German law jurisprudence[13] with respect to commercial confirmations between entrepreneurs (kaufmännisches Bestätigungsschreiben) are not implemented in Austria law in the same way but are discussed and it seems that the prevailing doctrine in Austria still reflects a non-constitutive effect of material changes. With respect to these aspects under Austrian law we suggest to adapt § 3.3 EFET General Agreement by adding a wording, which reflects the internal confirmation practice more specifically and especially foresees a specific rule for failures to object incorrect terms. Please note that without knowing the specific structure of a company no generally applicable wording can be proposed. Please note that under Austrian law an oral contract is valid and binding, so please make sure that any oral agreements – in most cases we assume that the trading communication is recorded – are checked against the written confirmations. A company which does not have an automatic structure for confirmation checks should make sure that its individual confirmation procedure is covered by the EFET GA wording.

(d) Reference to relevant EFET General Agreement

Whether or not the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged between the parties is sufficient for the inclusion of the Individual Contract in the EFET General Agreement depends on the individual circumstances of the case. However, generally if both parties entered into the contract with the intention that it is included as Individual Contract under the EFET General Agreement and not as stand alone contract, it is sufficient that the specific and explicit reference is included in the written confirmation post entering into the contract.

We note that in constellations where there are/could be different deviating intentions, e.g. two parties do have more than one EFET General Agreement in place between them or where one party wants to have a stand-alone contract and the other party wants to have an Individual Contract a court would consider many factors like the intention of the parties, whether or not they would have entered the contract anyway or whether the inclusion

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[13] BGH v 27.1.2011 – VII ZR 186/09, BGHZ 188, 128 (Tz 21 ff) unter Hinw auf Kramer in MünchKomm-BGB5 § 151 Rn 19 ff.

under the EFET General Agreement would be a material factor and would take a case-by-case approach to solve this situation.

3.5.3 C. V. 2. Means of Evidence

Under the Austrian Civil Procedure Act a judge is free in the consideration of evidence. (i) taped recording, (ii) witness' statement, (iii) e-mail or other electronic message or transaction entry system, and/or (iv) facsimile are generally proper means of evidence and are accepted by Austrian courts to provide evidence.

3.6 C. VI. Core Provisions

3.6.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law.

Provided in the separate annex (ANNEX 3).

3.6.2 C. VI. 1. Selections

Standard selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) would not change the substance of our conclusions above, as long as they follow the principles under Austrian law as outlined above and in ANNEX 3.

We note that we do not opine on any alterations of wordings in combination with selections, other than suggested under this opinion. As the EFET General Agreement provides for a wide range of flexible adaption options nobody is able to provide a "catch it all opinion" covering any and all potential alterations and modifications

We note that changes and selections which target a Core Provision might change the substance of our conclusions above and we suggest to request separate legal support for any change of Core Provisions as defined below.

3.6.3 C. VI. 2. Core Provisions

In our understanding at least the following provisions are to be considered as Core Provisions:

EFET General Agreement

(a) Subject of the Agreement (§ 1.1);

(b) Confirmations an Objections (in the proposed wording form or reflecting the guidance above) (§ 3.2; §3.3);

(c) Delivery and Acceptance (§ 4.1);

(d) Force Majeure (§ 7.1);

(e) Remedies for Failure to Deliver and Accept (§ 8.1 and 8.2);

(f) Term and Termination Rights (§ 10.1, § 10.3 (a-c; d; f), § 10.4 (in the proposed wording form or reflecting the guidance above), § 10.5 (c) (in the proposed wording form or reflecting the guidance above);

(g) Calculation of the Termination Amount (§ 11);

(h) Limitation of Liability (§ 12.2; § 12.4);

(i) Governing law and Arbitration (§ 22).

3.7 C. VII. Governing law, place of jurisdiction and arbitration

3.7.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law

Provided in the separate annex (ANNEX 3).

3.7.2 C. VII. 1. Choice of Law

According to the Regulation 593/2008/EC with respect to scenarios where Party B has its seat in the EU and with respect to scenarios where Party B has its seat outside the EU according to the Austrian International Private Law on Conflicts Party A may agree with Party B on the applicable law (including laws other than Austrian law) under an Austrian law EFET General Agreements.

Austrian courts accept and uphold the choice of another law than Austrian law as applicable law between entrepreneurs with respect to disputes under the EFET General Agreement, if such choice of law is accepted and valid under the law chosen by the parties (other than Austrian law) under an EFET General Agreements under law other than Austrian law.

Whether or not other courts than Austrian courts accept such choice of law would have to be assessed under the law applying to such proceedings outside of Austria.

3.7.3 C. VII. 2. Place of jurisdiction

According to the Regulation 1215/2012/EU with respect to scenarios where Party B has its seat in the EU and with respect to scenarios where Party B has its seat outside the EU according to the Austrian Jurisdiction Norm Party A may agree with Party B on the place of jurisdiction (including places of jurisdiction other than Austria) based on Austrian laws of conflict with respect to procedural law.

Austrian courts accept and uphold the choice of another jurisdiction than Austria as place of jurisdiction between entrepreneurs with respect to disputes under the EFET General Agreement.

Whether or not other courts than Austrian courts accept such choice of another jurisdiction than Austria as place of jurisdiction would have to be assessed under the law applying to such proceedings outside of Austria.

3.7.4 C. VII. 3. Arbitration

Party A may agree in writing with Party B on an arbitration proceeding instead of a proceeding before ordinary courts and Austrian courts recognize and uphold such arbitration clauses according to the Austrian Civil Procedure Act.

Austrian courts enforce arbitration awards of arbitration tribunals in Austria and Austrian courts enforce arbitration awards of arbitrations tribunals outside of Austria if the country or international organization is a member to the New York Convention of Recognition of International Arbitration Awards.

3.8 C. VIII. Regulatory Regime

3.8.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law with respect to corporate and commercial law.

Provided in the separate annex (ANNEX 3).

3.8.2 C. VIII. 1. Exchange control law - enforceability

There are no exchange control laws (Foreign Exchange Control/Devisenbewirtschaftungskontrolle) which affect the enforceability of the EFET General Agreement under Austrian law relevant for the purpose of the scope of this opinion.

We note that there are several laws like sanction laws, e.g. EU sanctions against Russia, which would render transactions invalid with the consequence of unenforceability under Austrian law, but the revision of such laws would have to be assessed on a case-by-case approach by each party separately and is not covered under this opinion.

3.8.3 C. VIII. 1. license requirements - enforceability

There are no license requirements – other than licensing of banking activities – with respect to trading of natural gas that might affect the enforceability of the EFET General Agreement under Austrian law.

If a party conducts activities which are considered licensable activities under the Austrian Banking Act, like the trading on own account with financial instruments, AND where such party has no Austrian banking license or validly passported a license into Austria, such party would lose its right to claim interest/fees for such activities against the other party. Please note that this is the general rule whereas there are several exemptions available for market participants which have to be carefully analysed in each individual case.

3.9 C. IX. Financial Instruments

3.9.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law with respect to financial instruments and emission allowances

Provided in the separate annexes (ANNEX 2 - Appendix B - Transactions under the EFET General Agreement and B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS and ANNEX 4 - Emission Allowances).

3.9.2 C. IX. 1. Emission allowances

Emission allowances (EUAs) are financial instruments falling under Section 1 no. 7 lit. k Austrian Securities Supervision Act (MiFID II Annex I Section C no. 11).

Any derivatives of EUAs (EUA Derivatives) are financial instruments falling under Section 1 no. 7 lit. d Austrian Securities Supervision Act (MiFID II Annex I Section C no. 4).

Trading with EUAs or EUA Derivatives requires a banking license under Section 1 para 1 no. 7a Austrian Banking Act. Please note that this is the general rule whereas there are several exemptions available for market participants which have to be carefully analysed in each individual case.

A party which conducts licensable banking business in Austria without having a license faces severe administrative fines under Austrian law and loses its claims for fees (Section 100 Austrian Banking Act) versus its contract partner.

3.9.3 C. IX. 2. Commodity trading products

Commodity Financial Instruments – as defined in (ANNEX 2 - Appendix B - Transactions under the EFET General Agreement and B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS – are financial instruments under Austrian Securities Supervision Act /MiFID II.

Trading with Commodity Financial Instruments requires a banking license under Section 1 para 1 no. 7a Austrian Banking Act. Please note that this is the general rule whereas there are several exemptions available for market participants which have to be carefully analysed in each individual case.

A party which conducts licensable banking business in Austria without having a license faces severe administrative fines under Austrian law and loses its claims for fees (Section 100 Austrian Banking Act) versus its contract partner.

Commodity Non-Financial Instruments – as defined in (ANNEX 2 - Appendix B - Transactions under the EFET General Agreement and B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS – are not financial instruments under Austrian Securities Supervision Act /MiFID II and trading with such products requires with respect to power no license under Austrian Trade Act but a license under the Austrian Electricity Business Act 2010 and with respect to natural gas a license under the Austrian Trade Act and a license under the Austrian Natural Gas Business Act.

3.9.4 C. IX. 3. Consequences for the analysis

With respect to such commodity products which qualify as financial instruments, we assume that Party A has also the respective necessary banking license in Austria and would therefore fall under the regulation for the insolvency of banks and credit institutions as specifically described in this opinion for Financial Market Companies.

With respect to such commodity products which do not qualify as financial instruments or where such party may apply other exemptions, which have to be assessed for each individual case, we assume that Party A has also the respective necessary trading/regulatory license in Austria and would therefore fall under the regulation for the standard commercial companies as specifically described in this opinion for Non-Financial Market Companies.

3.10 C. X. Other provisions

3.10.1 Brief Overview over Austrian law provisions with respect to general provisions as referred to in this chapter and their specifics under Austrian law

Provided in the separate annex (ANNEX 3).

3.10.2 C. X. 1. Additional representation proposal § 21

In order to further the mitigate the risk that the transactions under the Individual Contracts are not covered by the Austrian insolvency law protections with respect to certain netting/set-off provisions we suggest that with respect to Party A to consider – where factually possible – to include the following additional representation under § 21 EFET General Agreement:

"Party A represents and warrants that

- it does not use and does not intend to use any of the natural gas delivered to it under this Agreement to cover own use ("Eigenbedarf") and any transaction entered into by it shall constitute a pure trading transaction ("reines Handelsgeschaft") with listed goods and commodities (as defined in Section 1 no 3 Austrian Stock Exchange Act) within the meaning of Section 20 para 4 no. 2a of the Austrian Insolvency Act."

or more generally:

"Party A represents and warrants that any transaction under any Individual Contract qualifies as a transaction under Section 20 para 4 Austrian Insolvency Act."

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This opinion is given to each Addressee. We have not considered particular circumstances of any party other than only to the extent explicitly opined on in this opinion. We only accept and assume a duty of care to the Addressee in relation to the matters explicitly stated in this opinion; we have not assumed nor will we assume any further obligation to advise the Addressee in any matters regarding the Documents. Notwithstanding the opinions expressed herein, we reserve the right to represent any Addressee and any of their subsidiaries or affiliates or any of their opponents in relation to any disputes or matters in relation to the Documents and/or unrelated to the Documents.

This opinion is given for the benefit of each Addressee, and may be relied upon by the Addressee under the conditions that (i) any liability of WOLF THEISS is limited to the aggregate maximum amount of EUR 5,000,000.- (five million EUR) (ii) any issues of interpretation or liability arising hereunder shall be governed by Austrian law and (iii) the competent court for commercial matters for the first district in Vienna, Austria shall have exclusive jurisdiction to in respect of all disputes which may arise out of or in connection with this opinion. Only WOLF THEISS is responsible and liable to the Addressee for any losses, costs, expenses and damages incurred in connection with this opinion, but not any of the shareholders, managing directors, agents, substitute lawyers (Substituten) or employees of WOLF THEISS or any of the their partner offices, in particular WOLF THEISS Rechtsanwälte GmbH & Co KG. WOLF THEISS Rechtsanwälte GmbH & Co KG and any of its shareholders, managing directors, agents, substitute lawyers (Substituten) or employees, shall not be liable for any pecuniary loss or damage incurred by the Addressee unless such loss or damage is caused as a result of our wilful misconduct or gross negligence in the drafting and providing of this opinion.

This opinion may not be relied upon by or disclosed to any other person or used, circulated or otherwise referred to by any person without our prior written consent. We agree that a copy of this opinion may be disclosed to:

(i) the competent legal regulatory authorities for physical natural gas trading for the respective Member on request;

(ii) to any professional advisers or auditors of the Addressee in connection with the Documents (provided that each of the foregoing are bound to keep the opinion confidential) and

(iii) (iii) any other person, if so required by mandatory applicable law, rule or regulation or any competent judicial, governmental or supervisory body,

provided that, in each case, 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.

Kind regards,

WOLF THEISS Rechtsanwälte GmbH & Co KG

Dr. Andreas Schmid

SCHEDULE 1
LIST OF DOCUMENTS

For the purpose of this opinion the following documents were considered in accordance with the EFET Instruction Letter.

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

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

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

(4) EFET Credit Support Annex to the General Agreement (Version 1.0, published 5 April 2002),

(5) 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/February 28, 2018),

(6) EFET Amendment Letter to the Allowances Appendix (Version 3.0/April 3 2012),

(7) EFET Allowances Appendix (Gas) to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 3 April 2012),

(8) EFET Allowances Appendix (Gas) to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 17 July 2008),

(9) EFET Amendment Letter to the Allowances Appendix Version 2.0 (Version 2.0, published 3 April 2012),

(10) EFET Allowances Appendix (Gas) to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published March 2006),

(11) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 30 November 2006),

(12) EFET VAT Agreement for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 20 November 2005),

(13) 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),

(14) 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),

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

(16) EFET PVB Appendix Version 1.0 to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0, published 19 September 2016),

(17) EFET PSV Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published January 2007),

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

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

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

(21) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published April 2011),

(22) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published on 14 July 2006),

(23) EFET TTF Appendix Guidance Notes (Version 2.0, published 20 September 2006),

(24) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published on 1 June 2004),

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

(26) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 30 March 2015),

(27) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 31 March 2008),

(28) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 15 December 2004),

(29) EFET ZBT 2004 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published June 2006),

(30) EFET ZBT 2012 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 19 April 2013),

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

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

(33) 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),

(34) EFET UK Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 19 April 2013),

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

(36) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published December 2006),

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

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

(39) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published April 2011),

(40) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published on 14 July 2006),

(41) EFET TTF Appendix Guidance Notes (Version 2.0, published 20 September 2006),

(42) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published on 1 June 2004),

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

(44) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 30 March 2015),

(45) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 31 March 2008),

(46) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 15 December 2004),

(47) EFET ZBT 2004 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published June 2006),

(48) EFET ZBT 2012 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 19 April 2013),

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

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

(51) 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),

(52) EFET UK Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 19 April 2013),

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

(54) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published December 2006),

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

(55) EFET Electronic Confirmation Agreement (published 28 June 2005),

(56) Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 3 April 2012),

(57) Confirmation of Allowance Transactions (including EUA, CER & ERU Transactions) to the Allowances Appendix to the EFET Power Master Agreement or to the EFET Gas Master Agreement (Version 1.0, 6 March 2008).

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

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

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

(60) CPMA Cross-Product Master Agreement (Version 1.0, published 16 February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003),

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

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

SCHEDULE 2
B. I. ASSUMPTIONS

B. I. 1 General Assumptions EFET

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

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

2. Party A is a corporation, financial institution or other entity as further described in Appendix A to the EFET Instruction Letter (attached hereto as ANNEX 1).

3. The relevant EFET General Agreement is governed by the laws of Germany or England and Wales or Austrian law as described at the specific points of the opinion.

4. Each EFET General Agreement and any of the Annexes (including the EFET Credit Support Annex) and any of the Documents as listed in SCHEDULE 1 is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of Austria).

5. Each counterparty to any of the Documents as listed in SCHEDULE 1 is duly authorized, and has executed and delivered the relevant Document, and has the capacity to enter into the relevant Document.

6. On the basis of the terms and conditions of the EFET General Agreement and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B to the EFET Instruction Letter (ANNEX 2).

B. I. 2 Further Assumptions

<u>ACCURACY OF DOCUMENTATION AND SEARCHES</u>

7. The authenticity of all signatures and the persons purported to have signed any Document have signed that Document, when signing any of the Documents.

8. All Documents submitted to us as copies or pdf-copies conform to the authentic original documents thereof and all Documents are up-to-date, accurate and complete and have not been revoked, rescinded or terminated (irrespective whether as a whole or in part) before signing of any of the Documents.

9. The truth, accuracy and completeness at all relevant times of each of the statements of matters of fact contained in the Documents and that all representations and warranties given by any of the parties to the Documents are, and will at any time, be true and accurate.

APPLICABLE LAW AND FOREIGN LAW

10. No foreign law affects the conclusions stated in this opinion.

11. Insofar as any obligations under the Documents are to be performed in any jurisdiction outside of Austria, their performance will not be illegal or ineffective by virtue of the law of that other jurisdiction.

12. Each of the Documents constitutes legally binding, valid, and enforceable obligations of the parties thereto under all laws (other than Austrian law with respect to the provisions explicitly opined on herein) under which they are governed or which are otherwise applicable thereto.

DUE EXECUTION, CAPACITY AND INTENTION OF THE PARTIES

13. Each Document has been validly executed by all parties thereto.

14. Each party to the Documents is duly incorporated and validly exists under the applicable laws of its incorporation.

15. Each party to the Documents has the capacity, power and authority, and each party to the Documents has fulfilled all internal authorisation procedures or other approvals to execute or issue (as applicable), and to exercise its rights and perform its obligations under, the Documents.

16. All individuals executing any of the Documents on behalf of the parties have legal capacity to do so (volle Geschäftsfähigkeit).

17. Each party entering into any of the Documents has all necessary authorisations of any public authority and licenses to carry out any and all acts contemplated in a Document for such party and complies with all supervisory laws for the acts contemplated in a Document (financial market rules, energy market rules) in all relevant jurisdictions.

18. The by-laws, guidelines or other rules which exist with respect to a party to the Documents and/or the respective managing director(s) of a party to the Documents and/or the supervisory board of a party to the Documents do not foresee any regulation with respect to any limitation to or additional corporate authorization necessary for a party to the Documents entering into the Documents or – if such requirement is given – it is complied with by such party. The management board of a party to the Documents has approved the entering into the Documents either by written or by oral management board resolution.

19. Each Document and each document referred to in a Document has been entered into, and each of the transactions contemplated thereunder is carried out on arm's length terms by each of the parties thereto and for bona fide commercial reasons, for the purpose of carrying on their respective businesses and for their own benefit.

20. There are no other dealings, agreements or understandings (written or oral) between the parties that affect, amend, supersede or qualify any Document; in particular none of the parties has entered or will enter into any Document with any purpose other than those apparent from such Document or to the prejudice of any of its creditors.

21. The lack of bad faith and absence of fraud (Arglist), coercion, duress, violation of bonos mores (gute Sitten), abuse of representation power (Missbrauch der Vertretungsmacht), usury (Wucher), laesio enormis (Verkürzung über die Hälfte), error (Irrtum), deceit (List), change or frustration of the basis of the transaction (Änderung oder Wegfall der Geschäftsgrundlage), or undue influence on the part of any of the parties to each Document and their respective directors, employees, agents and advisors.

CORPORATE ISSUES AND FORMALITIES

22. The entering into and the provision of the Documents by a party to the Documents has been diligently verified/scrutinized by the managing directors of a party to the Documents.

23. The entering into and the provision of the Documents by a party to the Documents is part of the ordinary business of such party and any by-laws of any body of the company does not foresee any aspect which would lead to the qualification that the entering into the Documents is not ordinary business.

24. The Party A has its centre of main interest and is effectively administered in the jurisdiction of its incorporation, being Austria.

25. Each meeting of the managing directors and/or supervisory board (Aufsichtsrat) of the Party A has been duly convened and held (including by way of passing resolutions in writing) and, in each case, a duly qualified quorum of managing directors or supervisory board members was present and voted in favour of those resolutions and such resolutions remain in full force and effect, in any case if relevant for the entering into the Documents.

26. The Documents have been entered into by, and the obligations thereunder have been assumed by the Party A for the benefit of itself.

Contract Specific Assumptions

27. No Material Reason for termination as outlined in § 10.5 (Definition of Material Reason) with respect to a Party has occurred and is continuing when entering into the EFET General Agreement and any Individual Contract thereunder

28. The EFET General Agreement and any Individual Contracts thereunder are entered into prior to the formal commencement of any insolvency proceedings against either Party.

29. The EFET General Agreement and all Individual Contracts thereunder were entered into, and each delivery and payment made thereunder were made at arm's-length so that no element of gift or undervalue from one Party to the other Party is involved and without any intention of a Party to prefer the other Party in the event of its insolvency.

SCHEDULE 3
B. II. LIMITATIONS QUALIFICATIONS

The opinion statements expressed herein are subject to the following limitations and qualifications:

1. B. II. 1. LIMITATIONS REGARDING THE ENFORCEABILITY OF CLAIMS

1.1 Enforceability

In this opinion "enforceable" means that an obligation is of a type which the Austrian courts generally enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the relevant Agreement. In particular:

(i) Enforcement of the obligations under an Agreement may be limited by the general principle of good faith. Courts might not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights or to circumvent legal requirements (fehlender guter Glaube; Rechtsmissbrauch; umgehungstransaktionen);

(ii) Enforcement may be limited by the provisions of Austrian law applicable to agreements held to have been frustrated by events happening after their execution (Wegfall der Geschäftsgrundlage);

(iii) Enforcement may be further refused by Austrian courts, if the recognition of the enforceability of the obligation would manifestly be contrary to mandatory Austrian law or *ordre public* provisions;

(iv) claims may become barred under statutory limitations or may be or become subject to a defence of set-off or counterclaim;

A party to an agreement may be able to avoid its obligations under that agreement (and may have other remedies) where it has been induced to enter into that agreement by a misrepresentation and the Austrian courts will generally not enforce an obligation if there has been fraud.

2. B. II. 2. GENERAL LIMITATIONS AND QUALIFICATIONS

2.1 This opinion is limited to the laws of Austria (and European Regulations directly applicable in Austria) as they are in force on the day of this opinion and as currently applied and interpreted by the Austrian Supreme Court (Oberster Gerichtshof), the Austrian Supreme Administrative Court (Verwaltungsgerichtshof) and the Austrian Supreme Constitutional Court (Verfassungsgerichtshof), and no opinion is expressed or implied with regard to any law other than Austrian law, even if imported by Austrian private international law.

2.2 In this opinion, Austrian legal concepts are expressed in English terms and not in their original German terms. The translation of these concepts into English may not accurately represent the scope and extent of the respective legal concept in Austria.

2.3 We express no opinion as to any agreement, instrument, general terms and conditions or other document other than the Documents. We express no opinion to the Documents themselves as being legal, valid, binding and enforceable obligations of the parties thereto, under all laws by which they are governed (other than the provisions explicitly opined on herein under Austrian law) or which are otherwise applicable thereto. We express no opinion as to whether the Party A will effectively observe the Documents.

2.4 We assume no obligation to update or supplement this opinion to reflect any facts or circumstances which may after the date of this opinion come to our attention or any changes in the law which may hereafter occur.

2.5 No opinion is expressed on matters of fact or the financial condition or prospects of the Party A.

2.6 Our opinion statements may be limited or otherwise affected by equitable principles of general applicability and requirements as to the principle of good faith (bona fides; Grundsatz von Treu und Glauben), the exception of abuse of legal rights (Rechtsmissbrauch) and similar concepts.

2.7 The opinions statements above are subject to all limitations arising from the laws relating to insolvency, bankruptcy, liquidation, receivership, moratorium, reorganisation, including certain time periods before the institution of such proceedings for which a transaction may be contested (Anfechtungsfristen) and other laws affecting the rights of creditors (including secured creditors) generally including the principle of equitable subordination as discussed in detail in ANNEX 3.

2.8 Any power of attorney issued or appointment as agent granted by a corporation such as the Party A will cease to be valid upon the opening of an insolvency proceeding (Insolvenzverfahren) over its assets.

2.9 Section 1 para 1 of the Austrian Banking Act (Bankwesengesetz) enumerates certain banking activities. Companies may in general only conduct these activities in Austria on a commercial basis (gewerblich) if they have been granted a banking license by the Austrian Financial Market Authority (Finanzmarktaufsichtsbehörde). Furthermore, any credit institution authorized in a member state of the European Economic Area may perform the activities referred to in no 1 to no 14 of the annex I to the Consolidated Banking Directive in Austria either by the establishment of a branch or by way of the freedom to provide services. An essential precondition for the applicability of the Austrian Banking Act (Bankwesengesetz) is that the banking activities are conducted in Austria. According to legal scholars, the conduct of such banking business in Austria is deemed to occur if, for example, an offer is sent from or received in Austria (regardless of the means of communication), or if acts in connection with such banking activities set out in the Austrian Banking Act (Bankwesengesetz) are performed in Austria.

2.10 Anyone who conducts such banking business in Austria without the necessary license has no right to any interest or other proceeds (such as fees) out of such business. Sureties and guarantees connected with such business are unenforceable. Stand-alone guarantee business (Section 1 para 1 no.8 of the Austrian Banking Act (Bankwesengesetz)) would be enforceable but would also face the consequences of having no right to any interest or other proceeds (such as fees) out of such business. Conduct of banking business in Austria without the necessary license may also result in administrative fines, regulatory action, civil law suits for unfair competition by competitors and other sanctions, but not criminal sanctions. The transaction (agreement) itself, however, remains valid and enforceable.

2.11 We do not express opinion on the application of the terms of the EFET General Agreement if termination is triggered by insolvency of a Party's Credit Support Provider.

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

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

2.14 The opinions given herein are governed by and relate only to Austrian law as applied by the Austrian courts as of the opinion's date. We express no opinion on and consider the impact or application of any laws and regulations other than Austrian law (as applicable), even where, under Austrian law, any foreign law falls to be applied.

2.15 This opinion is issued and may only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by and construed in accordance with Austrian law and all disputes in relation to this opinion will be brought before the courts of Austria.

2.16 Austrian Insolvency Act Section 20 para 4 no 2a refers to Section 1 no 3 Austrian Stock Exchange Act which refers to goods generally suited to be traded on a general commodity exchange which are not specifically listed on a regulated market or traded on a agricultural product exchange (*alle zum börsemäßigen Handel geeigneten Waren, die nicht ausdrücklich den geregelten Märkten oder den landwirtschaftlichen Produktenbörsen zum Handel zugewiesen sind*). Courts might hold that the Individual Contracts are not covered by these definitions and this might lead to the consequence that such Individual Contracts would not be protected by Section 20 para 4 no 2a Austrian Insolvency Act which would result in the consequence that close-out netting would become invalid with respect to such Individual Contract and any claims thereunder would be standard claims in the insolvency proceeding.

3. B. III. POTENTIAL PARTIES

Please refer limitations and qualifications made in ANNEX 1.

4. B.IV. PRODUCT COVERAGE / COMMODITY TRANSACTIONS

Please refer limitations and qualifications made in ANNEX 2.

ANNEX 1
APPENDIX A - TYPES OF COUNTERPARTIES AND B.III POTENTIAL PARTIES

Part I Appendix A - Types of Counterparties

1. Corporations (e.g., limited liability companies or stock corporations)
2. Partnerships (e.g., general or limited partnerships)
3. Banks/Credit Institutions
4. Investment Services Provider/Investment Firms
5. Insurance Companies
6. Investment Fund Management Companies
7. other Financial Institution (please specify)
8. Municipalities or Counties
9. Associations of Local Government
10. Publicly-owned Corporations
11. Quasi Governmental Entities (please specify)

No. 1, no. 2, no. 6 and no. 10 are referred to as "**Non-Financial-Market Company**"; No. 3, no. 4, no. 5 and no. 7 referred to as "**Financial-Market Company**"; No. 8, no. 9 and no. 11 referred to as "**Governmental Entity**".

The EU Insolvency Regulation states in Article 1 para 2 that Regulation shall not apply to proceedings referred to in paragraph 1 that concern:

(a) insurance undertakings;

(b) credit institutions;

(c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or

(d) collective investment undertakings.

Article 2 para 2 EU Insolvency Regulation defines 'collective investment undertakings' means undertakings for collective investment in transferable securities (UCITS) as defined in Directive 2009/65/EC of the European Parliament and of the Council (1) and alternative investment funds (AIFs) as defined in Directive 2011/61/EU of the European Parliament and of the Council (2);

Respectively Investment Fund Management Companies seem not to fall under the EU Insolvency scope exemption with the effect, that EU Insolvency proceedings should be applicable.

Part II B.III POTENTIAL PARTIES

Trading natural gas in or into Austria requires both a license under the Austrian Natural Gas Business Act and a trading license under the Austrian Trade Act other than trading power in or into Austria which requires a license under the Austrian Electricity Business Act 2010 but does not require a trading license under the Austrian Trade Act

If certain natural gas trading products qualify as financial instruments under MiFID II / Austrian Banking Act / Austrian Securities Supervision Act than a banking license under Austrian law (or passported MiFID II licenses or passported CRD IV licenses) is required under Austrian law. Please note that this is the general rule whereas there are several exemptions available for market participants which have to be carefully analysed in each individual case .

Exemptions Whereas it is clear that in all cases where a MiFID 2 relevant Financial Instrument is processed by a MiFID 2 relevant service or action such activities conduct – as a general rule – licensable activities under national – Austrian – law. In most cases such activities - e.g. trading on own or other account with financial instrument – would require a banking license according to § 1 (1) no. 7/7a Austrian Banking Act which refers to trading with commodities (MiFID 2 activity).

However, there are several exemptions available for market participants which have to be carefully analysed in each individual case. In practice we have seen the following exemptions widely used in the energy industry[14]:

- Article 2 (1) lit (b) MiFID 2 Group Exemption (Konzernausnahme): MiFID 2 shall not apply to persons providing investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings.
- Article 2 (1) lit (e) MiFID 2 Operator Exemption (Anlagenbetreiberausnahme): MiFID 2 shall not apply to operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, provided that those persons do not apply a high-frequency algorithmic trading technique.
- Article 2 (1) lit (j) MiFID 2 Ancillary Activity Exemption (Nebentätigkeitsausnahme): MiFID 2 shall not apply to 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;

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14 Please note that we do not opine on the availability or exclusivity of the exemptions but only provide for some of the – to our experience – widely spread exemptions.

provided that:

— for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives,

— those persons do not apply a high-frequency algorithmic trading technique; and

— those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;

- Article 2 (1) lit (n) MiFID 2 TSO and TSO Service Provider Exemption (TSO-Ausnahme): MiFID 2 shall not apply to transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks.:

We note that from a practical approach there should be a three step analysis, where the exemption question is the last step of the analysis:

1) is it a financial instrument? if yes, step 2

2) is it an action which comprises of licensable activities? if yes, step 3

3) is an exemption available?

Please note that this constitutes a general guidance, but a party should consult its legal adviser with respect to any question regarding licensing requirements, as a party which conducts licensable banking business in Austria without having a license faces severe administrative fines under Austrian law and loses its claims for fees (Section 100 Austrian Banking Act) versus its contract partner, which is factually relevant for any netting as the claim itself is lost.

ANNEX 2
APPENDIX B - TRANSACTIONS UNDER THE EFET GENERAL AGREEMENT AND B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS /EXEMPTIONS

Part I - APPENDIX B - TRANSACTIONS UNDER THE EFET GENERAL AGREEMENT

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a Commodity at a 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. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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 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.

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 or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

"Commodity" means natural gas, emissions allowances, certificates or capacity rights.

Part II B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS

Under Austrian law which has implemented the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) into Austrian law (Austrian Banking Act and Austrian Securities Supervision Act) it needs to be differentiated between the products in order to assess whether they fall under MiFID II or not.

Emission allowances (EUAs) are financial instruments falling under Section 1 no. 7 lit. k Austrian Securities Supervision Act (MiFID II Annex I Section C no. 11).

Any derivatives of EUAs (EUA Derivatives) are financial instruments falling under Section 1 no. 7 lit. d Austrian Securities Supervision Act (MiFID II Annex I Section C no. 4).

Any commodity transaction, including commodity forwards, commodity futures, commodity swaps which either qualify as

(v) **C5-Financial Instruments:** MiFID II Annex I Section C no. 5 instrument (Section 1 no. 7 lit. e Austrian Securities Supervision Act), because they are options, futures, swaps, forwards and any other derivative contracts relating to commodities <u>that must be</u> settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event; or

(vi) **C6-Financial Instruments:** MiFID II Annex I Section C no. 6 (C6-Financial Instruments; Section 1 no. 7 lit. f Austrian Securities Supervision Act), because they are options, futures, swaps, and any other derivative contract relating to commodities <u>that can be physically</u> settled provided that they are traded on a regulated market, a MTF, or an OTF (exempted are such wholesale energy products traded on an OTF that must be physically settled; REMIT Carve Out); or as

(vii) **Look-alike Financial Instruments:** MiFID II Annex I Section C no. 7 (Look-alike Financial Instruments; Section 1 no. 7 lit. g Austrian Securities Supervision Act) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

are financial instruments falling under MiFID II/Austrian Securities Supervision Act. Together referred to a **Commodity Financial Instrument**.

Whenever a transaction, excluding EUA transactions, qualifies as a spot transaction such transaction would generally not qualify as financial instrument under MiFID II. A spot transaction would have to be assessed on a case-by-case approach but generally comprises of transactions excluding EUA transactions, where delivery is made at the latest within two days (for very rare commodities or certain specifics longer periods, but longer periods generally are not necessary with respect to natural gas trading products). It is referred to herein as **Commodity Non-Financial Instrument.**

<u>With respect to C6-Financial Instruments</u>

Article 5 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisations requirements and operating conditions for investment firms and defined terms for the purpose of that Directive (DelReg 2017/565/EU) states that:

Wholesale energy products that must be physically settled
(Article 4(1)(2) of Directive 2014/65/EU)

1.For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, a wholesale energy product must be physically settled where all the following conditions are satisfied:

(a) it contains provisions which ensure that parties to the contract have proportionate arrangements in place to be able to make or take delivery of the underlying commodity; a balancing agreement with the Transmission System Operator in the area of electricity and gas shall be considered a proportionate arrangement where the parties to the agreement have to ensure physical delivery of electricity or gas.

(b) it establishes unconditional, unrestricted and enforceable obligations of the parties to the contract to deliver and take delivery of the underlying commodity;

(c) it does not allow either party to replace physical delivery with cash settlement;

(d) the obligations under the contract cannot be offset against obligations from other contracts between the parties concerned, without prejudice to the rights of the parties to the contract, to net their cash payment obligations.

For the purposes of point (d), operational netting in power and gas markets shall not be considered as offsetting of obligations under a contract against obligations from other contracts.

2.Operational netting shall be understood as any nomination of quantities of power and gas to be fed into a gridwork upon being so required by the rules or requests of a Transmission System Operator as defined in Article 2(4) of Directive 2009/72/EC of the European Parliament and of the Council (1) for an entity performing an equivalent function to a Transmission System Operator at the national level. Any nomination of quantities based on operational netting shall not be at the discretion of the parties to the contract.

3.For the purposes of Section C(6) of Annex I to Directive 2014/65/EU, force majeure shall include any exceptional event or a set of circumstances which are outside the control of the parties to the contract, which the parties to the contract could not have reasonably foreseen or avoided by the exercise of appropriate and reasonable due diligence and which prevent one or both parties to the contract from fulfilling their contractual obligations.

4.For the purposes of Section C(6) of Annex I to Directive 2014/65/EU bona fide inability to settle shall include any event or set of circumstances, not qualifying as force majeure as referred to in paragraph 3, which are objectively and expressly defined in the contract terms, for one or both parties to the contract, acting in good faith, not to fulfil their contractual obligations.

5.The existence of force majeure or bona fide inability to settle provisions shall not prevent a contract from being considered as 'physically settled' for the purposes of Section C(6) of Annex I to Directive 2014/65/EU.

6.The existence of default clauses providing that a party is entitled to financial compensation in the case of non- or defective performance of the contract shall not prevent the contract from being considered as 'physically settled' within the meaning of Section C(6) of Annex I to Directive 2014/65/EU.

7.The delivery methods for the contracts being considered as 'physically settled' within the meaning of Section C(6) of Annex I to Directive 2014/65/EU shall include at least:

(a) physical delivery of the relevant commodities themselves;

(b) delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned;

(c) other methods of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of goods without physically delivering them, including notification, scheduling or nomination to the operator of an energy supply network, that entitles the recipient to the relevant quantity of the goods.

Article 6 para 3 DelReg 2017/565/EU states that:

For the purposes of Section C(6) of Annex I to Directive 2014/65/EU derivative contracts that have the characteristics of wholesale energy products as defined in Article 2(4) of Regulation (EU) No 1227/2011 shall be derivatives with electricity or natural gas as an underlying, in accordance with points (b) and (d) of Article 2(4) of that Regulation.

<u>With respect to Look-alike-Financial Instruments</u>

Article 7 DelReg 2017/565/EU states that:

Other derivative financial instruments
(Article 4(1)(2) of Directive 2014/65/EU)

1.For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not a spot contract in accordance with paragraph 2 and which is not for commercial purposes as laid down in paragraph 4 shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions:

(a) it meets one of the following criteria:

(i) it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;

(ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue;

(iii) it is 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;

(b) it is 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.

2.A spot contract for the purposes of paragraph 1 shall be a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

(a) 2 trading days;

(b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period referred to in paragraph 2.

3.For the purposes of Section C(10) of Annex I to Directive 2004/39/EC of the European Parliament and of the Council (1), a derivative contract relating to an underlying referred to in that Section or in Article 8 of this Regulation shall be considered to have the characteristics of other derivative financial instruments where one of the following conditions is satisfied:

(a) it 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;

(b) it 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;

(c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4.A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, where the following conditions are both met:

(a) it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network,

(b) it is necessary to keep in balance the supplies and uses of energy at a given time, including the case when the reserve capacity contracted by an transmission system operator as defined in Article 2(4) of Directive 2009/72/EC is being transferred from one prequalified balancing service provider to another prequalified balancing service provider with the consent of the relevant transmission system operator.

Although part b) specifically refers to electricity only we see sustainable arguments that such reference is made only "for the avoidance of doubt" using the term "including" and not to limit the scope excluding natural gas systems. However, we note that there is no guidance with respect to that and – at least in theory – there is a risk that a court or regulator might qualify this point differently which would result in a constellation where a natural gas TSO could not make use of such exclusion.

Part III - Exemptions Whereas it is clear that in all cases where a MiFID 2 relevant Financial Instrument is processed by a MiFID 2 relevant service or action such activities conduct – as a general rule – licensable activities under national – Austrian – law. In most cases such activities - e.g. trading on own or other account with financial instrument – would require a banking license according to § 1 (1) no. 7/7a Austrian Banking Act which refers to trading with commodities (MiFID 2 activity).

However, there are several exemptions available for market participants which have to be carefully analysed in each individual case. In practice we have seen the following exemptions widely used in the energy industry[15]:

- Article 2 (1) lit (b) MiFID 2 Group Exemption (Konzernausnahme): MiFID 2 shall not apply to persons providing investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings.

- Article 2 (1) lit (e) MiFID 2 Operator Exemption (Anlagenbetreiberausnahme): MiFID 2 shall not apply to operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, provided that those persons do not apply a high-frequency algorithmic trading technique.

- Article 2 (1) lit (j) MiFID 2 Ancillary Activity Exemption (Nebentätigkeitsausnahme): MiFID 2 shall not apply to 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;

provided that:

— for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives,

— those persons do not apply a high-frequency algorithmic trading technique; and

— those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;

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[15] Please note that we do not opine on the availability or exclusivity of the exemptions but only provide for some of the – to our experience – widely spread exemptions.

- Article 2 (1) lit (n) MiFID 2 TSO and TSO Service Provider Exemption (TSO-Ausnahme): MiFID 2 shall not apply to transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks.

We note that from a practical approach there should be a three step analysis, where the exemption question is the last step of the analysis:

1) is it a financial instrument? if yes, step 2

2) is it an action which comprises of licensable activities? if yes, step 3

3) is an exemption available?

Please note that this constitutes a general guidance, but a party should consult its legal adviser with respect to any question regarding licensing requirements, as a party which conducts licensable banking business in Austria without having a license faces severe administrative fines under Austrian law and loses its claims for fees (Section 100 Austrian Banking Act) versus its contract partner, which is factually relevant for any netting as the claim itself is lost.

ANNEX 3
BRIEF SUMMARY AUSTRIAN LEGAL SYSTEM

1. BRIEF GENERAL DISCUSSION OF AUSTRIAN INSOLVENCY LAWS

The provisions of Austrian insolvency laws including Austrian international private law provisions with respect to insolvency law constitute mandatory provisions under Austrian law (meaning they are applicable irrespective of the choice of law with respect to Austrian creditors and Austrian debtors).

1.1 Insolvency law and reorganisation law in Austria

1.1.1 Austrian Insolvency Act

Insolvency matters are generally regulated under Austrian law under the Austrian Insolvency Act[16]. Insolvency proceedings are initiated by filing of a petition/application for the opening of a proceeding (Insolvenzeröffnungsantrag) with the competent insolvency court (Insolvenzgericht). If either (i) insolvency (Zahlungsunfahigkeit), meaning the debtor is not able to meet its due and payable payment obligations in due time; or (ii) over-indebtedness (Überschuldung), meaning the debtor's liabilities exceed the debtor's assets plus a negative prognosis for future business (negative Fortbestehensprognose) is given. Any managing director/ management board member has the obligation (and it is part of its duties as a diligent manager) to file a petition/application for the opening of insolvency proceedings without undue delay, however not later than 60 calendar days upon occurrence of insolvency. Please note that any omission/failure to comply with such obligation triggers personal liability for any resulting damages towards the creditors under civil law for the managing directors. Under certain circumstances also criminal proceedings are opened, which in practice is in many case a tool which is facilitated by creditor statements provided to the public prosecutor.

Also any creditor may file a petition/application for the opening of insolvency proceedings against a debtor if the creditor provides reasonable arguments (glaubhaft machen) that the debtor is insolvent and the creditor has a claim – which does not have to be due and payable at that point in time.

Upon filing of an application by the debtor or by a creditor the competent insolvency court decides by court order on the opening of insolvency proceedings (Insolvenzeröffnung). Insolvency proceedings are opened without delay when the debtor itself files an application. When a creditor files an application for the opening of insolvency proceedings normally a hearing with the debtor is usually conducted if it is possible and does not hinder the insolvency proceeding or the outcome. In case the insolvency court holds that a

[16] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO).

creditor petition is obviously unsubstantiated or obviously abusive the insolvency court may reject the application immediately without conducting a hearing.

An insolvency proceeding is not opened in case of a lack of assets of the debtor to cover the commencement cost of the insolvency proceeding (Nichteröffnung mangels kostendeckenden Vermögens) or if the applicant does pay a cost prepayment (Kostenvorschuss) following the court's decision to either provide a cost prepayment (Kostenvorschuss) or accept the decision to deny the opening of the insolvency proceeding.

Under Austrian insolvency law the most relevant nexus is the point in time when the insolvency proceeding is opened and not the points in time when petitions/applications are filed. Please note that there is no specific deadline for the insolvency court until which the insolvency court has to decide on the opening of an insolvency proceeding. However, in case of a debtor filing/petition, the insolvency court has to "immediately (sofort)" open the proceeding, which takes - due to our experience - between a few hours and two business days; whereas in case a creditor filing/petition, the insolvency court has to open the proceeding "without delay (unverzüglich)", which takes - due to our experience - between two business days and 6 business days.

Insolvency proceeding (Insolvency Proceeding) is the general term under the Austrian Insolvency Act which covers both recapitalization proceedings (*Sanierungsverfahren)* and bankruptcy proceedings *(Konkursverfahren).* With respect to recapitalization proceedings (*Sanierungsverfahren)* creditors having unsecured claims vote on the recapitalization plan proposal and in case of their approval the insolvency court confirms such recapitalization plan.

The opening of an insolvency proceeding is publicly announced / published (other than the opening of a business reorganisation proceeding) under the link: http://edikte.justiz.gv.at/edikte/id/idedi8.nsf/suche!OpenForm&subf=v[17].

Under Austrian law a difference for credit institutions and investment firms is foreseen before the normal insolvency proceeding is opened/ or continues: Under the Austrian Act on Recovery and Resolution of Banks[18] (implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms) foresees that in case a petition for the opening of an insolvency proceeding for:

4. A CRR financial institution which is a (a) subsidiary of (i) a CRR credit institution or (ii) a CRR investment firm or (iii) financial holding companies, mixed financial holding companies and mixed-activity holding companies or (iv) parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed

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[17] Please note that the link is the link available at the point in time of this opinion and might be changed from time to time by the competent authorities.

[18] Bundesgesetz über die Sanierung und Abwicklung von Banken (Sanierungs- und Abwicklungsgesetz – BaSAG).

financial holding companies in a Member State, EU parent mixed financial holding companies, and (b) 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; (Section 1 para 1 no.2 Austrian Act on Recovery and Resolution of Banks)

5. financial holding companies, mixed financial holding companies and mixed-activity holding companies (Section 1 para 1 no.3 Austrian Act on Recovery and Resolution of Banks)

6. parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed financial holding companies in a Member State, EU parent mixed financial holding companies (Section 1 para 1 no.4 Austrian Act on Recovery and Resolution of Banks)

(together the "**BRRD Financial Market Companies**")

is filed, the Austrian Financial Markets Authority has a seven days period after either (i) the Austrian Financial Markets Authority has been informed about the petition or (ii) the Austrian Financial Markets Authority has filed the petition itself, to inform the competent insolvency court on whether or not the Austrian Financial Markets Authority plans a resolution measure. An insolvency proceeding <u>may be opened only</u> if the Austrian Financial Markets Authority (as the resolution authority (Abwicklungsbehörde)) does not inform the insolvency court about plans on resolution measures.

1.1.2 Austrian Business Reorganisation Act

Austrian law has implemented proceedings which shall support companies which have financial difficulties but are not insolvent under the Austrian Business Reorganisation Act[19].

Proceedings under the Austrian Business Reorganisation Act are different from proceedings under the Austrian Insolvency Act with the major consequence that only the debtor itself may file a petition/application for the opening of a reorganisation proceeding (Reorganisationsverfahren).

The Austrian Business Reorganisation Act applies to all business undertakings (Unternehmen) except for credit institutions, pension funds, insurance undertakings, investment firms, financial institutions (in particular leasing companies).

The debtor has to provide sufficient evidence for the need of a reorganisation and to provide within at the latest 60 calendar days a reorganisation plan.

The competent court appoints a reorganisation auditor which has to check whether the company is insolvent or becomes insolvent in the course of the reorganisation. However, after a certain period of time and after a positive review of the reorganisation plan and its

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[19] Bundesgesetz über die Reorganisation von Unternehmen (Unternehmensreorganisationsgesetz - URG).

measures such reorganisation auditor could be recalled from his position if it is not foreseen in the reorganisation plan, that a permanent supervision is necessary.

The opening of a business reorganisation proceeding is not publicly announced or published (other than the opening of an insolvency proceeding). Business reorganisation proceedings do not limit the legal ability to validly enter into agreements and perform its obligations thereunder.

There is another major difference to insolvency proceedings, which has an influence on the parties options to include a business reorganisation proceeding as trigger for an (automatic) termination under the EFET General Agreement, as contractual termination rights giving a party the right to rescind a contract in the event that a business reorganisation proceeding is opened are null and void under the Austrian Business Reorganisation Act with no exemptions available. Consequently, the opening of a business reorganisation proceeding cannot be used as trigger for an (automatic) termination under the EFET General Agreement. Respectively, if parties would like to have trigger related to factors with respect to business reorganisation the parties could integrate that connecting the termination right to the point in time before the petition for opening of a business reorganisation proceeding is filed by the debtor.

We note that in Austria still business reorganisation proceedings have a very minor role in daily business practice.

1.2 International insolvency law

Under Austrian international private law it needs to be differentiated between constellations where the EU Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of May 2015) is applicable or where not.

1.2.1 Constellations under the EU Insolvency Regulation

In constellations where a company is a Non-Financial Market Company and in the context of cross border insolvency scenarios where at least one party is a member of the European Union (Member; Member State; EU Member; EU Member State) the EU Insolvency Regulation applies.

With respect to the commencement of proceedings Article 3 of the EU Insolvency Regulation foresees that national courts have jurisdiction to open the main insolvency proceedings as the main interest lies in such jurisdiction and the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors apply.

Article 7 para 2 EU Insolvency Regulation states that the law of the state opening the proceedings, determines - amongst other provisions - the conditions under which set-offs may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

Article 9 para 1 EU Insolvency Regulation states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Respectively, Article 9 as a collision norm provides that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law (*Kindler* in *MüKoBGBl* EUInsVO Art 9 Rn 6-8; *Liersch* in *Kommentar EUInsVO (Vallender)* Art 9 Rn 6-7).

In practice this results in the following consequence which the parties should consider when choosing the applicable material law of the EFET General Agreement: (i) does the respective national material law allow the close-out netting and set-off provisions under the EFET General Agreement? and (ii) does the respective national insolvency related law allow the close-out netting and set-off provisions under the EFET General Agreement? It is strongly recommended only to apply such law if both questions can be answered with a clear "yes". If not, from an Austrian legal perspective, a court might follow an argumentation which is brought on differences between international private law aspects between material law on the contract and general legal provisions of insolvency laws. From Austrian legal perspective there are no specific cases finally decided by the Austrian Supreme Court, so this remark reflects – at the moment – a theoretical risk.

Please note Denmarks special position which excludes Denmark from the application of the EU Insolvency Regulation.[20]

Under the EU Insolvency Regulation the main insolvency proceeding is opened in the Member State where the debtor has the center of its main interest. These proceeding generally aims at encompassing all debtor's assets. However, under the EU Insolvency Regulation also secondary insolvency proceeding may be opened to run in parallel with the main proceeding in the Member State where the debtor has a branch (Zweigniederlassung), whereby secondary proceedings are limited to the assets located in that branch's Member State.

The EU Insolvency Regulation foresees that insolvency proceedings shall apply the law of the Member State of the commencement of such proceeding, with certain exceptions (e.g. third parties rights *in rem* situated within the territory of another Member State ; immovable property; employment contracts).

1.2.2 Constellations outside the EU Insolvency Regulation

In constellations where a company is a Financial Market Company and in the context of cross border insolvency scenarios where at least one party is a member of the European

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20 Recital 88 of the EU Insolvency Regulation

Union (Member; Member State; EU Member; EU Member State) the EU Insolvency Regulation does not apply.

The third main chapter (Drittes Hauptstück) of the Austrian Insolvency Act (Sections 221-242) foresees provisions for proceedings not falling under the EU Insolvency Regulation from an Austrian international private law perspective for Non-Financial Market Companies in such constellations and the forth main chapter (Viertes Hauptstück) of the Austrian Insolvency Act (Sections 243-251) foresees provisions for proceedings not falling under the EU Insolvency Regulation from an Austrian international private law perspective for Financial Market Companies in such constellations. However, we note that in such constellations any foreign law, to which Austrian international private law provisions might lead, would have to be checked by the parties for the regulation of such case under such foreign law as well as whether or not any bi-lateral treaties regulating such constellation exist. Please note that the relevant nexus in all cases is that at least a branch (Zweigniederlassung) in the EU exists.

Section 233 Austrian Insolvency Act foresees that netting arrangements ("*Saldierungsvereinbarungen*") shall be exclusively subject to the law applicable to the agreement.

Section 223 Austrian Insolvency Act foresees that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law. The reference to "chosen law" refers to the law applicable on the contract and not the foreign general law (other than Austrian law) on insolvency proceedings. We note that in the legal literature there are controversy discussion with respect to this point as whether the reference is only to the material law applying to the contract or to any and all legal provisions in a jurisdiction including its insolvency laws and that a court might follow the latter opinion coming to a different conclusion.

As a consequence, if under the law (other than Austrian law) governing the EFET General Agreement, the contractual close-out netting provision is valid and enforceable, it is also enforceable under Austrian law against Party A.

Section 237 Austrian Insolvency Act foresees an extension of insolvency proceedings to assets located outside the territory of Austria unless the following conditions have been met: (a) the center of the main interest of the debtor is located within another state, (b) an insolvency proceeding has been opened in that state, and (c) such insolvency proceeding does extend to foreign property.

Please note Denmark's special position which excludes Denmark from the application of the EU Insolvency Regulation.[21] Respectively, any proceedings with a Danish counterparty would fall with respect to the Danish counterparty not under the EU Insolvency Regulation

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21 Recital 88 of the EU Insolvency Regulation

and Danish counterparties would have to request separate legal advice with respect to their position and rights.

According to Section 240 Austrian Insolvency Act insolvency proceedings opened outside the EU are recognised in Austria if the following conditions are met: (a) the centre of the main interest of the debtor is located in such foreign state, and (b) the proceedings opened outside the EU are comparable to Austrian insolvency proceedings, in particular Austrian creditors are treated equally to creditors located within the territory of the state in which the proceeding takes place. A recognition in Austria is denied if (a) insolvency proceedings have been opened in Austria or injunctive relief has been granted in Austria or (b) the recognition of a foreign insolvency proceeding is contrary to the main principles of the Austrian legal system (*ordre public*).

1.3 The effects of insolvency proceedings on transactions

1.3.1 General effects

As a general rule the opening of insolvency proceedings triggers a stop of the debtor's right to make decisions for or dispositions of the debtor's property. Any decision is to be done or confirmed by an insolvency administrator or the insolvency court and any transaction concluded by the debtor after the opening of insolvency proceedings without such confirmation is void. The opening of insolvency proceedings forces a general stop also on legal proceedings (initiating of civil law proceedings, enforcement proceedings (or temporarily suspension in certain cases).

Insolvency proceeding (Insolvency Proceeding) is the general term under the Austrian Insolvency Act which covers both recapitalization proceedings (*Sanierungsverfahren)* and bankruptcy proceedings *(Konkursverfahren).*

Recapitalization proceedings can be opened in different constellations: (simplified summary)

(i) Recapitalization plan proceeding with self-administration of the debtor: the debtor maintains its self-administration, provided that (i) a recapitalization administrator is appointed; (ii) the debtor submits a sufficient prepared recapitalization plan in collaboration with its application for the opening of insolvency proceeding; and (iii) he offers a satisfaction quota of at least 30 % within 2 years to its creditors.

(ii) Recapitalization plan proceeding without self-administration of the debtor: Provided that an insolvency-administrator is appointed; the debtor has to submit an application to open the proceedings in collaboration with the recapitalization plan that contains at least a quota of 20 % within a period of 2 years.

(iii) Recapitalization plan proceeding during pending insolvency proceedings: At the opening of the proceeding, an insolvency administrator is appointed; quota of at least 20 % within a period of 2 years.

1.3.2 General effects on contracts

Austrian law differentiates between unilateral obligatory contracts (einseitiger Vertrag) and reciprocal obligatory contracts (zweiseitiger Vertrag).

In the context of Austrian insolvency laws, transactions regarding the purchase, sale, delivery and acceptance of natural gas, including options on the purchase, sale, delivery and acceptance of natural gas are qualified as reciprocal obligatory contracts (zweiseitiger Vertrag).

It further needs to be distinguished between (i) contracts which have been fully performed by one party at the time of the institution of the insolvency proceeding ("unilaterally unperformed contracts") and (ii) those contracts that have not, or not fully, been performed by each of the parties at such time ("bilaterally unperformed contracts").

We note that respectively Austrian insolvency law does not differentiate between spot contracts and forward contracts but only considers the fact whether or not the main obligations under the contract have been fulfilled or not.

(a) Unilaterally unperformed contracts

As a general rule, the existence of unilaterally unperformed contracts remains unaffected by the opening of insolvency proceedings:

(i) the solvent party owes performance under such a contract: the insolvent party (represented by the insolvency administrator) has a claim for performance enforceable against the solvent party;

(ii) the insolvent party owes performance under such a contract: the solvent party has a claim against the insolvency estate, which takes part in any distribution of the estate as an unsecured ordinary claim; the solvent party receives only a quota if no specific exemptions or protections of claims can be argued (e.g. most relevant exemptions for this opinion - Section 20 para 4 Austrian Insolvency Act).

(b) Bilaterally unperformed contracts

Within this category Austrian law distinguishes between: (i) multilaterally unperformed contracts regarding the supply of goods which have a market or exchange price and which are to be performed at a fixed time or within a fixed period of time (Fixgeschäft), (ii) multilaterally unperformed contracts regarding rental constellations (Bestandsverträge), multilaterally unperformed contracts regarding working/employment constellations (Arbeitsverträge) and (iv) multilaterally unperformed contracts regarding general contracts which are neither falling under points (i), (ii) or (iii) above. For this opinion only contracts under points (i) and (iv) seem to be relevant.

Multilaterally unperformed contracts regarding the supply of goods which have a market or exchange price and which are to be performed at a fixed time or within a fixed period of time (Fixgeschäft)

The fixed point in time would have to lie after the opening of the insolvency proceeding to be relevant for this constellation.

According to Section 22 Austrian Insolvency Act such contract is automatically terminated upon the opening of insolvency proceedings. The insolvency administrator (representing the debtor) has no right to either request or reject performance. The obligations under such contract are by operation of law replaced by a claim of the insolvency administrator or the solvent party for damages which, according to Section 22 para 2 Austrian Insolvency Act, equals the amount of the difference between the original purchase price and the market price prevailing on the second business day after the opening of the insolvency proceedings for the goods bought for delivery on the originally agreed delivery date.

Multilaterally unperformed contracts regarding general contracts which are neither falling under points (i), (ii) or (iii) above

According to Section 21 Austrian Insolvency Act the insolvency administrator – as a basic fall-back rule, if nothing else is applicable – may decide whether to perform or to reject performance of any multilaterally unperformed general contract. In determining whether to request or reject performance, the insolvency administrator must cover the interests of the insolvency estate and all creditors equally and shall act accordingly. Should the insolvency administrator (i) reject performance, the creditor is entitled to claim damages resulting from non-performance; Such damage claims, however, constitute ordinary claims in the insolvency proceedings and entitle to a respective share in the distributions to other unsecured creditors; (ii) request performance the other party may refuse performance until performance by the insolvent counterparty is effected or secured, provided the other party was not (or should not have been) aware of the financial distress at the time of entering into the contract.

1.3.3 General assessment of energy contracts including Individual Contracts under the EFET General Agreement

The purchase and sale of natural gas under the EFET General Agreement is specified in an Individual Contract.

The status of such Individual Contract can be at the point in time when an insolvency proceeding is opened either (a) Unilaterally unperformed or (b) multilaterally unperformed.

(a) Unilaterally unperformed Individual Contracts

As a general rule, the existence of unilaterally unperformed contracts remains unaffected by the opening of insolvency proceedings. Party A is the insolvent Party under this opinion; Party B the solvent party:

(i) the solvent party (Party B) owes performance under such a contract: the insolvent party (Party A represented by the insolvency administrator) has a claim for performance enforceable against the solvent party (Party B);

(ii) the insolvent party(Party A represented by the insolvency administrator) owes performance under such a contract: the solvent party (Party B) has a claim against the insolvency estate, which takes part in any distribution of the estate as an unsecured ordinary claim; the solvent party (Party B) receives only a quota if no specific exemptions or protections of claims can be argued (e.g. most relevant exemptions for this opinion - Section 20 para 4 Austrian Insolvency Act).

Please note that this general rule would apply in case the Individual Contract is qualified as unilaterally unperformed contract and no close-out netting or set-off clauses are applicable (either because the parties decided against it or because such clauses are not upheld by the courts due to different legal reasons). Please note that the specific protection for EFET General Agreements is discussed below under point 1.3.4 (Specific assessment of energy contracts as Individual Contract under the EFET General Agreement including the close-out netting and set-off provisions).

(b) Multilaterally unperformed contracts

Party A is the insolvent Party under this opinion; Party B the solvent party:

It could be argued that due to the specifics of natural gas trading agreements such agreements fall under Section 22 Austrian Insolvency Act and qualify as <u>multilaterally unperformed contracts regarding the supply of goods which have a market or exchange price and which are to be performed at a fixed time or within a fixed period of time (Fixgeschäft).</u>

The fixed point in time would have to lie after the opening of the insolvency proceeding to be relevant for this constellation. According to Section 22 Austrian Insolvency Act such contract is automatically terminated upon the opening of insolvency proceedings. The insolvency administrator (representing the debtor) has no right to either request or reject performance. The obligations under such contract are by operation of law replaced by a claim of the insolvency administrator or the solvent party for damages which, according to Section 22 para 2 Austrian Insolvency Act, equals the amount of the difference between the original purchase price and the market price prevailing on the second business day after the opening of the insolvency proceedings for the goods bought for delivery on the originally agreed delivery date.

Please note that this specific rule would apply in case the Individual Contract is qualified as multilaterally unperformed contract type "Fixgeschäft" and no close-out netting or set-off clauses are applicable (either because the parties decided against it or because such clauses are not upheld by the courts due to different legal reasons). We note that stronger arguments speak for the assessment as a general contract because strong arguments can be found against the "fixed point in time"-element which is necessary to qualifiy as multilaterally unperformed contract type "Fixgeschäft". Please note that the specific protection for EFET General Agreements is discussed below under point 1.3.4 (Specific assessment of energy contracts as Individual Contract under the EFET General Agreement including the close-out netting and set-off provisions).

Sustainable and strong arguments can be found that such Individual Contracts are done by using such specific contractual terms that for such goods no market or exchange price is available or (without adapting the § 10.4 by adding 10.5. (d) and 10.5. (a), which would – due to our experience - contradict market practice for trading contracts) no fixed term can be argued.

Such argumentation would be based on the fact that

- with respect to failures to deliver or accept natural gas according to § 10.5 (d) EFET General Agreement, the EFET General Agreement may be terminated, if a party fails to comply with its obligation to deliver or accept natural gas under an Individual Contract for more than seven consecutive days or for more than seven days in aggregate within a period of sixty days;

- with respect to failures to make a payment such failure is not cured within two(2) Business Days of a written demand,

which seems to contradict the argumentation of a "Fixgeschäft".

Additionally

- § 8 of the EFET General Agreement foresees remedies for failure to deliver and accept by providing a pre-agreed compensation mechanism; and
- § 10.4 of the EFET General Agreement does not foresee an automatic termination generally connected to § 10.5. (d) or § 10.5. (a) EFET General Agreement.

In order to constitute a fixed date transaction (*Fixgeschäft*) under Austrian law better arguments state that performance other than on the pre-agreed date <u>must not</u> be permissible. In addition, either by explicit language or by implied language a termination of the Individual Contract upon the occurrence of such an event must be pre-agreed. Both of these conditions are not satisfied by § 8 of the EFET General Agreement and the wording of § 10.4 of the EFET General Agreement.

Respectively, in such constellation the basic fall-back rule (Section 21 Austrian Insolvency Act) would kick in and the insolvency administrator – if nothing else is applicable – may decide whether to perform or to reject performance of any multilaterally unperformed general contract. In determining whether to request or reject performance, the insolvency administrator must cover the interests of the insolvency estate and all creditors equally and shall act accordingly. Should the insolvency administrator (i) reject performance, the creditor is entitled to claim damages resulting from non-performance; Such damage claims, however, constitute ordinary claims in the insolvency proceedings and entitle to a respective share in the distributions to other unsecured creditors; (ii) request performance the other party may refuse performance until performance by the insolvent counterparty is effected or secured, provided the other party was not (or should not have been) aware of the financial distress at the time of entering into the contract. Please note that this general rule would apply in case the Individual Contract is qualified as multilaterally unperformed general contract and no "Fixgeschäft" can be argued and no close-out netting or set-off clauses are applicable (either because the parties decided against it or because such clauses are not upheld by the courts due to different legal reasons). Please note that the specific protection for EFET General Agreements is discussed below under point 1.3.4 (Specific assessment of energy contracts as Individual Contract under the EFET General Agreement including the close-out netting and set-off provisions)..

1.3.4 Specific assessment of energy contracts as Individual Contract under the EFET General Agreement including the close-out netting and set-off provisions

The EFET General Agreement foresees a specific mechanism with respect to insolvency related scenarios which allows that a contract – in case of the application of § 10.4. – is automatically terminated in an insolvency scenario (§ 10.5.(c) and calculating the Settlement Amount according to §§ 10.3 and 11. as a set-off amount.

Austrian law foresees specific provisions which protect set-off/netting provisions ("Aufrechenbar sind ..." wording used in Section 20 para 4 Austrian Insolvency Act):

According to Section 20 para 4 in conjunction with Section 25b para 2 of the Austrian Insolvency Act set-off/ netting with respect to claims out of contracts,

- which have been terminated **because of the opening of an insolvency**, where such termination is based on the contractual agreement that in case of an insolvency opening is terminated or could be terminated by the other party, and that all reciprocal receivables are to be netted; and
- which are
  - (Section 20 para 4 no. 1 Austrian Insolvency Act) specific off-balance sheet finance agreements, including derivative instruments for credit risk transfer; specified in Annex II of the CRR; which are
    - 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.

- 3. Contracts of a nature similar to those in points 1(a) to (e) and 2(a) to (d) above 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 above. Points 4-7, 9 and 10 are:

    - (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;

    - (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 default or other termination event;

    - (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, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;

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

    - (9) Financial contracts for differences;

    - (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 default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, 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;

- (Section 20 para 4 no. 2 Austrian Insolvency Act) sold interest rate options, currency options, precious metal options, commodity options (*Rohstoffoptionen*), share options and other security options as well as options on indices;
- (Section 20 para 4 no. 2a Austrian Insolvency Act) trading transactions with listed goods and commodities in the meaning of Section 1 no 3 Austrian Stock Exchange Act, if such trades are pure trading transactions and are not entered into to cover own use ("**Own Use**"; Eigenverbrauch).
- (Section 20 para 4 no. 3 Austrian Insolvency Act) pension trades (Pensionsgeschäfte) (Section 50 para 1 Austrian Banking Act and Article 4 para 1 no. 83 Regulation (EU) 575/2013);
- (Section 20 para 4 no. 4 Austrian Insolvency Act) securities lending and borrowing transactions

is allowed.

Section 1 no 3 Austrian Stock Exchange Act refers to goods generally suited to be traded on a general commodity exchange which are not specifically listed on a regulated market or traded on a agricultural product exchange (*alle zum börsemäßigen Handel geeigneten Waren, die nicht ausdrücklich den geregelten Märkten oder den landwirtschaftlichen Produktenbörsen zum Handel zugewiesen sind*). If Austrian courts held that Individual Contracts are not covered by these definitions this would lead to the consequence that such Individual Contracts would not be protected by Section 20 para 4 no 2a Austrian Insolvency Act which would result in the consequence that close-out netting would become invalid with respect to such Individual Contract and any claims thereunder would be standard claims in the insolvency proceeding. However, as of the date of this opinion, there is no decision practice with respect to this specific case available.

The Austrian legislator has - in the explaining remarks (Erläuternde Bemerkungen) to the Austrian Insolvency Act – explicitly made reference to EFET transactions with the intention to support Austrian companies with respect to their market conformity in international transactions. We derive from that position of the Austrian legislator that it is intended to protect all forms of trading under EFET General Agreements.

We note that in the event the EFET General Agreement is used for transactions within the meaning of Section 20 Paragraph 4 Austrian Insolvency Act and for transactions outside the meaning of Section 20 Paragraph 4 Austrian Insolvency Act an Austrian Court might take the approach to differentiate within the scope of enforceability between financial and non-financial transactions by assessing the telos of Section 20 Paragraph 4 Austrian Insolvency Act, which could lead to another opinion than the opinion provided herein. We further note that in case certain transactions are protected by the netting/set-off protection under Section 20 para 4 Austrian Insolvency Act and other transactions not, that it is unclear how the entire portfolio is considered and whether only the specific transactions or all transaction are not protected anymore.

However, in the absence of specific court cases dealing with exactly this question there are in our understanding sustainable arguments that the close out netting/ set-off provisions under the EFET General Agreement are explicitly protected under Austrian insolvency law due to the explicit intention of the Austrian legislator.

We further note that in order to further mitigate the risk that Austrian insolvency does not protect the claims, which have been set-off the point in time has been set contractually to a point in time before the opening of the insolvency proceeding by suggesting the wording:

"§ 10.4 shall apply to Party A, with termination effective generally upon occurrence of a [Material Reason described in § 10.5 (c)"] [Material Reason described in § 10.5 (c) (iv) and (viii)"].. In the case of a Material Reason described in § 10.5 (c) (iv) or – to the extent analogous thereto – § 10.5 (c)(viii) – **termination shall be effective as of 11.59 pm on the day before the occurrence of such Material Reason described in § 10.5 (c) (iv) or – to the extent analogous thereto – § 10.5 (c)(viii).**"

in the wording proposal for § 10.4.

Sections 19 and 20 of the Austrian Insolvency Act providing for the general set of rules do not make a distinction between contractual close-out netting provisions and set-offs in general. However, under Austrian law contractual close-out netting provision is regarded as a mutually pre-agreed set-off triggered by the occurrence of certain events.

This is partially due to the fact that for the time being, Austrian scholars and judicial opinion do not make a clear distinction between set-off and close-out netting and consider them basically as similar rights, the latter being often viewed merely as a contractually pre-agreed set-off upon the occurrence of certain events.

If the General Agreement and all Individual Contracts are terminated (Termination for Material Reason or Automatic Termination) *before* the point in time "opening of insolvency proceeding" the netting of all termination values is valid and remains unaffected by the insolvency proceedings due to permanent Austrian Supreme Court jurisprudence and prevailing school of thought.

If the General Agreement and all Individual Contracts are terminated *upon* the formal opening of insolvency proceedings, Section 25b foresees as a general rule that any agreement on such termination are invalid. Exempted are only contracts under Section 20 para 4 Austrian Insolvency Act

Please note that such protection under Section 20 para 4 Austrian Insolvency Act is not given if Party B has acquired a claim within six months prior to the opening of insolvency proceedings and was aware or should have been aware of the Party A's insolvency (Section 20 para 2 2nd half of the first sentence Austrian Insolvency Act). We note that this view is risk averse and alternatively one could argue that Section 20 para 4 Austrian Insolvency Act is lex specialis even to Section 20 para 1 Austrian Insolvency Act. However, Austrian law with respect to the possibility of avoidance would kick-in – please refer to ANNEX 3 point 1.4 (Avoidance of transactions under Austrian law) – which would in our understanding lead to the same factual consequences.

1.3.5 Specific assessment of energy contracts as Individual Contract under the EFET General Agreement including the close-out netting and set-off provisions in cross-border scenarios

(i) In scope of applicability of the EU Insolvency Regulation

Article 3 of the EU Insolvency Regulation foresees that such Member State's courts have jurisdiction to open the main insolvency proceedings in which the main interest lies.

Article 7 para 2 EU Insolvency Regulation states that the law of the state opening the proceedings, determines - amongst other provisions - the conditions under which set-offs may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

Article 9 para 1 EU Insolvency Regulation states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Respectively, Article 9 as a collision norm provides that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law (Kindler in MüKoBGB/ EUInsVO Art 9 Rn 6-8; Liersch in Kommentar EUInsVO (Vallender) Art 9 Rn 6-7).

We understand that although it is discussed whether or not the EU Insolvency Regulation protects also close-out netting or only set-off, there are – under Austrian law sustainable arguments to qualify close-out netting as a pre-agreed set of set-off rules under a contract. Respectively, and in the absence of deviating ECJ or Austrian Supreme Court decisions it can be argued as a justified position that in cross border transactions falling under the EU Insolvency Regulation close-out netting where Austrian law is applicable to the EFET general Agreement is protected and respectively also enforceable under Austrian law.

We note that for any other law governing the EFET General Agreement other than Austrian law, the parties have to consult external counsel for additional advice whether or not such law (other than Austrian law) protects the close-out netting provision under their EFET General Agreement. If such law (other than Austrian law) protects such close-out netting provision under the EFET General Agreement Austrian courts uphold such protection if such contract is enforced in Austria.

(ii) Payment systems and financial markets under the EU Insolvency Regulation

We note that with respect to payment or settlement systems or to a financial market in a cross-border scenario different rules apply as there is a specific need to protect international clearing systems.

According to Article 12 the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

It is not specified what in detail a payment or settlement systems or a financial market means.

Making reference to the Directive 98/29/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (Settlement Finality Directive) Article 2 lit (a) a "systems" means a formal arrangement:

- between <u>three or more participants</u>, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants;

- governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and

- designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the European Securities and Markets Authority by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

With respect to the scope of this opinion where only a scenario with two parties (Party A and Party B) is given, scenarios with a system of more than two parties are excluded. However, we strongly advice the parties to request separate external legal advice with respect to constellation where the parties enter into transactions where the settlement is covered by a system falling under Article 2 lit (a) Settlement Finality Directive[22] or where the settlement is done in a financial market environment with respect to at least a clearing system with respect to the term "financial market" under Article 12 EU Insolvency Regulation.

(iii) Out of scope of applicability of the EU Insolvency Regulation

The third main chapter (Drittes Hauptstück) of the Austrian Insolvency Act foresees provisions for proceedings with respect to cross-border transactions not falling under the EU Insolvency Regulation.

Section 233 Austrian Insolvency Act foresees that netting arrangements ("Saidierungsvereinbarungen") shall be exclusively subject to the law applicable to the agreement.

Section 223 Austrian Insolvency Act foresees that when a set-off is "protected" (permitted) by the law chosen by the parties to the EFET General Agreement, then it is not affected by the opening of an insolvency proceeding under Austrian law. The reference to "chosen law" refers to the law applicable on the contract and not the foreign general law (other than Austrian law) on insolvency proceedings. We note that in the legal literature there are controversy discussion with respect to this point as whether the reference is only to the material law applying to the contract or to any and all legal provisions in a jurisdiction including its insolvency laws and that a court might follow the latter opinion coming to a different conclusion.

Respectively, and in the absence of deviating Austrian Supreme Court decisions it can be argued as a justified position that in cross border transactions falling under the third main chapter (Drittes Hauptstück) of the Austrian Insolvency Act close-out netting where Austrian law is applicable to the EFET general Agreement is protected and respectively also enforceable under Austrian law.

We note that for any other law governing the EFET General Agreement other than Austrian law, the parties have to consult external counsel for additional advice whether or not such law (other than Austrian law) protects the close-out netting provision under the EFET General Agreement. If such law (other than Austrian law) protects such close-out netting provision under the EFET General

[22] Bundesgesetz über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und -abrechnungssystemen (Finalitätsgesetz) as transposed from the Settlement Finality Directive into Austrian law.

Agreement Austrian courts uphold such protection if such contract is enforced in Austria.

(iv) Payment systems and financial markets out of the scope of the EU Insolvency Regulation

We note that with respect to a system in a cross-border scenario different rules apply as there is a specific need to protect international clearing systems.

According to Section 16 of the Austrian Settlement Finality Act the effects of insolvency proceedings on the rights and obligations of the parties to a system shall be governed solely by the law applicable to that system.

According to Section 2 para 1 of the Austrian Settlement Finality Act "System" means a formal arrangement on clearing with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants.

- between three or more participants, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant;

- governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and

- designated as a system and notified to the European Securities and Markets Authority by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

According to Sections 7 and 3 para 1 no.3 of the Austrian Settlement Finality Act companies with their administrative headquarter outside of the EU, whose business is similar to the business of credit institutions and investment firms as defined under Section 3 para 1 and 2 of the Austrian Settlement Finality Act

With respect to the scope of this opinion where only a scenario with two parties (Party A and Party B) is given, scenarios with a system of more than two parties are excluded. However, we strongly advice the parties to request separate external legal advice with respect to constellation where the parties enter into transactions where the settlement is covered by a system falling under Section 2 para 1 Austrian Settlement Finality Act[23].

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[23] Bundesgesetz über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und -abrechnungssystemen (Finalitätsgesetz)

1.4 Avoidance of transactions under Austrian law

1.4.1 General Overview

In an insolvency scenario: An insolvency administrator may avoid (anfechten) any transaction (including the granting of security and the performance of an obligation) of the debtor which took place before the opening of the insolvency proceeding under certain circumstances according to the provisions of the second chapter of the Austrian Insolvency Act (Insolvenzordnung; Sections 27 et seq.).

Outside an insolvency scenario: any transactions of the debtor may be avoided (angefochten) by creditors pursuant to the Austrian Avoidance Act[24] *(Anfechtungsordnung),* which proceedings may be continued by the insolvency administrator upon the opening of insolvency proceedings (Section 37 para 2 and 3 Austrian insolvency Act).

Please note that the right to avoid actions with respect to detrimental actions with a certain degree of intention or involvement of the debtor are a basic right of a creditor and therefore can never be excluded.

1.4.2 Avoidance under the Austrian Insolvency Act

The rules of the Austrian Insolvency Act concerning the avoidance of contracts are mandatory law *(Eingriffsnormen)* and can therefore not be excluded by the parties.

The Austrian Insolvency Act foresees the following avoidance rights under the following specific circumstances:

(i) According to Section 28 Austrian Insolvency Act (intention to disadvantage; Benachteiligungsabsicht) all actions of the debtor are avoidable which have been

- effected in the last ten years preceding the opening of insolvency proceedings and the intention of the insolvent Austrian counterparty to disadvantage its other creditors was known by the respective other party, as the case may be; (Section 28 no. 1 Austrian Insolvency Act)

- effected in the last two years preceding the opening of insolvency proceedings, if the other creditors of the insolvent Austrian party were effectively disadvantaged, and the intention of insolvent Austrian counterparty to disadvantage its other creditors should have been known by the respective other party; (Section 28 no. 2 Austrian Insolvency Act)

- effected in the last two years preceding the opening of insolvency proceedings with a close relative or a shareholder or previous

[24] Anfechtungsordnung.

shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act), and the other creditors of the insolvent Austrian counterparty were effectively disadvantaged unless such close relative or shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act), as the case may be, can establish that the intention of the insolvent Austrian counterparty to disadvantage its other creditors was not known to it; (Section 28 no. 3 Austrian Insolvency Act)

(ii) According to Section 28 Austrian Insolvency Act (concealment of assets; Vermögensverschleuderung) all actions of the debtor are avoidable which have been

- effected within the last one year preceding the opening of insolvency proceedings and are to be qualified a sales, swap, or delivery agreements and the concealment of assets to the detriment of the other creditors was known or should have been known by the respective other party; (Section 28 no. 4 Austrian Insolvency Act)

(iii) According to Section 29 Austrian Insolvency Act (gratuitous or similar actions; unentgeltlicher und ihnen gleichgestellter Verfügungen) all actions of the debtor are avoidable which have been

- effected within the last two years preceding the opening of insolvency proceedings, which have been conducted without consideration/ gratuitously unless such acts (a) have been effected in discharging a legal duty, (b) constituting a customary donation, or (c) being of adequate amount for charitable purposes or to honor a moral obligation; (Section 29 no. 1 Austrian Insolvency Act)

- effected within the last two years preceding the opening of insolvency proceedings constituting the acquisition of assets of the insolvent debtor in compliance with an authoritative order if the money payable as consideration originated from the insolvent debtor; with respect to close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) it is a rebuttable presumption (widerlegbare Vermutung) that the money originates from the insolvent debtor; (Section 29 no. 2 Austrian Insolvency Act)

(iv) According to Section 30 Austrian Insolvency Act (preferential treatment; Begünstigung) all actions of the debtor are avoidable which have been

- effected within the last year preceding the opening of insolvency proceedings and

  (a) within 60 days prior to the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung); or

  (b) after the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung); or

  (c) within 60 days prior to the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung); or

  (d) after the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung);

  and

  (i) the debtor has received a discharge of obligations (Befriedigung) or the granting of security (Sicherstellung) which the debtor has (a) never; (b) not in this form or (c) not at this point in time requested, subject to constellations where such debtor has not been preferentially treated by such action; (Section 30 par 1 no. 1 Austrian Insolvency Act); or

  (ii) a close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) is the beneficiary of a discharge of obligations (Befriedigung) or the granting of security (Sicherstellung), in constellations where the intention of the debtor to preferentially treat the close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) was known or should have been known by the close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act); (Section 30 par 1 no. 2 Austrian Insolvency Act)

  (iii) other persons than close relatives or shareholders or previous shareholders or members of the management board or supervisory board or shareholders (qualified as such under the Austrian Equity Replacement Act) are beneficiaries of a discharge of obligations (Befriedigung) or the granting of security (Sicherstellung) in constellations where the intention of the debtor to preferentially treat the close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) was known or should have been known by the person other than a close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act); (Section 30 par 1 no. 3 Austrian Insolvency Act)

(v) According to Section 31 Austrian Insolvency Act (knowledge of insolvency; Kenntnis der Zahlungsunfähigkeit) all actions of the debtor are avoidable which have been

- effected within the last 6 months preceding the opening of insolvency proceedings and

  (a) after the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung); or

  (b) after the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung);

  and

  (i) a close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) is the beneficiary of a discharge of obligations (Befriedigung) or the granting of security (Sicherstellung) for an insolvency claim (Insolvenzforderung) and any other transactions being detrimental for the creditors, in constellations where the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung) or the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung) was known or should have been known by the close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) and that with respect to a detrimental transaction the occurrence of a detrimental impact could have been objectively foreseen; (Section 31 par 1 no. 1 Austrian Insolvency Act)

  (ii) another insolvency creditor is the beneficiary of a discharge of obligations (Befriedigung) or the granting of security (Sicherstellung) for an insolvency claim (Insolvenzforderung) or any other transactions being detrimental for the creditors, in constellations where the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung) or the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung) was known or should have been known by the insolvency creditor (being the beneficiary); (Section 31 par 1 no. 2 Austrian Insolvency Act)

(iii) any third person is the beneficiary of any transactions being detrimental for the creditors, in constellations where the insolvency (Zahlungsunfahigkeit) or over-indebtedness (Überschuldung) or the filing of a petition for the opening of insolvency proceedings (Antrag auf Insolvenzeröffnung) was known or should have been known by the third person (being the beneficiary) and where the occurrence of a detrimental impact for the insolvency mass (Insolvenmasse) could have been objectively foreseen; an objectively foreseeable occurrence is given in case of an obviously ineligible recapitalization plan. (Section 31 par 1 no. 3 Austrian Insolvency Act)

1.4.3 Avoidance under the Austrian Avoidance Act

The rules of the Austrian Avoidance Act concerning the avoidance of contracts are mandatory law *(Eingriffsnormen)* and can therefore not be excluded by the parties.

The Austrian Avoidance Act foresees the following avoidance rights under the following specific circumstances:

(i) According to Section 2 Austrian Avoidance Act (intention to disadvantage; Benachteiligungsabsicht) all actions of the debtor are avoidable which have been

- effected in the <u>last ten years</u> preceding the action of avoidance and the intention of the debtor to disadvantage its other creditors was known by the respective other party, as the case may be; (Section 2 no. 1 Austrian Avoidance Act)

- effected in the <u>last two years</u> preceding the action of avoidance, if the other creditors of the debtor were effectively disadvantaged, and the intention of the debtor to disadvantage its other creditors should have been known by the respective other party; (Section 2 no. 2 Avoidance Insolvency Act)

- effected in the <u>last two years</u> preceding the action of avoidance with a close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act), and the other creditors of the debtor were effectively disadvantaged unless such close relative or shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act), as the case may be, can establish that the intention of the debtor to disadvantage its other creditors was not known to it; (Section 2 no. 3 Austrian Insolvency Act)

(ii) According to Section 2 Austrian Avoidance Act (concealment of assets; Vermögensverschleuderung) all actions of the debtor are avoidable which have been

- effected within the last one year preceding the action of avoidance and are to be qualified a sales, swap, or delivery agreements and the concealment of assets to the detriment of the other creditors was known or should have been known by the respective other party; (Section 2 no. 4 Austrian Avoidance Act)

(iii) According to Section 3 Austrian Avoidance Act (gratuitous or similar actions; unentgeltlicher und ihnen gleichgestellter Verfügungen) all actions of the debtor are avoidable which have been

- effected within the last two years preceding the action of avoidance, which have been conducted without consideration/ gratuitously unless such acts (a) have been effected in discharging a legal duty, (b) constituting a customary donation, or (c) being of adequate amount for charitable purposes or to honour a moral obligation; (Section 3 no. 1 Austrian Avoidance Act)

- effected within the last two years preceding the action of avoidance constituting the acquisition of assets of the debtor in compliance with an authoritative order if the money payable as consideration originated from the debtor; with respect to close relative or a shareholder or previous shareholder or member of the management board or supervisory board or shareholder (qualified as such under the Austrian Equity Replacement Act) it is a rebuttable presumption (widerlegbare Vermutung) that the money originates from the debtor; (Section 3 no. 2 Austrian Avoidance Act).

1.5 Insolvency provisions for Austrian credit institutions

According to Section 82 para 3 Austrian Banking Act only the Austrian Financial Market Authority (FMA) may apply for the opening of an insolvency proceeding of a credit institution.

According to Section 83 para 1 Austrian Banking Act the Austrian Financial Market Authority (FMA) or the credit institution may apply for business supervision (Geschäftsaufsicht) in case where over-indebtedness or insolvency can be overcome. The opening of an insolvency proceeding ends any business supervision (Geschäftsaufsicht) according to Section 90 para 1 Austrian Banking Act.

The Austrian Financial Markets Authority in Austria is a mandatory party to any insolvency proceedings and bank supervision proceedings of credit institutions.

With respect to cross border scenarios with respect to the specific business supervision measure (Geschäftsaufsichtsmaßnahme) Section 81c Austrian Banking Act foresees that a creditors right to set-off/net (aufrechnen) a claim against a claim of the credit institution is not affected by the opening of a measure under Article 2 Directive 2001/24/EG (including the business supervision measure (Geschäftsaufsichtsmaßnahme)), if such right to set-off/net (aufrechnen) is valid under the law applicable to the claim of the credit institution.

Section 119 of the Austrian Act on Recovery and Resolution of Banks (implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms) foresees that in case a petition for the opening of an insolvency proceeding for:

1. CRR financial institutions which is a (a) subsidiary of (i) a CRR credit institution or (ii) a CRR investment firm or (iii) financial holding companies, mixed financial holding companies and mixed-activity holding companies or (iv) parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed financial holding companies in a Member State, EU parent mixed financial holding companies, and (b) 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; (Section 1 para 1 no.2 Austrian Act on Recovery and Resolution of Banks)

2. financial holding companies, mixed financial holding companies and mixed-activity holding companies (Section 1 para 1 no.3 Austrian Act on Recovery and Resolution of Banks)

3. parent financial holding companies in a Member State, EU parent financial holding companies, parent mixed financial holding companies in a Member State, EU parent mixed financial holding companies (Section 1 para 1 no.4 Austrian Act on Recovery and Resolution of Banks)

(together the "**BRRD Financial Market Companies**")

is filed, the Austrian Financial Markets Authority has a seven days period after either (i) the Austrian Financial Markets Authority has been informed about the petition or (ii) the Austrian Financial Markets Authority has filed the petition itself, to inform the competent insolvency court on whether or not the Austrian Financial Markets Authority plans a resolution measure. An insolvency proceeding may be opened only if the Austrian Financial Markets Authority (as the resolution authority (Abwicklungsbehörde)) does not inform the insolvency court about plans on resolution measures.

Respectively, if one of the Financial Market Companies is qualified as BRRD Financial Market Company, and

- the Austrian Financial Markets Authority does not inform the insolvency court about resolution measures within seven days, then the same applies as specified above with respect to Non-Financial Market Companies under 3.1.2(a)3.1.2(a)(i) above;
- the Austrian Financial Markets Authority does inform the insolvency court about resolution measures within seven days, then it depends on which measures are used by the Austrian Financial Markets Authority (as the resolution authority (Abwicklungsbehörde); most relevant would be the bail-in instrument (Section 74 para 2 no. 4 Austrian Act on Recovery and Resolution of Banks), which foresees the right to bail-in under specific circumstances (resolution prerequisites of Section 49 or Section 52 of the Austrian Act on Recovery and Resolution of Banks) certain receivables of the BRRD Financial Market Companies (write down and conversion powers). It is to be noted that with respect to derivatives Section 91 Austrian Act on Recovery and Resolution of Banks (transposing Article 49 of Directive 49/2014/EU) foresees specific rules which safeguards netting provisions and allows the bail-in only with respect the net amount resulting from the netting provision after closing out (Glattstellung). Section 91 para 5 Austrian Act on Recovery and Resolution of Banks also foresees that financial contracts under framework agreement (including netting agreements), in particular transactions under Section 20 para 4 no. 1 – 4 Austrian Insolvency Act, are also covered by the provisions for derivatives. Financial contracts includes the following contracts and agreements:

(a) securities contracts, including:

contracts for the purchase, sale or loan of a security, a group or index of securities;

options on a security or group or index of securities;

repurchase or reverse repurchase transactions on any such security, group or index;

(b) commodities contracts, including:

contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;

options on a commodity or group or index of commodities;

repurchase or reverse repurchase transactions on any such commodity, group or index;

(c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;

(d) swap agreements, including:

swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;

total return, credit spread or credit swaps;

any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

(e) inter-bank borrowing agreements where the term of the borrowing is three months or less;

(f) master agreements for any of the contracts or agreements referred to in points (a) to (e);

Respectively, transactions as specified under ANNEX 2 (Annex B – Transactions under EFET General Agreement), are covered by this definition of derivatives and financial contracts.

As consequence netting agreements are enforceable also with respect to the Financial Market Companies, including the BRRD Financial Market Companies. In a resolution proceeding under the Austrian Act on Recovery and Resolution of Banks all points of § 10.5. EFET General Agreement are enforceable (also in conjunction with an automatic termination right) and if alternatively or after such resolution proceeding an insolvency proceeding is opened the same (including limitations to enforceability as specified under 3.1.2(a)3.1.2(a)(i) above) applies as specified above with respect to Non-Financial Market Companies under 3.1.2(a)3.1.2(a)(i) above.

We note that questions falling under national/international sanction laws are not discussed within this opinion, but have to be considered separately by each Addressee when dealing with a Financial Market Company.

With respect to the scope of this opinion where only a scenario with two parties (Party A and Party B) is given, this scenarios with a system of more than two parties are excluded.

However, we strongly advice the parties to request separate external legal advice with respect to constellations where the parties enter into transactions where the settlement is covered by a system falling under Article 2 lit (a) Settlement Finality Directive[25] or where the settlement is done in a financial market environment with respect to at least a clearing system with respect to the term "financial market" under Article 12 EU Insolvency Regulation.

The Austrian Act on Recovery and Resolution of Banks has entered into force on January 1, 2015. The Austrian Financial Market Authority has extensive operative competences regarding the regards the winding-up of BRRD Financial Market Companies and the handling of such proceedings. FMA's competences include instructions regarding (i) the sale of a business, (ii) the transfer of assets and liabilities, (iii) the settlement or termination of financial and derivative contracts, (iv) the suspension of payment or supply obligations, (v) the temporary suspension of termination rights or (vi) the limitation of enforcement rights as regards collateral instruments. Therefore, the initiation of such winding-up procedures and connected instructions given by regulatory authorities might massively affect the legal relations between the institution subject to winding-up procedures and its counterparties.

The Austrian Financial Market Authority must execute the intervention rights in accordance with winding-up objectives such as (i) to ensure the continuity of critical functions, (ii) the avoidance of significant negative implications on financial stability, (iii) the protection of public funds or (iv) the protection of assets and funds of clients.

We note that we do not opine on any crisis prevention measures specifically but please note that according to Section 63 para 6 Austrian Act on Recovery and Resolution of Banks any contractual provisions which allow the termination of contracts triggered by crisis prevention measures are void as long as the main duties are continuously fulfilled (Section 63 para 4 Austrian Act on Recovery and Resolution of Banks).

We note that due to the variety of potential situations and the complex set of instruments and measures we have only opined and the specific situations mentioned herein but do not and do not purport to provide a comprehensive opinion on any and all potential constellations and facts with respect to the insolvency of Financial Market Companies or any other company on which other rules in addition to the Austrian Insolvency Act are applicable. we note that measures other than the described measures under this opinion might influence the enforceability and close-out netting of claims.

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[25] Bundesgesetz über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und -abrechnungssystemen (Finalitätsgesetz)

2. BRIEF GENERAL DISCUSSION OF AUSTRIAN CIVIL, COMMERCIAL AND CORPORATE LAW PROVISIONS

2.1 Relevant provisions under Austrian Corporate Law

A branch is not qualified as a stand-alone legal entity under Austrian law. A company may acquire rights and obligations through the business activity of its branch but the branch is organizationally and economically always directly connected to the company and conducts its own business pursuant to the instructions by the company, binding in all cases the company by its actions.

Any obligations of a branch by executing Individual Contracts under the EFET General Agreement are always obligations of the company. Respectively, the EFET General Agreement is treated as a single unified agreement by an Austrian insolvency administrator under the laws of Austria.

A foreign company may perform business activities through a branch provided that the foreign company is registered with the respective foreign commercial registry. In Austria, a branch of a foreign entity is also not considered as a separate legal entity; transactions conducted by the branch of a foreign company are generally considered as transactions of the foreign legal entity under Austrian law.

Applications with the Austrian Companies Register in Austria are required and have to be done with the respective competent court at the designated seat of the branch. In case of branches with foreign companies having their main seat, i.e. the main administrative center, outside of the EU, certain specific additional requirements have to be fulfilled (depending on the type of company; e.g. a permanent representative with its usual place of residence in Austria needs be appointed, etc.)

2.2 Relevant provisions under Austrian Civil Law

2.2.1 Conclusion of contracts under Austrian law

Under Austrian law generally no formal requirements are mandatorily necessary to conclude a binding contract. A contract generally becomes binding at <u>the point in time when both parties agree on the essential parts of the contract</u> (e.g. in a standard constellation: agreement on the goods plus the price for the goods). It makes no difference whether the agreement is reached orally, in writing or implicit (by signs/actions).Any confirmation later on in writing is just a confirmation but does not change the point in time when the contract has been entered into with binding effect. Any failure to object to incorrect terms in a received confirmation would constitute only "acceptance" if such incorrect terms are not material/essential terms of the contract. Otherwise it would be generally seen as a different offer, which again triggers the necessity of an approval/denial act.

Please note that the principles of German law and German law jurisprudence[26] with respect to commercial confirmations between entrepreneurs (kaufmännisches Bestätigungsschreiben) are not implemented in Austria law in the same way but are discussed and it seems that the prevailing doctrine in Austria still reflects a non-constitutive effect of material changes of confirmation letters.

We note that the specific structure of a company's confirmation process should be reflected in the structure of the contractual provisions with respect to the regulation of the confirmation practice.

Austrian law always considers the parties intent at the point in time of entering the contract with respect to the qualification of any part of the contract, including under which framework or conditions the contract is entered into.

We note that in constellations where there are/could be different deviating intentions, e.g. two parties do have more than one framework agreement in place between them or where one party wants to have a stand-alone contract and the other party wants to have contract in a framework a court would consider many factors like the intention of the parties, whether or not they would have entered the contract anyway or whether the inclusion under a framework would be a material factor and would take a case-by-case approach to solve this situation. The decision would depend on the evidence provided by each party and the court's consideration of such evidence.

Under the Austrian Civil Procedure Act a judge is free in the consideration of evidence. (i) taped recording, (ii) witness' statement, (iii) e-mail or other electronic message or transaction entry system, and/or (iv) facsimile are generally proper means of evidence and are accepted by Austrian courts to provide evidence.

Please note that when concluding contracts with a public entity it should be made sure that the persons representing such entity have the capacity and authority to represent such public entity, which as a matter of fact, requires in each individual situation a case-by-case check. No general rule covering any and all potential situations can be covered in this opinion.

In order to cover such situations it is strongly recommended to apply § 3.4 of the EFET General Agreement and make sure at the beginning of the business relationship to check lists on a regular basis.

2.2.2 Collateral/Security Interest/Security (Sicherheiten) under Austrian Civil Law Act

Austrian law generally differentiates between movable and immovable assets and in the class of movable assets between tangible assets (körperliche Sachen) and intangible assets/rights/receivables (unkörperliche Sachen/Rechte).

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[26] BGH v 27.1.2011 – VII ZR 186/09, BGHZ 188, 128 (Tz 21 ff) unter Hinw auf Kramer in MünchKomm-BGB5 § 151 Rn 19 ff.

Furthermore Austrian law generally differentiates between a security (Sicherheit) which is only given on an obligatory basis (schuldrechtlich) and a security which is given by establishing a right in rem (sachenrechtlich). The huge difference is, that a right in rem is generally enforceable against anybody, whereas the right on an obligatory basis is only enforceable vis-à-vis the security provider.

Respectively, under Austrian law in order to provide for sustainable security (Sicherheit) a secured party tries to receive a right in rem for which title (Titel; the obligatory part) plus mode (Modus; the right in rem part) must be given in order to establish a valid security. Austrian law generally does not recognise an abstract transfer of rights.

Austrian law recognises the following types of security (Sicherheit) where a right in rem is established: (i) pledges (Pfandrechte), (ii) title transfers for security purposes (Sicherungsübereignung) as well as (iii) security assignments (Sicherungszession; with respect to claims/rights/receivables).

Whereas the Austrian Civil Law Act[27] does not explicitly foresee rules for title transfer for security purposes it is recognized by the Austrian Supreme Court and in practice as a generally applicable concept which follows the rules for pledges in order to avoid circumvention possibilities.

Austrian law foresees generally the following mode options (Modi) for a valid transfer in order to establish a right in rem:

for movable goods: (i) transfer by hand/ handing over (körperliche Übergabe); (ii) if transfer by hand/ handing over (körperliche Übergabe) is impossible, transfer by using signs (Übertragung durch Zeichen); (Sections 451 and 452 Austrian Civil Law Act);

for immovable goods: (i) transfer by registration in the respective registers; if an immovable good is not registered in a register by depositing a notarized pledge agreement with the competent court for such immovable good; (Section 451 Austrian Civil Law Act);

Generally, a valid transfer of ownership of movable goods for security purposes will be valid only if the collateral is handed over to the beneficiary or its representative by party posting the collateral.

If the collateral consists of assets other than cash, the beneficiary has to liquidate (verwerten) the collateral upon foreclosure (Pfandreife). Depending of which sort of security has been provided, different rules for the liquidation apply.

If cash has been provided as security and upon foreclosure (Pfandreife) the pledgee may use the cash and set-off the cash against his claims against the security provider. Any

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27 Allgemeines bürgerliches Gesetzbuch (ABGB).

hyperocha (amount which exceeds the secured amount) has to be returned to the security provider (Section 451 Austrian Civil Law Act).

Clauses pursuant to which the pledgee may simply keep the collateral other than cash upon foreclosure (Pfandreife) are void (Section 1371 Austrian Civil Law Act). Collateral other than cash has to be liquidated upon foreclosure (Pfandreife).

Under Austrian law, pledges, title transfers for security purposes and security assignments are strictly <u>accessory</u> and thus dependant on the validity and existence of a secured obligation. Accordingly, upon discharge of the secured obligation the pledge as a general rule (with certain limited exceptions) automatically ceases to exist. Also in the case of a novation of the secured obligation the security interest ceases to be valid unless otherwise agreed.

A secured obligation must be at least determinable, may be conditional or and does not have to be due yet. For the purpose of securing future obligations this means that the parties (i.e. the collateral provider and the collateral taker) and the legal basis (causa, *Rechtsgrund*) of the obligation (i.e. the obligation to be secured) need to be determined in a way that the secured obligation can at least be individualised. On the contrary, a security for all future obligations arising generally from "the parties" business relations (*Geschaftsbeziehung)* might be considered too vague.

The other relevant collateral (other than cash) for the purpose of this opinion would respectively be such falling under the definition of "Letter of Credit" under the EFET General Agreement, which are for the purpose of this opinion:

- stand-by letters of credit;
- bank guarantees;
- parent company guarantees;

A guarantee, in order to be valid under Austrian law, shall be made in written and signed form. Notarization or filing with any register is not required. We strongly recommend to apply this principle to all forms of collateral used by the parties.

(a) Stand-by letters of credit

Under a standard stand-by letter of credit the security provider arranges that security provider's bank issues a standby letter of credit which foresees that in case the security receiver delivers certain documents to security provider's bank (e.g. declaration that the security provider has not fulfilled the security provider's obligations vis-à-vis the security receiver within a certain grace period) the security provider's bank has to pay a specified amount of money to the security receiver.

Standby letters of credit (Haftungsübernahme in Akkreditivform)[28] are - like bank guarantees or letters of credit (Akkreditiv) – neither qualified as cash, nor as financial instrument, nor as credit claim under Austrian law. Respectively, standby letters of credit (Haftungsübernahme in Akkreditivform) fall outside of the scope of the Austrian Financial Collateral Act.

Standby letters of credit (Haftungsübernahme in Akkreditivform)[29] qualify - like bank guarantees or letters of credit (Akkreditiv) - as collateral provided as a contractual/obligatory security from one party to another party (or in trilateral constellations). In such contractual security the parties have to precisely regulate what they want to secure and which rules apply in case the secured claim is due and payable but not payment is received within a certain/ no grace period.

(b) Bank guarantees

Under a standard bank guarantee the security provider arranges that security provider's bank issues a bank guarantee which foresees that in case the security receiver delivers certain documents to security provider's bank (e.g. declaration that the security provider has not fulfilled the security provider's obligations vis-à-vis the security receiver within a certain grace period) the security provider's bank has to pay a specified amount of money to the security receiver.

Bank guarantees are - like letters of credit (Akkreditiv) – neither qualified as cash, nor as financial instrument, nor as credit claim under Austrian law. Respectively, bank guarantees fall outside of the scope of the Austrian Financial Collateral Act.

Bank guarantees qualify – like letters of credit (Akkreditiv) - as collateral provided as a contractual/obligatory security from one party to another party (or in trilateral constellations). In such contractual security the parties have to precisely regulate what they want to secure and which rules apply in case the secured claim is due and payable but not payment is received within a certain/ no grace period.

(c) Parent company guarantees

Under a standard parent company guarantee the security provider arranges that security provider's parent company issues a parent company guarantee which foresees that in case the security receiver delivers certain documents to security provider's parent company (e.g. declaration that the security provider has not fulfilled the security provider's obligations vis-à-vis the security receiver within a certain grace period) the security provider's parent company has to pay a specified amount of money to the security receiver.

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28 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz ½.

29 Apathy in Apathy/Iro/Koziol (Hrsg), Österreichisches Bankvertragsrecht2 (2008) A. Begriff und Arten des Akkreditiv; Rz ½.

We note that there are many different forms of patronage and/or parent company wordings (e.g. harte oder weiche Patronatserklärung; Ausstattungszusagen; etc.) and also other forms of security like sureties (Bürgschaften) on the market; however only the abstract guarantee of a parent company for the direct benefit of a security receiver is covered by this opinion, as it is the most sustainable and most spread form of security (due to (i) negative tax implications with respect to security in form of a surety (Bürgschaft) because of the stamp duty risk (Rechtsgeschäftsgebühr); and (ii) the indirect claims risk (Ausstattungsanspruch zur Austattung des Schuldners statt direkter Erfüllung gegen den Gläubiger) for a hard patronage declaration (Patronatserklärung hart); and (iii) the huge risk of legal disputes with respect to soft patronage declarations (Patronatserklärung weich)). Due to the wide range of differences between such documents (other than parent company guarantees as described above), we cannot opine on all such documents in this opinion, but the parties would have to consult their advisers with respect to any collaterals which deviate from standard abstract parent company guarantees as defined herein (abstract guarantee wording form).

2.2.3 Force majeure under Austrian Civil Law Act

Whereas Austrian Civil Law Act does not explicitly make use of the term "force majeure" (höhere Gewalt), the concept of force majeure is known to Austrian law in general (e.g. Section 19 para 12 Austrian Alternative Investment Fonds Manager Act; Section 27 Austrian Natural Gas Business Act; etc.) and more widely referred to as "coincidence" (Zufall) (e.g. Section 338 Austrian Civil Law Act; Section 460 Austrian Civil Law Act; Section 920 Austrian Civil Law Act; Section 1311 Austrian Civil Law Act; Section 1447 Austrian Civil Law Act; etc.). The Austrian Supreme Court defines "force majeure" (höhere Gewalt) as an incidental and extraordinary event, coming from outside, showing no operational coherence, the occurrence of which cannot be expected and prevented, even with reasonable diligence.[30]

However, consequences foreseen under Austrian Civil Law Act are not mandatory with respect to the EFET General Agreement between two entrepreneurs with the consequence that the parties may agree on the specific remedies and consequences of Force Majeure under the EFET General Agreement.

2.2.4 Cessation of the business' basis under Austrian Civil Law Act

A release of the contractual obligations under the principle of cessation of the basic and typical business elements bases under Austrian law on an analogical conclusion based on the Sections 936, 947 etq., 1052 and 1170a (Wegfall der Geschäftsgrundlage)[31]

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30 RS0073836 (Höhere Gewalt setzt eine von außen kommende unabwendbare Fremdeinwirkung voraus). OGH 08.05.1984 2Ob208/83 (Höhere Gewalt ist ein von außen einwirkendes, elementares Ereignis, das auch durch die äußerst zumutbare Sorgfalt nicht zu verhindern war und so außergewöhnlich ist, dass es nicht als typische Betriebsgefahr anzusehen ist.).

31 Riedler in Schwimann/Kodek (Hrsg), ABGB Praxiskommentar[4] (2014) zu § 901 ABGB; Rz 7.

The cessation of the basic and typical business elements (Wegfall der Geschäftsgrundlage) foresees scenarios where both parties when entering into a contract have had the same intention/idea with respect to basics of the contracts (existence, continuity, occurrence of certain business typical circumstances and have not put them into the contract explicitly because no party considered them to be necessary to be included explicitly) and such basics fall away, then there should be the option to challenge and adapt the contract.

In order to apply the cessation of the basic and typical business elements rules the following is required:

(i) the business elements which fall away, must be typically related to the respective business and not only individual motives of a party;

(ii) the cessation lies beyond the claiming party sphere; and

(iii) the party claiming the cessation of the basic and typical business elements (Wegfall der Geschäftsgrundlage) could not have foreseen such cessation.

Additionally in the last decisions and also a relevant part of the Austrian scholars apply a Fourth element: (iv) material disruption of the contractual equilibrium (e.g. in many cases argued with completely unreasonable actions to the detriment of one party even if not endangering the existence of a party). We note that this element is fiercely discussed and disputed resulting in a fragmented case by case approach.

2.2.5 Remedies for non-performance under Austrian law

Under Austrian Law the debtor is liable for partial or complete non-performance even though such non performance is not caused by him with culpa.

The creditor is entitled to the compensation of ordinary damages and lost profit as well as just compensation of immaterial damage that could have been foreseen by the creditor at the time the agreement was concluded as a possible consequence of the breach, considering all facts that he knew or should have known at the time.

In the event of fraud or intentional non-performance or due to gross negligence, the creditor is entitled to request from the debtor compensation of the entire damages due to the breach, regardless of the fact that the debtor was not aware of the special circumstances which caused the breach.

The party referring to the breach has to undertake all reasonable measures in order to reduce the damages caused by such breach; otherwise the other party may request reduction of the compensation.

2.2.6 Liability under Austrian law

It is generally accepted among courts and legal scholars in Austria that the exclusion of liability is not enforceable in cases of intention (Vorsatz) like fraud (Betrug), intentional default (vorsätzliche Nichtleistung) or wilful misconduct (vorsätzliche Fehlleistung).

Please note that is fiercely discussed whether or not liability based on gross negligence (*grobe Fahrlassigkeit)* may also be excluded or not (can be enforced or not) under Austrian law between entrepreneurs. In summary: there is a risk that an Austrian court might not enforce a provision which excludes the liability for damages caused gross negligently. The risk for such decision becomes higher if such gross negligent act is very close to intentional default/ wilful misconduct and in cases where a party which benefits from such clause has a very dominant market position or in similar circumstances of economic pressure imposed on the other party (to which this clause is detrimental). The Austrian Supreme Court applies a case by case approach with the principle of bona fide (gute Sitten) in particualr according to § 879 Austrian Civil Law Act also differentiating in the application of principles between the essential provisions of a contract and side provisions.[32]

The exclusion of liability in cases of slight negligence (*leichte Fahrlassigkeit*) or negligence (Fahrlässigkeit) between entrepreneurs is generally accepted among courts and legal commentators in Austria.

We note that this opinion only refers to entrepreneurs and does not cover any constellations of consumer protection (as well as cases where entrepreneurs are re-qualified as consumers or consumer-like by a court).

According to the Austrian Supreme Court, the above principles concerning the limitation of liability apply only with respect to such damages incurred by the parties, which could have (at the time of the execution of the respective agreement) generally been foreseen or could be expected. Consequently, any limitation of liability is invalid, insofar damages incur which the parties (at the time of the execution of the respective agreement) could have objectively and subjectively not foreseen, including even cases of slight negligence.[33] However, we do see a very limited relevance for this limitation with respect to damages resulting from a party failure under the EFET General Agreement as these damages in most cases would consist of lost profit (which is even excluded under § 12.3 EFET General Agreement) and reasonable cost for enforcing the parties rights. However and in this light, the parties could consider to include additional wording under § 12.4. by inserting "(d) damage caused by any action constituting at least negligent conduct that could not be realistically expected at the time of execution of this Agreement."

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[32] Riedler in Schwimann/Kodek (Hrsg), ABGB Praxiskommentar4 (2014) zu § 879 ABGB - Teil 1; Rz 9. Riedler in Schwimann/Kodek (Hrsg), ABGB Praxiskommentar4 (2014) zu § 879 ABGB - Teil 2; Rz 39.

[33] Krejci in Rummel/Lukas, ABGB4 § 879 Rz 127 (Stand 1.11.2014, rdb.at)

Under Austrian Law the duty to mitigate losses is generally accepted among courts and legal commentators.

2.2.7 Collateral/Security Interest/Security (Sicherheiten) under the Austrian Financial Collateral Act

The Austrian Financial Collateral Act implements Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (Financial Collateral Arrangements Directive) into Austrian law.

According to Section 2 para 1 of the Austrian Financial Collateral Act parties under the scope of the Austrian Financial Collateral Act are:

(no. 1) public authorities (excluding publicly guaranteed undertakings unless they fall under no. (2) to (5)) including: (i) public sector bodies of Member States charged with or intervening in the management of public debt, and (ii) public sector bodies of Member States authorised to hold accounts for customers;

(no. 2) superordinated financial market institutions, which are central banks, the European Central Bank, the Bank for International Settlements, a multilateral development banks as referred to in Article 117 of the Regulation No. 575/2013; the International Monetary Fund and the European Investment Bank;

(no. 3) financial institutions subject to prudential supervision including: (i) a credit institution as defined in Article 4 para 1 no. 1 of the Regulation No. 575/2013 , including the institutions listed in Article 2 para 3 of Directive 2013/26/EU; (ii) investment firms as defined in Article 4(1)(1) of Directive 2004/39/EC[34]; (iii) financial institutions as defined in Article 4 para 1 no. 26 of the Regulation No. 575/2013; (iv) insurance undertakings as defined in Article 13 no. 1 Directive 2009/138/EC; (v) undertakings for collective investment in transferable securities (UCITS) as defined in Article 1 para 2 of Directive 2009/65/EC; (vi) management companies as defined in Article 1 para 1 of Directive 2009/65/EC;

(no. 4) central counterparties, settlement agents or clearing houses, as defined respectively in Article 2 lit. (c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive,

(no. 5) and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points (no.1) to (no.4);

[34] This is an old reference which actually should have already been changed by the Austrian legislator to the MiFID II.

According to Section 2 para 2 of the Austrian Financial Collateral Act parties under the scope of the Austrian Financial Collateral Act could also be persons other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (no.1) to (no.4) of Section 2 para 1 Austrian Financial Collateral Act with respect to contracts on the establishing and enforcement/liquidation of collateral.

2.3 Relevant provisions under Austrian Commercial Law

According to the Austrian Trade Act companies may have, outside of the place of their seat, branches (weitere Betriebsstätten; Section 46 Austrian Trade Act) where business activities may be conducted.

The competent trade authority is the administrative district authority (*Bezirksverwaltungsbehorde)*.

This information is not a final list of any and all provisions which might be relevant for the parties but merely consist of information to which has been made referred in the opinion.

Wholesale trading with natural gas is permitted in Austria only with a license under the Austrian Trade Act ("*Gewerbeordnung")*.

The Austrian Natural Gas Business[35] Act 2011 in connection with ordinances exist which foresee certain reporting and compliance task, which however do not affect the necessity of a license under the Austrian Natural Gas Business Act 2011.

2.4 Relevant provisions under Austrian Banking Law

Please refer to the explanations under ANNEX 2 with respect to licensing requirements and exemptions

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35 Gaswirtschaftsgesetz 2011 – GWG.

ANNEX 4
EMISSION ALLOWANCES

The Austrian Emission Allowances Act 2011[36] states that emission allowances may be traded between natural and non-natural persons within the European Union and outside the European Union, but with the latter only if a bilateral treaty foresees the reciprocal acceptance. According to Section 44 of the Austrian Emission Allowances Act 2011 emission allowances have the legal character of commodities and may be traded on commodity exchanges.

Generally general allowances (EUAs) and aviation allowances (EUAAs) constitute an allowance to emit one tonne of carbon dioxide equivalent during a specified period.

EUAs and EUAAs are transferable in accordance with the provisions of Directive 2003/87/EC, as defined respectively in Articles 3(7) and (8) of Commission Regulation (EU) No 389/2013 in its respective valid version, collectively referred to as "allowances". Allowances are registered in the Union Registry and can be transferred at the respective delivery day depending on the markets.

Green Certified Emission Reductions (CER) are not covered by this opinion.

EUAs and EUAAs are referred to herein as emission allowances.

Primary Auctions are excluded from the scope of this opinion.

Secondary trading of emission allowances

The rules under which emission allowances are traded depend on the respective exchange and the respective clearing house rules. E.g. emission allowances traded at the EEX are cleared by the ECC AG (ECC). After payment of the purchase price, ECC transfers the purchased emission allowances into the internal account of the purchaser in the ECC internal account system and subsequently makes the corresponding changes in the ECC escrow accounts held at the registry. Each exchange participant is entitled to demand the transfer of emission allowances, held in escrow for them, in the ECC escrow accounts at the registry, to a registry account specified by them.[37]

The EEX (European Energy Exchange) is registered in Germany having its seat in Leipzig.

The ECC (European Commodity Clearing AG) is registered in Germany having its seat in Leipzig.

In scope of EU Insolvency Regulation

We note that in case a party is qualified as party to a payment or settlement system or to a financial market under Article 12 EU Insolvency Regulation, the effects of insolvency proceedings on the

[36] Emissionszertifikategesetz 2011 – EZG 2011.

[37] EEX Kontraktspezifikationen Version 0062b

rights and obligations of the parties are governed solely by the law of the Member State applicable to that system or market. In case of the example above: trading and clearing at the EEX/ECC would trigger German law.

At the point in time of this opinion there is no payment or settlement system or to a financial market under Article 12 EU Insolvency Regulation in Austria which allows the trading of emission allowances to our knowledge.

Out of scope of EU Insolvency Regulation

Section 226 Austrian Insolvency Act states that , the effects of insolvency proceedings on the rights and obligations of the parties are governed solely by the law of the Member State applicable to a regulated market according to Article 4 para 1 no. 21 MiFID II. Regulated market means under MiFID II a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive. Section 233 Austrian Insolvency Act foresees that netting arrangements ("Saidierungsvereinbarungen") shall be exclusively subject to the law applicable to the agreement. In case of the example above: trading and clearing at the EEX/ECC would trigger German law.

At the point in time of this opinion there is no regulated market under Section 226 Austrian Insolvency Act in conjunction with to Article 4 para 1 no. 21 MiFID II in Austria which allows the trading of emission allowances to our knowledge.