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TURKISH LEGAL OPINION

regarding

THE ENFORCEABILITY OF CLOSE-OUT NETTING AND OTHER RELATED ISSUES UNDER THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

for the

EUROPEAN FEDERATION OF ENERGY TRADERS

dated 15 March 2019

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15 March 2019

The European Federation of Energy Traders

Amstelveenseweg 998

1081 JS Amsterdam

The Netherlands

Dear Dr. Jan Haizmann,

Legal Opinion Regarding the Enforceability of Close-Out Netting and Other Related Issues under the EFET General Agreement Concerning the Delivery and Acceptance of Electricity

You have instructed us to render an opinion in respect of the Turkish Law on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity ("**EFET General Agreement**") and certain other related issues. Please find enclosed our legal opinion rendered in that end.

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A) INTRODUCTION

1.1 Documents Considered

In this opinion ("**Opinion**") we considered;

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007);
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010).

This Opinion does not relate to any individual contract ("**Individual Contracts**"). Tax, accounting, customs, regulatory or related aspects of the matters we opine on hereunder are exclusive of the scope of this Opinion.

1.2 Definitions

Capitalized terms used herein will have the meanings set out opposite to them.

"**Amendment to Law No. 488**" means the Law Amending Certain Laws for the Purpose of Improvement of the Investment Environment No. 6728 dated 15 July 2016, which was published in the Official Gazette dated 9 August 2016 and numbered 29796;

"**Amendment on the Communiqué on the Exemptions**" means Communiqué on the Amendment to the Communiqué (Communiqué No: 2008-32 /34) on the Decree No. 32 on the Protection of the Value of Turkish Currency (Communique No: 2018-32/ 52) published in the Official Gazette dated 16 November 2018 and numbered 30597;

"**Banking Law**" means the Banking Law numbered 5411 dated 19 October 2005 as amended from time to time until the date of this Opinion;

"**Bankruptcy Administration**" means the administration authorized to conduct the bankruptcy proceedings, appointed by the creditors of the bankrupt entity;

"**Bankruptcy Decision**" means the decision rendered by the competent court upon which the merchant in question becomes bankrupt and the bankruptcy estate constitutes (opening of the bankruptcy);

"**Bankruptcy Estate**" means the estate which consists of all rights and receivables of the bankrupt entity and which is formed simultaneously with the issuance of the Bankruptcy Decision;

"**BRSA**" means Banking Regulation and Supervision Agency as defined under the Banking Law;

"**Capital Markets Law**" means the Capital Markets Law numbered 6362 dated 6 December 2012 as amended from time to time until the date of this Opinion;

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"**Civil Procedural Law**" means the Turkish Civil Procedural Law numbered 6100 dated 12 January 2011 as amended from time to time until the date of this Opinion;

"**CMB**" means the Capital Markets Board as defined under Capital Markets Law;

"**Company**" means company types as defined under the TCC including joint stock companies (*anonim şirket*) and limited liability companies (*limited şirket*);

"**Communiqué on the Exemptions**" means Communiqué on the Amendment to the Communiqué (Communiqué No: 2008-32 / 34) on the Decree No. 32 on the Protection of the Value of Turkish Currency (Communiqué No. 2018-32/51), published in the Official Gazette dated 6 October 2018 and numbered 30557;

"Concord Project" means the project submitted to the court and to be approved by the creditors for the realization of the concord (which is a form of creditor arrangement pursuant to Turkish law);

"**Concord Amendments**" means the amendments made to the EBL regarding concord arrangements along with further the amendments published in the Official Gazette on 15 March 2018;

"**Decree Law No. 32**" means the Decree Law on Protection of the Value of Turkish Lira numbered 32 dated 7 August 1989 as amended from time to time until the date of this Opinion;

"**Definite Grace Period**" means the definite grace period granted by the court after the Temporary Grace Period and prior to the decision regarding the approval of concord as explained in Section D.I.1.(dd).(ii);

"**EBL**" means the Enforcement and Bankruptcy Law numbered 2004 dated 9 June 1932 as amended from time to time until the date of this Opinion;

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

"**Election Sheet**" means the specifications selected by the parties in the election sheet contained in the EFET General Agreement;

"**EMRA**" means the Energy Market Regulatory Authority as defined under the Law on Structure and Duties of the Energy Market Regulatory Authority No. 4628;

"**EML**" means the Electricity Market Law No. 6446 dated 14 March 2013 as amended from time to time until the date of this Opinion;

"**EMLR**" means the Electricity Market License Regulation published in the Official Gazette dated 2 November 2013 and numbered 28809 as amended from time to time until the date of this Opinion;

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"**EÜAŞ**" means Turkish Electricity Generation Company (*Türkiye Elektrik Üretim A.Ş.*);

"**Exclusive Evidence Agreement**" means the evidence agreements, with which parties restrict the scope of the forms of evidence that the law requires and only provide that the form of evidence determined in the evidence agreement will be used in a dispute;

"**Grace Period**" means the Temporary Grace Period and Definite Grace Period granted by the court regarding the concord as explained in Section D.I.1.(dd).(ii);

"**IAL**" means International Arbitration Law No. 4686 dated 21 June 2001 as amended from time to time until the date of this Opinion;

"**Individual Contracts**" means the individual contracts as referred to in Section A.1.1;

"**Insurance Law**" means the Insurance Law No. 5684 dated 3 June 2007 as amended from time to time until the date of this Opinion;

"**Istanbul Exchange**" means Borsa İstanbul Joint Stock Company (*Borsa İstanbul Anonim Şirketi*);

"**IPPL**" means the International Private and International Civil Procedural Law No. 5718 and dated 27 November 2007 as amended from time to time until the date of this Opinion;

"Land Registry Law" means the Land Registry Law No. 2644 dated 22 December 1934 as amended time to time until the date of this Opinion;

"**Law No. 488**" means the Stamp Tax Law No. 488 dated 1 July 1964 as amended from time to time until the date of this Opinion;

"**Law No. 805**" means the Law on Statutory Use of Turkish of Commercial Enterprises numbered 805 dated 10 April 1926, as amended from time to time until the date of this Opinion;

"**Law No. 4501**" means Law No. 4501 on Principles that shall be complied with in case of Arbitration for the Resolution of Disputes Arising from Concession Specifications and Contracts in respect of Public Services dated 21 January 2000 as amended from time to time until the date of this Opinion;

"**Non-Exclusive Evidence Agreement**" means the evidence agreements, in which forms of evidence listed in a manner that the listed evidences will be additional to those required by the law;

"**Opinion**" means this Legal Opinion regarding the Enforceability of Close-Out Netting and Other Related Issues under the EFET General Agreement concerning the Delivery and Acceptance of Electricity dated 15 March 2019;

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"**Presidential Decree**" means the Presidential Decree (No. 85) on the Amendments to the Decree Law No. 32, published in the Official Gazette dated 13 September 2018 and numbered 30534;

"**SDEBA**" means the Swiss Federal Act on Debt Enforcement and Bankruptcy (*Bundesgesetz über Schuldbetreibung und Konkurs)*;

"**SDIF**" means the Saving Deposit Insurance Fund, as defined under the Banking Law;

"**TCC**" means the Turkish Commercial Code numbered 6102 dated 13 January 2011 as amended from time to time until the date of this Opinion;

"**TCO**" means the Turkish Code of Obligations numbered 6098 and dated 11 January 2011, as amended from time to time until the date of this Opinion;

"**Temporary Grace Period**" means the temporary grace period granted by the court prior to the Definite Grace Period upon the application of concord, as explained in Section D.I.1.(dd).(ii);

"**Turkish Lira**" and the sign "**TL**" mean the lawful currency of the Republic of Turkey.

1.3 Scope Of Review

We opine only on (i) Turkish law as applied by the Turkish courts, (ii) the recognition of agreements where the parties have chosen foreign applicable law and (iii) the statutory restrictions to choose the applicable law, as of the date of this Opinion. We are not qualified to express legal opinions on any law other than the Turkish law. The expressions and descriptions are used within the meaning of Turkish law and may be not identical with their original meanings in the English language.

We have not been requested to express opinion to any agreement other than those referred under Section A.1.1 above. We have only considered bilateral close-out netting under a single agreement.

B) EXECUTIVE SUMMARY

This section highlights certain important risks/issues that have been covered in the entirety of our legal opinion. The executive summary is neither exhaustive nor a substitute for reading the legal opinion in its entirety. It is subject to the more detailed discussions, limitations and explanations set out in the whole of the legal opinion. Therefore, the reader is urged to read the entire legal opinion and should not simply rely on the information contained in this section.

1. The concept of "close-out netting" is not regulated under Turkish law. There is no provision in the Enforcement and Bankruptcy Law No. 2004 ("**EBL**") which provides for the termination upon bankruptcy of physical commodities contracts (including the transactions listed in the Appendix B) or financial (derivatives) contracts.

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Under Turkish law, certain contracts are specifically prescribed in the laws as being automatically terminated upon bankruptcy of one of the parties to the contract, such as running account agreements (*cari hesap sözleşmesi*), agency agreements (*acentelik sözleşmesi*), powers of attorney (*vekaletname*), insurance contracts (upon insolvency of the insurance Company), financial lease agreements (upon bankruptcy of the lessee). Physical commodity trade contracts and financial derivative contracts are not prescribed as contracts automatically terminating upon bankruptcy of one of the parties to such contracts. Therefore, Turkish laws do not provide any "safe harbors" for certain derivatives and the contract types listed in Appendix B. The EBL contains no explicit prohibition with regards to contractual early termination or automatic termination clauses based on insolvency-related events (except for concord situation). However, the EBL provides certain mandatory restrictions for set-off between bankrupt entities and their creditors or debtors. It provides that no such set-off can be made if a debtor of the bankrupt entity becomes a creditor of the bankrupt entity *after* the opening of the bankruptcy or a creditor of the bankrupt entity becomes a debtor of the bankrupt entity *after* the opening of the bankruptcy. Certain scholars are of the opinion that set-off agreements made *before* the opening of the bankruptcy, but the *effects of which emerge after* the opening of the bankruptcy by changing the obligations of the parties (*e.g.* by terminating the obligations), circumvent the afore-mentioned mandatory set-off restrictions of the EBL, and are therefore are null and void.

While there is no precedent or scholar opinion stating the invalidity of contractual early termination or automatic termination clauses (except for a concord situation[1]), as such early termination and automatic termination clauses are closely related to the set-off (*i.e.* their principle purpose is to initiate and facilitate the set-off mechanism), the wide interpretation based on the scholar opinions (regarding the nullity and voidness of the set-off agreements) mentioned in the above paragraph may apply to early termination or automatic termination clauses based on insolvency-related events as they may be interpreted to be circumventing the statutory set-off provisions of the EBL.

Notwithstanding the above, it is possible to argue that, contractual early termination or automatic termination clauses are valid and enforceable, if the relevant termination rights are based on reasons (other than concord, as the termination based on concord is prohibited as per the EBL) which occur prior to the Bankruptcy Decision (*e.g.* upon occurrence of a certain over-indebtedness). On the other hand, it is also generally accepted under Turkish law that the bankruptcy administration (the administration authorized to conduct the bankruptcy proceedings, appointed by the creditors of the bankrupt entity ("**Bankruptcy Administration**")) has a cherry-picking right, so that it can cherry-pick certain non-monetary obligations and demand their performance.

[1] The concord procedure is discussed in detail below. It is a form of creditor arrangement in an insolvency situation.

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Therefore, designation of certain insolvency, over-indebtedness-related early termination events may raise the question of whether such selection of a termination event would be interpreted as circumventing the cherry-picking right of the Bankruptcy Administration, jeopardizing the validity of such clauses. We are not aware of any precedent on this issue (please see Section D.I.1.(a) for further information). The EBL is dated 1932 and has not been amended and improved in order to serve the necessities and requirements of modern business. The EBL was adapted from the SDEBA. We understand that in 1997, Article 211 of the SDEBA was amended to remove the cherry-picking right of the Bankruptcy Administration for (i) fixed term agreements and (ii) financial contracts, swaps and options, provided that the value of the contractual obligations on the date of the opening of the bankruptcy can be determined based on market or exchange prices. However, the EBL was not amended to reflect similar changes.

The EBL was amended to drastically alter the concord mechanism (*i.e.* a debt restructuring mechanism) contained in the EBL and also to replace the deferral of bankruptcy mechanism (please see Section D.I.1.(dd).(ii) for further information) ("**Concord Amendments**"). One of the new provisions inserted into the EBL invalidates contractual termination provisions which are triggered upon the request of a concord arrangement. This strengthens the widely held interpretation that an insolvency termination circumvents the statutory netting provisions of the EBL.

Another provision which was added to the EBL prohibits the set-off of debts and receivables that have arisen after the Preliminary Grace Period is announced by the court (this is the initial grace period granted in a concord procedure to allow the court to assess the merits of the concord proposal). Accordingly, it is worth pointing out that, in case a Grace Period for concord is granted to the debtor by the court (as discussed in detail below, a Grace Period is amount of time set by the court for how long the concord protections will apply until the concord decision is awarded), and an agreement is terminated for a reason under Article 10.5 other than concord or insolvency during the Grace Period, it will not be possible to use the close-out netting mechanisms in the EFET to calculate the Termination Amount. As the Settlement Amounts shall arise at the time of the termination, which is during the Grace Period in this case, they cannot be set-off with each other due to the provisions of the EBL. Therefore, in case the General Agreement is terminated for a Material Reason not related to concord or insolvency related reasons, the terminating party will have to pay all the negative Settlement Amounts and request the payment of all the positive Settlement Amounts without setting-off negative and positive amounts from each other. If the terminating party, however, performs the set-off despite of the existence of this prohibition, the counter-party may initiate a lawsuit or an executing proceeding requesting the payment of all the negative amounts from the terminating party.

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2. Impairment in financial conditions in certain regulated Companies (*i.e.* banks[2], insurance companies, capital market institutions[3] and regulated energy companies[4]) is stipulated as an event triggering the intervention of regulatory authority competent over such Companies or the Ministry to which the Treasury is bound, for the insurance companies. Such impairment may eventually result in the quasi-liquidation of banks and capital market institutions by the authorities regulating their activities. Where such regulatory entities are concerned, designation of certain insolvency, over-indebtedness-related early termination events may raise the question of whether such selection of a termination event would be interpreted as circumventing the regulatory authorities of such entities, jeopardizing the validity of such clauses[5].

3. The Bankruptcy Administration has "avoidance" powers to claw back certain payments made by the insolvent entity during a five-year "look back" period prior to the issuance of the bankruptcy decision (the decision rendered by the competent court upon which the merchant in question becomes bankrupt and the Bankruptcy Estate constitutes ("**Bankruptcy Decision**")) against such entity (please see Section D.I.1.(bb)(bb).(v) for further information).

4. The EBL provides for certain corporate rescue mechanisms such as concord which limits the ability of creditors to pursue their claims against debtors being insolvent or having financial difficulties (please see Section D.I.1.(dd).(ii) for further information).

C) ASSUMPTIONS

Our Opinion is based on the following assumptions:

1.1. Assumptions Relating to the Parties

(a) The EFET General Agreement is entered into by two parties and at least one of such parties is incorporated or organized or has its center of main interest in Turkey ("**Party A**").

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[2] Including deposit banks, participation banks and development and investment banks as defined under the Banking Law.

[3] Including Intermediary Institutions (*Aracı Kurumlar*), Collective Investment Corporations (*Kolektif Yatırım Kuruluşları*), Portfolio Management Companies (*Portföy Yönetim Şirketleri*) among others as defined under the Capital Markets Law.

[4] *i.e.* natural gas transmission and distribution companies and electricity distribution companies and authorized (electricity) supply companies.

[5] According to energy legislation, market activities in the energy sector (*e.g.* purchase, sale or trading of natural gas or electricity or their transmission, distribution or wholesale) require the market participants to obtain licenses from the EMRA. Due to the current energy legislation and their own legislation, banks, insurance companies and most capital market institutions cannot engage in electricity market activities and execute the EFET General Agreement. Please see Appendix A for further explanations on which bodies may qualify as counterparts to execute the EFET General Agreement.

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(b) The parties to the EFET General Agreement are and will continue to be legal entities that are validly existing, and they have the capacity, power and authority under any applicable laws to enter into and perform their obligations under the EFET General Agreement and any Individual Contract that may be entered into in connection with the EFET General Agreement.

(c) Each of the parties has taken all necessary steps to execute, deliver and perform the EFET General Agreement and any Individual Contract and to ensure their legal validity.

(d) We considered only Companies as counterparties which qualify as merchants (*tacir*) in accordance with Article 16 of the Turkish Commercial Code. Please see Appendix A for detailed explanations on various types of counterparties and which one of those are qualified to execute the General Agreement under Turkish law.

(e) Where any authority or power of attorney has been used to enter into the EFET General Agreement or any Individual Contract, or any decisions or operations contemplated thereby, such authority or power of attorney had under all applicable laws the effect of binding the person or entity purportedly represented under such authority or power of attorney and such power of attorney has not been revoked prior to such execution.

(f) Each of the parties has obtained, complied with the terms of, and maintained all authorizations, approvals, licenses and consents required to enable it to lawfully enter into, and perform its obligations under the EFET General Agreement and any Individual Contract and to ensure the legality, validity, enforceability or admissibility in evidence of the EFET General Agreement and any Individual Contract.

(g) None of the parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process.

1.2. Assumptions Relating to the EFET General Agreement and Individual Contracts

(a) The parties have entered into the EFET General Agreement and the Individual Contracts in good faith and on arm's-length basis for the purpose of carrying on their businesses.

(b) The relevant EFET General Agreement is governed by the laws of Turkey or by the laws of another jurisdiction (including German or English law), but subject to mandatory bankruptcy provisions in Turkey, and provided that we are not qualified to assess the meaning and consequences of the terms of the EFET General Agreement and its Annexes, under any law other than Turkish law and we express no opinion as to any law other than Turkish law in force as at the date hereof.

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(c) Subsequent to the execution of the EFET General Agreement, the parties, over time, enter into a number of Individual Contracts all of which are in accordance with the terms and conditions of the EFET General Agreement.

(d) The Individual Contracts provide for the physical delivery of commodities.

(e) The Individual Contracts are made as Over-the-Counter transactions.

(f) EFET General Agreement is used only for physical trading purposes.

(g) The EFET General Agreement and Individual Contracts constitute as sale contracts for movables under Turkish law.

(h) The parties have mutual obligations pursuant to the EFET General Agreement and the Individual Contracts. The terms of the EFET General Agreement will not be varied, waived or discharged by the parties, except for the specifications selected by the parties in the election sheet contained in the EFET General Agreement ("**Election Sheet**").

(i) The EFET General Agreement and each Individual Contract cannot be voided or otherwise held ineffective (in whole or in part) by reason of mistake, illegality or otherwise.

(j) Each of the parties will duly perform its obligations under the EFET General Agreement and any Individual Contract, except for an event of Termination for Material Reason in respect of a Party.

(k) The EFET General Agreement and the Individual Contracts do not constitute a default under or otherwise infringe the terms of any agreement, obligation, trust deed, promissory note, or other instrument to which any of the parties to the EFET General Agreement or the Individual Contract is a party or by which any of its assets are bound with.

(l) In the event that the EFET General Agreement is governed by English, German or other law, the EFET General Agreement is enforceable under the determined governing law.

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D) OPINION AND LEGAL ANALYSIS

I. Enforceability of Close-out Netting

1. Winding-up, Insolvency or Attachment

General Overview (including Set-Off)

(aa) Brief general discussion of the relevant Turkish insolvency proceedings, laws and terminology applicable to the Party A and the contract types listed in the Appendix B

Bankruptcy proceedings in Turkey are primarily regulated under the EBL. The EBL was adapted from the Swiss Federal Act on Debt Enforcement and Bankruptcy (*Bundesgesetz über Schuldbetreibung und Konkurs)* ("**SDEBA**"). The EBL has been amended several times since its enactment in 1932, however, it is not considered to reflect the practices of modern business. None of the amendments was to accommodate financial contracts or commodity contracts in a way to include recognition of the elements of the netting process described herein. In fact, the need to modernize the major pieces of legislation has been raised in Turkish legal circles since the beginning of 2000s and fundamental changes have been observed for many major pieces of legislation. The Civil Code, the Civil Procedural Law, the TCC and the TCO are among those civil law codes that have been entirely renewed between 2000 and 2012[6]. Various studies were carried out during this term to renew the EBL. However, there is not any specific time-table for the enactment of a new Enforcement and Bankruptcy Law. Furthermore, with Concord Amendments, certain amendments were made to in certain parts of the EBL (*i.e* the deferral of bankruptcy was removed and the concord provisions were amended)[7]. However, the compatibility problem of the EBL still persists.

The bankruptcy procedure in relation to a merchant is mainly regulated under the EBL. In addition to the bankruptcy procedure, the EBL also regulates corporate rescue procedures such as ordinary concord, concord by way of abandonment of assets and amicable restructuring. The EBL does not include explicit provisions for enforceability of early termination based on insolvency related reasons and close-out netting provisions. Also, it does not contain provisions that stipulate protections from certain avoidance powers for certain transactions which may include commodity and financial contracts (swaps, forward contracts *etc*.). On the other hand, the Concord Amendments added provisions preventing the termination of agreements due to concord, and provisions similar to cherry-picking in concord and accordingly suggesting that the law-maker does not have any intention to include recognition of the elements of the netting process described herein.

[6] Certain public law codes such as the Criminal Code and the Criminal Procedural Law have also been renewed in entirety during this period.

[7] For the details of the amendments see Section D.I.1.(dd).(ii).

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In addition to the bankruptcy and corporate rescue procedures provided in the EBL, the Turkish Commercial Code No. 6102 ("**TCC**") contains a "technical insolvency" notion defined whereby a capital company's (a limited liability company or joint stock company) loss of a significant amount of its share capital imposes certain steps to be taken by the Companies in question[8].

Under Turkish law, only merchants (or those who are deemed to be liable as merchants in accordance with the TCC) can be subject to bankruptcy proceedings[9].

The Banking Law and the Capital Markets Law stipulate certain specific provisions for bankruptcy proceedings of capital market institutions and banks, complementary to those set forth in the EBL. Please see Section D.I.1.(g) for further information on bankruptcy of certain specific entities such as banks and capital market institutions.

The assets of the Turkish State[10] cannot be subject to attachment[11]. Public law entities which are supervised by the State can be exempted from bankruptcy procedures *via* specific regulations, such as their corporation status. In such a case, the provisions of the EBL will not be applied to the bankruptcy of such entities. Please note that the legal entities subject to private law but owned by the State[12] are subject to bankruptcy under the provisions of the EBL. However, in practice, bankruptcy of state economic enterprises has never been witnessed. The reason for this is that they are financially supported by the State under its economic policy, which prevents any circumstance

8 Loss of ½ of the sum of the share capital and the legal reserves

According to its most recent statutory (annual) balance sheet, if a company loses one half of the sum of its share capital and legal reserves, its board (in joint stock companies) or its manager(s) (in limited liability companies) should immediately inform its shareholders by convening an extraordinary general assembly and submit to them remedial measures to cure the situation. The shareholders are obliged to consider the situation, however, are not obliged at this stage to take any specific action.

Loss of ⅔ of the sum of the Share Capital and the legal reserves

If the company loses ⅔ of the sum of its share capital and legal reserves, the board (in joint stock companies) or its manager(s) (in limited liability companies) should immediately inform the shareholders by convening an extraordinary general assembly. In such an event, the shareholders must resolve either (a) to decrease the company's capital (to maintain a share capital and legal reserve in excess of ⅓ of its share capital), provided that the minimum capital requirements are satisfied, or (b) top-up the equity (inject further equity). Toping-up as prescribed in option (b) can be made in two ways: (i) shareholders may inject money (neither as capital nor as loan) to the company in order to cover an adequate portion of the deficit (*i.e.* the loss); (ii) Company's share capital may be increased. If the shareholders fail to act in one of these two ways (option a or b), then the company will be automatically dissolved. In such a case, any creditor and/or shareholder may file a declaratory action (***Poroy/Tekinalp/Çamoğlu*** p. 333).

9 However, in certain cases, even if a person ceases to be a merchant, it can still be subject to bankruptcy proceeding. For example, according to Article 44 of the EBL, persons ceasing their commercial activities will continue to be subject to bankruptcy proceedings for an additional period of one year.

10 Article 82 of the EBL provides that "states assets" cannot be attached; however, what should be considered as a state asset and which assets fall under this provision are regulated under different laws and require a case-specific review which should be made taking into account the legal nature of the governmental body to which the concerned asset belongs.

11 According to Article 82 of the EBL, state assets and the assets which are explicitly exempted from attachment in specific legislation cannot be subject to attachment (***Kuru*** p. 188).

12 *e.g.* Turkish Petroleum Pipeline Corporation (*Boru Hatları ile Petrol Taşıma A.Ş.* ("**BOTAŞ**")); Turkish Electricity Generation Company (*Türkiye Elektrik Üretim A.Ş.* ("**EÜAŞ**")).

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that may lead to bankruptcy.

(bb) *Discussion on whether the contract types listed in the Appendix B are governed by different rules and whether these rules would result in a splitting-up or segregation of the portfolio of Individual Contracts under an EFET General Agreement into two or more "netting pools" of disparate treatment or would otherwise limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the EFET General Agreement*

Close-out netting is not a concept regulated under Turkish law. There is no provision in the EBL which provides for the termination upon bankruptcy of the contract types listed in the Appendix B. On the other hand, there is no explicit prohibition with regards to contractual early termination or automatic termination clauses based on insolvency-related events in the EBL except for the prohibition in case of concord under Article 296 of the EBL (see Section D.I.1.(dd).(ii)). Whether or not early termination or automatic termination clauses based on insolvency-related reasons may be considered as circumventing the statutory insolvency provisions is unclear under Turkish law (please see Section D.I.1.(a) for the enforceability of early termination clauses). Also, please see Section D.I.1.(dd).(ii) for our evaluation on certain clauses for early termination in case of a concord situation.

If the early termination and contractual netting provisions of the EFET General Agreement were recognized in a bankruptcy proceeding, the contractual netting provisions would apply and no disparate treatment would occur to the Individual Contracts.

Disparate treatment may occur if the contractual early termination and netting provisions were not recognized in a bankruptcy proceeding and the Bankruptcy Administration applied statutory insolvency provisions separately to each Individual Contract (please see Section D.I.1.(a) for the enforceability of early termination clauses and the cherry-picking right, and Section D.I.1.(cc) for avoidance claims).

The EBL does not provide for different statutory insolvency rules depending on contract types. However, different rules might apply depending on the status of the performance (*i.e.* whether the commodity is delivered at the time of the opening of the bankruptcy) or the type of the claim (*i.e.* whether it is a monetary claim or performance claim, whether it is subject to a future condition or not).

The following statutory insolvency provisions are stipulated in the EBL:

- Article 195 of the EBL provides that all obligations of the bankrupt entity except for obligations secured by mortgage become due simultaneously with the Bankruptcy Decision.
- According to Article 197 of the EBL, if a receivable is subject to a future condition, this receivable may also be registered in the Bankruptcy Estate. However, the creditor may only be able to collect its receivable when the future condition is realized.

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- According to Article 198 of the EBL, as a principle, upon the Bankruptcy Decision, all obligations of the debtor convert into monetary obligations (in equal value). However, if the obligation of the debtor is not a monetary obligation, but a non-monetary obligation in a mutual agreement, the Bankruptcy Administration is entitled to continue with the performance of the non-monetary obligation which it deems economically beneficial for the Bankruptcy Estate, instead of converting the non-monetary obligation in an equivalent monetary obligation. This Article 198 of the EBL is generally accepted as providing for a cherry-picking right of the Bankruptcy Administration. This is a right, but not an obligation[13] of the Bankruptcy Administration. The creditor, however, may request a security as a guarantee of the non-monetary obligation.
- Article 199 of the EBL stipulates that in the event a commodity has been sold and delivered to the debtor before the opening of the bankruptcy, the seller is not entitled to terminate the agreement and claw back the delivered commodity although the termination and claw back right have explicitly been reserved under the contract between the parties.

If the contractual close-out netting provisions were not recognized in a bankruptcy proceeding, and the Bankruptcy Administration applied the above mentioned statutory insolvency provisions separately to each Individual Contract (being a Commodity Spot, Commodity Forward, Commodity Option or Commodity Swap transaction), they might be subject to different provisions depending on the status of the performance *etc.*

We believe that Commodity Forward and Commodity Spot transactions would be considered as sale contracts under Turkish law. If the bankrupt party is the seller in the transaction and neither the good is delivered nor the purchase price already paid at the time of the Bankruptcy Decision, then the buyer is not obliged to pay the purchase price, unless security is given to him by the Bankruptcy Administration as to that the good will be delivered to him, if the Bankruptcy Administration decided to perform the non-monetary obligation (*i.e.* the delivery of the good). If the Bankruptcy Administration did not use its cherry-picking right, as explained above, the buyer also has the right to request security in return. If the Bankruptcy Administration does not provide a security in an adequate time period, the buyer may terminate the contract.

If the buyer made a partial payment prior to the Bankruptcy Decision, the buyer may request reimbursement of the amounts that it has paid according to the principle of "enrichment without cause". If the buyer does not terminate the contract, it may set-off its payment obligation and its claim regarding the value of the good. If the good is already delivered, but the buyer has not made the payment by the time of the Bankruptcy Decision, the Bankruptcy Administration will request the payment from the buyer when it is due.

13 ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 399.

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If the bankrupt party is the buyer, and neither the good is delivered, nor the price is paid yet at the time of the Bankruptcy Decision, the seller may refrain from delivery until security is provided by the Bankruptcy Administration that the purchase price will be paid. If the Bankruptcy Administration does not provide the security in an adequate time period, the seller may terminate the contract. If the buyer made a partial payment prior to the Bankruptcy Decision, it may request reimbursement of the amounts that it paid according to the principle of "enrichment without cause". According to the EBL, if a commodity has been sold and delivered to the debtor before the opening of the bankruptcy, the seller is not entitled to terminate the agreement and claw back the delivered commodity, although the termination and claw-back right have explicitly been reserved under the contract between the parties. Nevertheless, the seller may register its claim for the purchase price to the Bankruptcy Estate.

Purchase or sale rights under a Commodity Option transaction may be considered as a receivable subject to a future condition (exercise of the option right by the option holder) in terms of Article 197 of the EBL. Please see the explanations above under this Section. We believe that when the condition is realized (*i.e.* the option is exercised by the option holder), our explanations regarding sale contracts in the above paragraphs would be valid for the option contract as well.

In a Commodity Swap transaction, the parties' obligations would be bilateral. The bankruptcy administration may decide to continue the transaction if it is profitable.

Disparate treatment between different Individual Contracts may also occur in the event of a concord. As per Article 296/2 of the EBL, the debtor who obtained a Grace Period for concord will be entitled to terminate the continual obligation relationships which impede the concord target to be reached, subject to the approval of both the commissar and the court. The effective date of such a termination is at the discretion of the debtor. We believe that all the Individual Contracts may be interpreted as different continual obligations, and only certain Individual Contracts may be terminated by the debtor, provided that these Individual Contracts impede the concord target. Since the provision is a recently introduced provision as of the date of writing, there is no precedent that would set forth what criteria are sought when determining whether the concord target would be impeded in a continual obligation relationship and whether electricity sale agreements of electricity trade companies can be construed as continual obligation relations that may impede the target of the concord in certain cases.

(cc) *Opinion on whether the termination of the General Agreement, the calculation and/or payment of the Termination Amount is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court.*

(i) General

The EBL regulates the avoidance action for certain legal acts of debtors. Debtors' disposal rights on the assets included in the Bankruptcy Estate are restricted upon the

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opening of the bankruptcy[14]. Before the opening of the bankruptcy, there are no restrictions on the disposal rights of the debtor, unless any protective measures have been taken or a Grace Period for concord is granted to the debtor (please see Section D.I.1.(dd) and Section D.I.1.(dd).(ii)).

Therefore, with an avoidance action, an entitled party may challenge certain legal acts of the debtor conducted prior to the opening of the bankruptcy. An avoidance action aims to avoid any collisional transaction whereby a debtor hides or transfers its assets to third parties predicting that a bankruptcy proceeding would be initiated against him and to provide the creditors with a maximum protection against collisional disposals of the debtors. The EBL does not contain provisions that stipulate protections from certain avoidance powers for certain transactions which may include commodity and financial contracts (swaps, forward contracts *etc*.).

(ii) Parties to the Avoidance Action

Claimant

The Bankruptcy Administration[15] is entitled to submit an avoidance action. If the creditors conclude during the second creditors' meeting[16] that a claim is not required to be pursued by the Bankruptcy Administration, such right to submit the avoidance action is transferred to the requesting creditors.

Defendant

Avoidance action is to be directed to the third parties who benefit from the legal act of the debtor (*i.e*. the counter-party benefiting from the transaction and third parties with bad faith)[17].

The EBL sets out three types of voidable transactions under Article 277 *et seq.*

(iii) Avoidance in accordance with Article 278 of the EBL/Gratuitous Legal Acts

The avoidance right provided under Article 278 is regarding the gratuitous legal acts of the debtor.

In order to submit an avoidance action against gratuitous transactions and donations of the debtor:

a) The gratuitous transactions or donations must be conducted within two

[14] ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 389.

[15] Please be informed that the law provides this right also for the creditors of a debtor against whom an attachment procedure is commenced. This kind of avoidance action will not be analyzed in this Opinion as the attachment procedure is out of the scope of this Opinion.

[16] Please see below Section D.I.1.(dd) for procedural steps in a bankruptcy proceeding.

[17] ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 534.

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years prior to the opening of the bankruptcy;

b) They must be deemed as unusual transactions. The competent court has discretion on determining whether the gratuitous transactions and donations are within the limits of usual gifts.

Article 278 accepts certain legal acts as donations. These are automatically subject to avoidance action. The burden to proof of the contrary is on the debtor. These acts are:

a) Onerous transactions among conjoint persons who are in lineal consanguinity,

b) Legal acts on which the debtor transfers the subject matter with a very low price in return,

c) Annuity agreements and lifelong nursing agreements.

(iv) Avoidance in accordance with Article 279 of the EBL/Insolvency Related Acts

Following legal acts of the debtor conducted within a year prior to the opening of the bankruptcy are voidable:

a) Granting of pledges for an existing obligation unless the debtor previously ensured to secure the obligation;

b) Settlement of a monetary debt in a manner other than in cash or by other unusual means of payment;

c) Repayment of debts not yet due; or

d) Annotations initiated at the title deed registry in order to strengthen personal rights.

A third party who benefits from the legal acts of the debtor listed in Article 279 has the burden of proof that it was not aware of the state of insolvency of the debtor.

(v) Avoidance in accordance with Article 280 of the EBL/Invalidation for Intent

The avoidance action provided under Article 280 of the EBL is a more general category. Pursuant to Article 280 of the EBL ("invalidation for intent"), all acts that a debtor carried out within the five-year period prior to the start of a proceeding for bankruptcy or attachment are voidable if the debtor acted with the intention to decrease the rights of the creditors or favor a creditor over others.

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Type of the Act

In order to file an avoidance action against a legal act under Article 280 of the EBL, the legal act in question must be made in order to decrease the assets of the debtor which is insolvent. Furthermore it must be proven that the counterparty of the transactions knows or should know that the debtor acts with the intention to decrease the assets of the debtor.

Intent

If a debtor, whose assets are not sufficient to meet its debts, conducts an act with the purpose of damaging its creditors and a third party who benefits from the act is aware of the intention of the debtor, the act of the debtor is voidable and can be challenged[18]. Not only the acts detrimental to all creditors, but also those, which favor certain creditors over the others, are classified as voidable[19].

The Bankruptcy Administration –or the creditor– who submitted the avoidance action is obliged to prove that the third party benefited from the legal act was aware of the intent of the debtor.

(vi) Result of the Avoidance Action

If the bankruptcy court rules in favor of the Bankruptcy Administration with regards to the avoidance action, the value subject to the avoidance action will be included into the Bankruptcy Estate as if it belongs to the debtor.

(vii) Conclusion

We are of the opinion that the calculation and/or payment of the Termination Amount is not at risk of being voidable, challengeable or in any way capable of being invalidated by the Bankruptcy Administration under Article 278, as the Termination Amount cannot be considered as donation or gratuitous transaction. In order to invalidate calculation and/or payment of the Termination Amount according to Article 279, a creditor or the Bankruptcy Administration should prove that the Termination Amount was paid for a non-due debt. We are of the opinion that the calculation of the Termination Amount is not made for non-due debts as the Termination Amount becomes due with the termination of the Agreement. (However, for possible invalidity claims regarding early termination and automatic termination clauses please see Section D.I.1.(a). Also for the possibility of avoidance action in case cash (as defined in the Credit Support Annex) is paid to a party under Credit Support Annex that is executed between the parties please see Section D.III).

18 Third parties which take over or purchase the whole commercial enterprise or commodities in this enterprise are deemed to be aware of the bad faith of the debtor.

19 ***Erdönmez*** p.7.

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Whether solely the termination may be challenged under Article 280 is questionable. We believe that solely the termination cannot be challenged under Article 280, as a prerequisite of an avoidance claim under Article 280 is that the transaction diminishes the existing assets of the debtor. Accordingly, we believe that the termination may only be challenged together with the calculation and the payment as the termination itself may not diminish the assets of the debtor. In order to invalidate the termination and calculation and/or payment of the Termination Amount according to Article 280, the Bankruptcy Administration or a creditor should prove that the debtor acted with the intention to decrease the rights of creditors. The calculation of the Termination Amount may well be more favorable to the creditors as they might be entitled to receive the payment of the Termination Amount. One may argue, therefore, that a challenge against the termination of the Agreement, including the calculation and payment of the Termination Amount, would not succeed as such provisions are not *per se* detrimental to other creditors.

(dd) Opinion on whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected.

(i) General

Beginning from the opening of the bankruptcy, debtors cannot dispose of the assets that are included in the Bankruptcy Estate[20]. Before the opening of the bankruptcy, unless any protective measures or preliminary injunctions are in place, there are no such restrictions on debtors' disposal rights.

The EBL limits the ability of creditors to pursue their claims against a debtor under the following procedures:

a) concord; and
b) amicable restructuring.

Concord and amicable restructuring are corporate rescue procedures which may affect the creditor's rights in a pre-filing state.

[20] ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 389.

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(ii) Pre-filing State

The following procedures may affect the creditors' rights in a pre-filing state: *a) concord* and *b) amicable restructuring*.

a) Concord

Concord is a corporate rescue procedure in the form of a consensual process binding on all creditors of the debtor, with certain exceptions. Upon the Concord Amendments' publication on 15 March 2018, formerly existing (but almost never applied) concord provisions were amended in a way to create a concord mechanism replacing procedure.

Concord may be requested by the debtor or any of its creditors which are entitled to initiate bankruptcy proceedings (i) before the Bankruptcy Decision including the time period before the commencement of bankruptcy proceedings; (ii) after the Bankruptcy Decision. Another type of the concord is concord by way of abandonment of assets of the debtor to the creditors whereby the debtor transfers all or a part of its assets to the creditors and the creditors' claims are satisfied by the proceeds of liquidation of the transferred assets or sale to a third party.

As per the new provisions of the EBL, the main steps of the concord mechanism are as follows:

- In the event the debtor or a creditor applies to the competent commercial court for a concord request, the court will make an examination based on the documents required in the EBL. The documents to be provided include a project by the requesting company setting out how it intends to restructure to recover from bankruptcy.
- Upon its preliminary evaluation, the court will decide to grant a temporary grace period for concord for a maximum period of three months (that can be extended for two more months maximum), in the event the court deems as a preliminary evaluation that the conditions for concord are met ("**Temporary Grace Period**").
- At the decision granting the Temporary Grace Period, the court also appoints a temporary commissar that will supervise the company, and certain transactions shall be subject to the approval of such commissar.
- At the end of the Temporary Grace Period, during which the court will make a thorough evaluation; the court will decide on the definite grace period if it deems the conditions of concord are met ("**Definite Grace Period**"). The Definite Grace Period may be for a maximum period of one year and extended for six more months maximum.

  (Temporary Grace Period and Definite Grace Period will be referred to together as "**Grace Period**" in this Memorandum.)

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- For the Definite Grace Period, either a new commissar is appointed or the one appointed before continues its duty. The commissar will then make a public announcement inviting all the creditors to notify their receivables.

- During the Definite Grace Period, the project should be accepted by the creditors in accordance with the decision quorum determined in the EBL. As per the EBL, the project is deemed accepted if (i) the half of creditors which registered their receivables and creditors representing half of the registered receivables or (ii) one quarter of the creditors which registered their receivables and creditors representing two third of the total registered receivables signs and accepts the terms of the project ("**Concord Project**"). As per the EBL, only creditors which are affected by Concord Project have a right to vote.

- According to Article 297 of the EBL, the debtor may continue its business under the supervision of the commissar. The court may also decide that certain transactions should be performed with the approval of the commissar or that the commissar conducts the company instead of the debtor as well. During the Grace Period, the debtor shall not establish any pledge, be a guarantor, transfer continual equipment of the enterprise or conduct gratuitous legal transactions without the approval of the commercial court."

- The court shall decide on the concord decision prior to the end of the Definite Grace Period as per its evaluation on the report of commissar and if the minimum decision quorum by the creditors has been met, amongst other criteria.

- The Concord Project shall most likely include reduction in the receivables of the creditors as well as deferral through installments.

- The concord decision becomes binding at the decision date or at the date the decision is finalized, depending on the agreement in the Concord Project.

Upon the approval of the concord, the admitted plan will be binding on all creditors, except creditors with secured receivables and certain public receivables. Applied attachments in all execution filings initiated against the debtor will be released.

Invalidity of Termination Clause:

As per Article 296 of the EBL, in the event that the debtor applies for concord, provisions stating that the request of concord by the debtor will (i) render the debt due and payable, (ii) be breach of contract or (iii) be just cause for termination, will not be applicable for agreements which are of importance for the continuation of the company's activities. This provision applies regardless of whether the counter-party wishing to terminate the agreement is affected from the concord.

Even though the provision only refers to the non-applicability, *i.e.* invalidity of the above-mentioned provisions of a contract only if the debtor itself applied for concord, we understand that the provision actually covers the application for concord by any

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party and the granting of Grace Period and approval of the concord decision as well. Furthermore, terminating the General Agreement with another insolvency-related reason may also be construed as circumventing the prohibition of termination under Article 296.

Termination Right of the Debtor for Continual Obligation Relationships:

As per the second paragraph of Article 296, the debtor will be entitled to terminate the continual obligation relationships which impede the concord target to be reached, subject to the approval of both the commissar and the court, the effective date of which being at the discretion of the debtor. As per the provision, the indemnity to be paid by the debtor for such a termination will be included in the Concord Project. In the event that such termination right is used for certain Individual Contracts under one General Agreement (the Individual Contracts and the General Agreements not being construed as a single agreement), it would impede the close-out netting as a result of a termination for another valid reason under Article 10.5 under the General Agreement later on.

Cherry-Picking Right of the Debtor:

Article 294 of the EBL brings an institution similar to the cherry-picking right of the bankruptcy administration in case of the bankruptcy. The receivables of the creditors other than monetary receivables convert into monetary obligations in equal value and notified to the commissar by the creditors. However, in the event that the debtor wishes to perform a non-monetary obligation, it may implement the specific performance of the obligation with the consent of the commissar. The difference of this provision from the cherry-picking right during bankruptcy is that the will to perform the non-monetary obligation is on the debtor with the approval of the commissar and not directly by the commissar itself, whereas it is directly on the bankruptcy administration in case of bankruptcy. While we are not aware of any precedent on the matter, it is also possible that the termination of the General Agreement for another insolvency related early termination reason later on be construed as circumventing the cherry-picking right of the debtor during the Grace Period.

Set-Off Limitation:

As per Article 294 of the EBL, the provisions regulating set-off during bankruptcy (Articles 200 and 201) shall also apply for both Temporary Grace Period and Definite Grace Period. Accordingly, creditors of the debtor can set-off their claims against their debts to the debtor. However, in case a Grace Period is granted for the debtor, in order to effectuate a set-off, it should be declared to the commissar[21]. As explained under Section D.I.1.(gg).(i) in detail, Article 200 of the EBL provides certain restrictions for set-off. While recognizing the general principle that a creditor of an entity that obtained

[21] The declaration is not subject to any form requirement, it is unilateral notification to the commissar.

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Grace Period can set-off its receivables from such entity against its debts to such entity, it provides that set-off cannot be made if:

(a) Any debtor of the company that obtained the Grace Period became a creditor after the announcement of Grace Period;

(b) Any creditor of the company that obtained the Grace Period became a debtor after the announcement of the Grace Period; or

(c) If the receivable of the creditor is based on a bearer type negotiable instrument (*e.g.* a bearer check).

Accordingly, we believe that the Concord Amendments, may have an effect on the validity/applicability of the following early termination reasons under the General Agreement:

1. Article 10.5.(c)(iii) setting forth that "*seeking or becoming 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*"

As a commissar is appointed by the court upon granting a Temporary Grace Period for concord, we believe that a request for concord or institution of a concord may be deemed as an automatic termination reason under Article 10.5.(c)(iii) stating "*seeking or becoming 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*" as an automatic termination reason. According to this provision, the termination would become effective (i) at the time the debtor applied for concord, in case the request for concord is made by the debtor itself, and (ii) at the time the temporary commissar is appointed, in case a creditor applied for concord request.

If a concord request or institution of a concord is deemed as an automatic termination reason under Article 10.5.(c)(iii) of the EFET Agreement, this provision of the EFET General Agreement may be considered invalid under Article 296 of the EBL as it may be deemed as a provision determining the request for concord as a termination ground. However, it is possible to allege that the wording does not refer in any way to "concord", therefore Article 296 should not apply in this case and the automatic termination is valid.

Furthermore, there is also a risk that this provision is deemed invalid with a possible allegation that terminating the agreement with such a ground will mean to circumvent the cherry-picking right provided to the debtor during the Grace Period, regardless of who initiated the concord process.

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2. Article 10.5(c)(vi) setting forth that "*making a general assignment, arrangement or composition with or for the benefit of its creditors constitute automatic termination for both Parties*".

Even though the exact equivalent concepts mentioned in this provision do not exist under Turkish law, as the concord actually constitutes of an arrangement with and for the benefit of creditors (in the sense that they receive their receivables that they could not have obtained, had the concord not been instituted) before the court, we believe that the institution of a concord decision may be interpreted as constituting automatic termination under Article 10.5 (c) (vi).

While Article 296 states that a termination on the grounds that the debtor applied for concord is invalid, we understand that it means to cover the granting of Grace Period and the approval of the concord decision as well, therefore the termination under this Article 10.5(c)(ii) may be deemed invalid as per Article 296.

3. Termination with Material Reason under Article 10.5(c)(iv)

We believe the wording of "*a Party instituting or having instituted against it a proceeding seeking a judgement of any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights*" in Article 10.5(c)(iv) may be interpreted in a way to cover the application for a concord request as well. However, this may also be deemed invalid for the same reasons explained above under paragraph 1 above *i.e.* either under Article 296 or as circumvention of the cherry-picking right of the debtor during Grace Period), if Article 10.5(c)(iv) is chosen as an automatic termination reason.

Furthermore, even if a Party terminated the General Agreement validly for another early termination reason during the Grace Period, as the Termination Amount covers the set-off of the Settlement Amounts of each Individual Contract, and each Settlement Amount would arise during the Grace Period, performing the set-off of the Settlement Amount would be against Article 294 of the EBL. Therefore, we believe once a Grace Period is granted to a Party, we believe the close-out netting becomes inapplicable; unless and until the court decides not to approve the concord decision and bankruptcy decision is not granted in the end.

b) Amicable Restructuring

Amicable Restructuring is a corporate rescue mechanism, which is also available for Companies experiencing financial difficulties. Accordingly, Companies that are unable to pay their debts (*aciz hali*) may initiate amicable restructuring process in compliance with Article 309/m *et seq*. Amicable Restructuring can involve a debt rescheduling, organization of the entire financial structure of the debtor and re-organization of the management. Additionally, the Company can propose settling the debts of certain creditors whilst at the same time restructuring those of other creditors.

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Therefore, certain creditors may be unaffected by the arrangements. It will be binding for those who are affected by the arrangements

(iii) Filing of Bankruptcy Lawsuit

In principal, filing of a bankruptcy lawsuit does not have any effects on the creditors' rights. Upon a request of bankruptcy[22], the commercial court first examines whether it

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[22] **Bankruptcy filing may be made either by the insolvent company and its management or creditors.**

1. Bankruptcy Request by Creditors Following an Execution Process:

Upon non-performance of a mature debt, a creditor may initiate an execution process by way of bankruptcy against the debtor. If the creditor initiates an ordinary execution process by way of bankruptcy, the debtor shall be given a period of time (seven days) for paying the claimed amount or submit its objections following the service of payment order. If the debtor does not object to the payment order, the creditor may request bankruptcy at a commercial court against the debtor. If the debtor objects, the creditor may request bankruptcy as well as request lift the objection within one year from the service of the payment order.

2. Direct Bankruptcy: Direct bankruptcy may be filed by the creditor or the company.

Direct Bankruptcy by the Creditor: The conditions for a creditor to request for direct bankruptcy are the following: (i) the debtor does not have a firm domicile, (ii) he/it escapes for the purposes of avoiding his obligations, (iii) he/it enters into fraudulent transactions or intends in some other manner to violate the rights of his creditors, (iv) the debtor hides his/its assets during the proceeding *via* attachment, (v) the debtor suspends his/its payments, (vi) the court decides to reject the concord request due to the non-approval of the concord, and the reasons for directly requesting the bankruptcy of the concord are existing (vii) a receivable subject to a court decision is not paid even after execution order, and (viii) the company becomes insolvent, (vii) a receivable subject to a court decision is not paid even after execution order, and (viii) the company becomes insolvent, (ix) termination of amicable restructuring or breach of the debtor's obligations according to the amicable restructuring project.

Direct Bankruptcy by the Company Itself: If the company is insolvent (when the company loses 2/3 of its share capital) (*borca batık*), then the board is obliged to provide the commercial court with the actual financial situation of the company and request for its bankruptcy. However, if the company is unable to pay its debts (*aciz hali*) request for bankruptcy is not obligatory.

Procedure to Follow for Bankruptcy Request Following an Execution Process:

If the debtor does not object

If the debtor does not object but does not make the payment either, the bankruptcy proceeding (*iflas takibi*) becomes final, and the creditor has to file a bankruptcy lawsuit against the debtor at a commercial court. Upon the filing of the lawsuit, the bankruptcy request is announced by the commercial court in order for the other creditors to object or intervene. If no such objection or intervention is made within 15 days, or the commercial court does not find the objections appropriate, the commercial court grants a storage decision requesting the debtor to make the payment together with expenses and interests within seven days. In the event of failure to deposit the amount to the commercial court or make the payment directly to the creditor, the commercial court decides on the bankruptcy in the first following session.

If the debtor objects

If the debtor objects, the creditor has to file a lawsuit in the commercial court requesting both (i) lifting of the objection and (ii) the bankruptcy of the debtor. The commercial court will first evaluate the request for lifting. Following the analysis on the existence of the conditions for lifting of objection (*i.e.* the existence of the receivable), if the objection is lifted by the commercial court, the bankruptcy request is announced by the commercial court in order for the other creditors to object or intervene. If no such objection or intervention is made within 15 days or the commercial court does not find the objections to be valid, the commercial court grants the storage decision. If the debtor does not store or make the payment within seven days after the storage decision, the commercial court decides on the bankruptcy of the debtor.

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is necessary to take protective measures to protect the creditors' rights against the bankrupt entity's acts and determine the content of these protective measures. The authority of the commercial court to take protective measures after the filing of the bankruptcy lawsuit is specifically defined in the EBL, separate from the preliminary injunctions. Contrary to preliminary injunctions which provide protection for a creditor on a specific asset of the debtor, the protective measures aim to provide protection for all creditors on certain or entire assets of the debtor.

According to Article 159 of the EBL, upon receiving a request for the bankruptcy of an entity, the commercial court can take protective measures regardless of whether or not the creditors request so (if it deems it necessary for protecting rights of the creditors). The commercial court especially examines whether there is any possibility that the entity subject to the bankruptcy lawsuit hides or transfers its assets to third parties through fraudulent transactions for the purposes of decreasing its assets which will be subjected to the Bankruptcy Estate. If this is the case, the commercial court shall take protective measures.

The bankruptcy court has discretion to take such measures. However, if such measures are requested by one or more creditors and if the entity subject to the Bankruptcy Lawsuit has not objected to the payment order, the bankruptcy court is obliged to take protective measures.

The EBL does not list the protective measures that can be taken upon a bankruptcy request explicitly, but, only regulates the bookkeeping measure.

Bookkeeping

Bookkeeping is a protective measure regulated under the EBL. Accordingly, the bankruptcy office records all assets of the debtor. The debtor will be obliged to handover all the assets recorded in the list kept by the bankruptcy office if and when requested by the Bankruptcy Administration. The court order regarding bookkeeping will remain in force for four months unless prolonged by the court in the relevant order.

Other Protective Measures

The EBL entitles the commercial court to take protective measures other than bookkeeping. As mentioned, these are not explicitly determined in the EBL and left to the discretion of the commercial court. In practice such measures can be identifying the assets of the debtor, ordering creditors of the debtor not to make payments to the

Procedure to Follow for Direct Bankruptcy:

If one of the conditions for the direct bankruptcy applies, there is no need for the creditor to start execution proceedings first. Accordingly, the creditor will directly file the bankruptcy lawsuit, and the court will evaluate to confirm the existence of the receivable of the creditor (if filed by a creditor) and the existence of the direct bankruptcy reason. The same procedure following the filing of bankruptcy lawsuit explained above, except for the storage decision, applies in this method.

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debtor, sealing the debtor's businesses and warehouses, escrow some of the debtor's assets to a trustee and affix of an annotation with the land registry to prevent the debtor from transferring its immovable.

However, in cases where the creditor requests further protection from the bookkeeping, the court may request a security to be submitted from such creditor.

(iv) A Bankruptcy Court Recognizing the Filing of Proceedings Seeking a Judgment of Insolvency

The recognition of the filing of proceedings seeking a judgment of insolvency is not referred to as a specific procedural step in bankruptcy proceedings. If the procedural prerequisites are met, the court will review the case on its merits and decide on opening the bankruptcy or reject the bankruptcy request.

(v) Bankruptcy Decision

The Bankruptcy Estate shall constitute and the bankruptcy shall be deemed opened for the bankrupt entity on the date on which the Bankruptcy Decision has been taken[23]. Thus in its decision, the bankruptcy court must mention the date, hour and minute on which the relevant bankruptcy opens. All effects of bankruptcy become effective on the date mentioned in the decision.

Simultaneously with the issuance of the Bankruptcy Decision, all assets of the debtor *ipso iure* constitute the Bankruptcy Estate[24] and the legal capacity of the debtor is

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[23] Upon the court's decision of the debtor's bankruptcy, such decision will be notified to the relevant authorities such as title deed registries, trade registries, customs administration, the banks association of Turkey, chambers of commerce, stock exchanges, capital markets board, as the case may be. The Bankruptcy office will also announce the Bankruptcy Decision in a national newspaper having a daily circulation of over 50,000 and a local newspaper where the bankruptcy entity is located and trade registry gazette. Bankruptcy Office determines the assets of the Bankruptcy Estate by bookkeeping and takes other protective measures. Later on, depending on the value of the assets, Bankruptcy office decides on the method of liquidation. (There are two different methods of liquidation: (i) simple liquidation and (ii) ordinary liquidation. Please note that our explanations herein are made as per the ordinary liquidation method which is the main method.) Bankruptcy office announces the liquidation method. Such announcement is for; (i) the creditors of the bankrupt entity and persons who claim rights on the property included in the Bankruptcy Estate to have their claims registered with the bankruptcy office within a month in company with the documents supporting their claims, (ii) the debtors of the bankrupt (debtor) to have registered their debts, (iii) any others, if holding possession of a property belonging to the bankrupt entity, to return the property to the bankruptcy office.

[24] Following the court's Bankruptcy Decision, the bankruptcy office begins to establish the "Bankruptcy Estate" by preparing a list of assets.

- The bankruptcy office interviews the executives of the bankrupt company and may also appoint an expert for the purpose of establishing the "Bankruptcy Estate";
- following the establishment of the "Bankruptcy Estate", the bankruptcy office convenes the first creditors meeting;
- the main purpose of the first creditors meeting is to appoint the candidates for "Bankruptcy Administration" among which the enforcement court will determine the Bankruptcy Administration. The quorum for the first creditors meeting is a majority of creditors holding at least ¼ of the known debt. If there are less than five creditors, then the quorum is a majority of creditors holding at least ½ of the known debt;

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restricted. The creditor's rights and requests will henceforth be subject to statutory insolvency provisions as provided under the EBL. Any dispositions of the bankrupt entity over its property after the opening of the bankruptcy are void[25].

Bankruptcy administration's right to reject a claim

Once the Bankruptcy Administration is appointed after the first creditors' meeting, it has an authority to accept or reject claims. Accordingly, if the creditor calculates the Termination Amount according to close-out netting provisions and applies to the Bankruptcy Administration to register this (netted) claim in the list of creditors (ranking list), the Bankruptcy Administration may reject the claim. If the Bankruptcy Administration rejects the claim of the creditor, the creditor may object to the rejection of the Bankruptcy Administration by filing an objection to the list of creditors (ranking list) as explained below.

Objection to the ranking list

The Bankruptcy Administration prepares a list of creditors. Pursuant to Article 235 of the EBL, creditors are entitled to submit their objections against the list of creditors before a commercial court at the place of Bankruptcy Decision. The objection of the creditors has to be submitted within 15 days following the announcement of the list of creditors. Thus, through filing a lawsuit, creditors may seek a judgment against the Bankruptcy Administration's decision regarding the ranking of receivables. If the creditor objects to its own rank, it may file a complaint to the relevant enforcement court.

(vi) Final Bankruptcy Decision

The court's decision becomes final after the appeal period expires, if no appeal is made. The debtor is entitled to appeal the court decision regarding its bankruptcy within ten days beginning from the issuance of the court decision. Upon the Regional Court of Justice decision, the debtor may appeal to the Court of Appeal within ten

- the Bankruptcy Administration prepares and announces the list of creditors (ranking list);
- the second creditors' meeting will be convened, provided that the Bankruptcy Decision of the court has become final following the appeal process, if a lawsuit against the decision of the first instance court has been submitted;
- the same quorums apply to the second creditors' meeting as to the first;
- the second creditors' meeting has the authority to determine the method of disposal of assets, *e.g.* public auctions or private sales;
- following certain requirements, *i.e.* valuation of the assets, announcement of the auction *etc.*, the assets will be liquidated;
- a distribution list is prepared and realizations are distributed to the creditors;
- creditors who are not fully satisfied receive a certificate of insolvency;
- the court decides on the closing of the bankruptcy upon the submission of the final report provided by the Bankruptcy Administration.

Only Bankruptcy Estate can allege the voidness of the dispositions of the bankrupt entity. Bankruptcy Estate may approve the disposition if Bankruptcy Estate benefits from the disposition.

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days beginning from the notice of the Regional Court of Justice's decision. If the debtor files the decision to the Court of Appeal[26] the decision will first be deemed finalized when the Court of Appeal renders its decision regarding the case. If the decision of the court is rejected during the appeal process, the decision will become finalized when the appeal process is completed. Please be informed that examination before the Court of Appeal or the Regional Court of Justice does not suspend the execution of the court of first instance's Bankruptcy Decision. Accordingly, during the appeal examination, the Bankruptcy Estate constitutes and the relevant proceedings are executed. However, pursuant to Article 164/3 of the EBL, the second creditors' meeting shall not take place until the Bankruptcy Decision becomes final. Thus, commencement of the liquidation and the distribution processes suspend until the finalization of the decision.

It has to be emphasized that the protective measures, if any, rendered by the commercial court of first instance, continue to be valid during the ten days appeal period as well as during the appeal examination at Regional Court of Justice, and during the ten days appeal period to apply to the Court of Appeal if not amended or removed by the Regional Court of Justice or the Court of Appeal.

(vii) Disposal of Assets

The proceeds obtained from the sale of the assets of the Bankruptcy Estate are distributed amongst the creditors in the following order:

(a) Pledged obligations;

(b) Certain specific taxes and duties (such as taxes arising out of lease revenues generating from immovable properties);

(c) Claims of employees including severance and notice payment based on employment contracts and accrued within the one year period prior to Bankruptcy Decision and severance and notice arisen due to termination of the contract in accordance with bankruptcy. Debts of employers to associations and institution established for the purpose of organization of social support and aid funds; all kinds of alimony (in monetary kind) that are in accordance with family law and have arisen within the year prior to the Bankruptcy Decision;

(d) Receivables of legal guardians (provided that the bankruptcy opens during the legal guardianship or in one year after the legal guardianship ends);

26 The Court of Appeal (*Yargıtay*) is the last instance court after the Regional Courts of Justice (*Bölge Adliye Mahkemesi*) for reviewing rulings and judgments rendered by civil courts, criminal courts and examination courts and renders verdicts upon appeal. The decisions rendered by the Court of Appeal are considered as precedents for the rulings of the first instance courts, in order to achieve uniform application of the laws.

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(e) Receivables stated to be privileged in specific legislation;

(f) All other receivables that are not privileged.

In the event that some of the creditors are not satisfied through the proceeds, they are provided with a certificate that represents the unpaid portion of their debts.

For explanations on credit support documents please see Section D.III.

Receivables secured with letters of guarantee

If a receivable is secured with a letter of guarantee (*e.g.* a letter of credit issued by a bank), the creditor may cash in the letter of guarantee without registering the receivable in the stated ranking as the letter of guarantee is considered as a type of contract of guarantee which gives rise to an independent performance which is not related to the relationship between the beneficiary and the bank. Accordingly, in case of bankruptcy of the party who delivered a letter of guarantee, the creditor may cash in the letter of guarantee for its receivable whereas the bank shall claim[27] its receivable from the Bankruptcy Estate. However, in the event of a concord, please note that if the payment due date of a receivable of a party is later than the date of the concord becoming binding, we believe such receivable will be subject to the agreed terms of the Concord Project, thus the guarantee may be liquidated at the reduced amount and only after the newly set installment payment due dates that has been determined in the Concord Project.

(ee) Opinion on whether the Turkish insolvency law provides for a "safe harbor" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix B would benefit from such provision(s).

We understand that the term "safe harbor" refers to a provision which provides protection from the application of statutory insolvency provisions such as cherry-picking right of the Bankruptcy Administration regarding certain transactions. Under Turkish law, certain contracts are specifically prescribed in the laws as being automatically terminated upon bankruptcy of one of the parties to the contract, such as running account agreements (*cari hesap sözleşmesi*), agency agreements (*acentelik sözleşmesi*), powers of attorney (*vekaletname*), insurance contracts (upon insolvency of the insurance Company), financial lease agreements (upon bankruptcy of the lessee). Physical commodity trade contracts and financial derivative contracts are not prescribed as contracts automatically terminating upon bankruptcy of one of the parties to such contracts. Therefore, Turkish insolvency law does not provide any "safe harbors" for certain derivatives and the contract types listed in Appendix B.

The EBL is dated 1932 and has not been amended and improved in order to serve the

[27] ***Reisoğlu*** p. 223.

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necessities and requirements of the modern business system[28]. The EBL was adapted from the SDEBA. We understand that in 1997, Article 211 of the SDEBA was amended to remove the cherry-picking right of the Bankruptcy Administration for (i) fixed term agreements and (ii) financial contracts, swaps and options, provided that the value of the contractual obligations on the date of the opening of the bankruptcy can be determined based on market or exchange prices. However, these SDEBA reforms have not been made to the EBL[29]. As a result, Turkish laws do not include any provision which removes the cherry-picking right of the Bankruptcy Administration for physical commodity trade contracts and financial derivative contracts upon bankruptcy of one of the parties. Furthermore, the insertion of the provision on 15 March 2018 to the EBL which invalidate termination reasons which are triggered by the request for concord, may be construed so as to strengthen the interpretation that a termination due to insolvency is circumventing the statutory netting provisions of the EBL (see Section D.I.1.(dd).(ii)).

(ff) *Opinion on whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc.).*

Turkish legislation contains several explicit publication obligations regarding bankruptcy proceedings. However, they concern the procedural steps upon the Bankruptcy Decision, not before the Bankruptcy Decision such as filing of proceedings seeking a judgment of bankruptcy (except for listed companies, as explained below).

Article 166 of the EBL obliges the bankruptcy office to immediately notify the Bankruptcy Decision to the relevant authorities such as title deed registries, trade registries, customs administration, the banks association of Turkey, chambers of commerce, chambers of industry, stock exchanges, capital markets board, as the case may be. Furthermore, the bankruptcy office will announce the Bankruptcy Decision in a national newspaper having a daily circulation of over 50,000, and a local newspaper where the bankruptcy entity is located and the trade registry gazette.

The Turkish Trade Registry Gazette's website publishes the gazettes of the Companies online. Such gazettes contain all corporate decisions of the Companies which have to be registered with the trade registry gazette in accordance with the relevant legislation. However the research can only be made with the title of the Company and there is no additional list where the Bankruptcy Decisions regarding the Companies are provided.

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[28] The EBL has been amended many times since its enactment in 1932. However, no improvement has been made with regards to safe harbor provisions for certain financial transactions and commodity contracts.

[29] Notwithstanding the exclusion of Article 211.2 bis of the SDBEA, as per the Swiss Memorandum, we understand that Article 211.1, the equivalent provision of 198 of EBL, is deemed to be a procedural provision and not of a mandatory nature, thus may be contracted out. On the other hand, in Turkey, Article 198 is rather accepted as a mandatory provision under Turkish law. Therefore, provisions in breach of such Article 198 will be deemed invalid. For further details please see EFET Electricity Close-Out Netting Memorandum for Switzerland dated 25 February 2013.

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Another publication obligation is provided under Article 14 of the EBL for the Court of Appeal. Pursuant to the EBL, the Court of Appeal is obliged to publish all its decisions regarding execution and insolvency transactions. In practice, unfortunately the Court of Appeal does not publish all its decisions.

However, such publication obligations are based on outdated mechanisms, such as publication in the newspaper. Therefore, they do not have much practical use in the contemporary business environment. Thus, finding a Bankruptcy Decision regarding a specific entity is only possible through a research in the relevant bankruptcy court files, which generally is not permitted by the court without a power of attorney.

For listed Companies however, such decisions are accessible. Listed Companies should disclose any filing of proceedings seeking a judgment of bankruptcy and the foregoing procedural steps in accordance with the capital markets legislation. The Public Disclosure Platform (*Kamuyu Aydınlatma Platformu*) operates under Istanbul Exchange (www.kap.gov.tr) and has been established for the purpose of information disclosure in respect of listed Companies, including insolvency procedures.

The system allows everyone to have access to information about listed Companies over the Internet simultaneously. The system also allows access to historical information.

(gg) A general description of limitations in Turkish law, if any, applicable to set-off of claims (both in an Early Termination scenario and otherwise)

- *between parties of claims arising under the EFET General Agreement;*
- *between parties of claims arising outside the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement; and*
- *between Affiliates or Credit Support Providers of parties if contractually provided for in an amendment to the EFET General Agreement.*

(i) Set-off in General

The set-off concept is regulated under Turkish law in the Turkish Code of Obligations No. 6098 ("**TCO**") Article 139 *et seq.* Accordingly, if two persons mutually owe to each other monetary or other identical obligations/debts, each of them may set-off its receivable with its debt to the other party provided that both of the mutual debts are due. In principle set-off can be performed for identical debts[30]. However, the parties are entitled to set-off their non-identical debts by concluding an agreement to this end[31]. Set-off should be declared to the other party. However, if the parties agree in the

[30] ***Oğuzman/Öz*** p. 577.
[31] ***Oğuzman/Öz*** p. 578.

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agreement that they will perform the set-off, there will be no need for the declaration any more.

Principally, insolvency of a debtor does not deprive its creditors of their set-off rights. Article 142 of the TCO sets forth that creditors of a bankrupt entity are entitled to set-off their claims against their debts to the bankrupt entity, even if their claims are not due at the time of the bankruptcy[32]. The same principle is repeated in Article 200 of the EBL. According to Article 200 of the EBL, creditors of a bankrupt entity can set-off their claims against their debts to the bankrupt entity. However, in case of the bankruptcy of the debtor, in order to effectuate a set-off it should be declared to the Bankruptcy Administration. The declaration is not subject to any form requirement, it is an unilateral notification to the Bankruptcy Administration.

(ii) Limitations on Contractual Set-off Arrangements

Article 200 of the EBL provides certain restrictions for set-off. While recognizing the general principle that a creditor of a bankrupt entity can set-off its receivables from the bankrupt entity against its debts to the bankrupt entity; it provides that set-off cannot be made if:

(a) Any debtor of the bankrupt entity became a creditor after the opening of the bankruptcy;

(b) Any creditor of the bankrupt entity became a debtor after the opening of the bankruptcy; or

(c) If the receivable of the creditor is based on a bearer type negotiable instrument (*e.g.* a bearer check).

Accordingly, if any of above mentioned situations occurs, no set-off declaration can be made to the Bankruptcy Administration.

The parties cannot make set-off agreements which circumvent the above-mentioned limitations. Certain scholars are of the opinion that any set-off agreement made before the opening of the bankruptcy proceedings, but the effects of which emerge after the opening of the bankruptcy by changing the obligations of the parties (*e.g.* by terminating these obligations), when the bankrupt entity is no longer entitled to dispose upon its assets included in the Bankruptcy Estate, is null and void[33]. Such agreements are supposed to circumvent the restrictions provided for set-off under Article 200 of the EBL (please see Section D.I.1.(a) for discussions on whether the close-out netting provisions can be interpreted as circumventing such restrictions).

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32 This is in parallel with the provision of the EBL stating that all the obligations of the debtor become due with the opening of the bankruptcy.

33 ***Develioğlu*** p. 195.

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Pursuant to Article 201 of the EBL, a set-off can be challenged by an avoidance action if the debtor of the bankrupt entity has acquired the claim before the opening of the bankruptcy, but in awareness of the bankrupt entity's insolvency, in order to generate an advantage for itself or a third party to the detriment of the Bankruptcy Estate.

Set-off claims between affiliates are not subject to different provisions, provided that both parties have payment obligations towards each other. On the other hand, it is not possible to perform a set-off a receivable from an Affiliate of the counter-party with a debt to the counter-party itself, as both parties should have reciprocal payment obligations towards each other that have become due in order to perform set-off between the parties.

(hh) *Opinion on whether Turkish laws consider early termination, set-off and close-out netting as legally distinct and separate or similar rights, similar or related rights or whether they make no such distinctions between them.*

(i) General

Close-out netting is not a regulated concept under Turkish law. However, Turkish law recognizes similar concepts of "set-off" (*takas*) and "netting" (*mahsup*)[34].

Close-out netting encompasses a process involving termination of obligations under a contract with a defaulting party, subsequent calculation of positive and negative replacements values and combining them into a single net payable or receivable[35]. Therefore, it involves three steps: (i) early termination whereby the non-defaulting party terminates all obligations under an agreement (*i.e.* all Individual Contracts under the EFET General Agreement) prior to their scheduled termination dates; (ii) valuation whereby the non-defaulting party determines the replacement cost of each transaction under the contract; (iii) set-off of the positive and negative settlement amounts and determining a net balance-close-out amount, which would constitute the Termination Amount [36].

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34 Another netting concept which is relevant for the Payment-Netting clauses of the EFET General Agreement (Article13.6) is the running-account (*cari hesap*) concept regulated under Turkish law as a type of set-off.

35 Close-Out Netting and Risk Management in Over-the-Counter Derivatives, David L. Mengle, International Swaps and Derivatives Association and Fordham University, June 1, 2010, https://ssrn.com/abstract=1619480.

36 We understand that the Turkish law legal opinion provided to ISDA regarding the Close-out Netting provisions of ISDA Master Agreement interprets the concept of close-out netting as a consequence of "set-off" and discusses only the set-off concept under Turkish law and explains that the set-off is recognized under Turkish law as a statutory right before, on or after bankruptcy and therefore the close-out netting provisions of ISDA Master Agreement are valid and applicable in Turkey. We believe that the concept of close-out netting is not identical to that of set-off and as it includes not only set-off elements but also termination and valuation elements. Therefore, we believe that, in order to analyze whether close-out netting provisions are enforceable in Turkey, one should analyze whether the automatic termination or early termination clauses may be deemed as circumventing the statutory insolvency provisions including but not limited to the cherry-picking right of the bankruptcy administration and the restrictions provided

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The Netting Part (Mahsup) of Close-out Netting

Netting (*mahsup*) is a calculation method used in order to determine a net receivable amount taking into account the gains obtained and losses and costs incurred as a result of the relevant transaction. Accordingly, we believe that the Settlement Amount calculation stated under Article 11.2 can be considered as a netting transaction under Turkish law as it requires a calculation.

The Set-off Part (Takas) of Close-out Netting

We understand that the Termination Amount calculation contains not only the calculation of Settlement Amounts, but also a set-off (*takas*) of claims payable between the parties. Close-out netting encompasses a set-off of claims after the calculation of receivables and debts of the Parties to each other. Such set-off part will be subject to the statutory provisions provided in case of concord (please see Section D.I.1.(dd).(ii)) and in case of bankruptcy (please see Section D.I.1.(gg)). In order to effectuate the set-off upon the Bankruptcy, it needs to be declared to the Bankruptcy Administration. A creditor cannot set-off its claims without making a set-off declaration to the Bankruptcy Administration. The declaration is not subject to any form requirement, it is unilateral notification to the Bankruptcy Administration.

(a) Assuming the parties have not specified that Automatic Termination (as defined in Article 10.4 of the General Agreement) applies, are the provisions of the General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in Article 10.5(c) of the General Agreement enforceable under Turkish laws or is there a risk that (i) the entering into the General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?

Material Reasons described in Article 10.5(c) of the EFET General Agreement are based on insolvency-related events. Turkish laws do not provide any limitation or restriction regarding contractual early termination based on insolvency-related events except for concord (please see Section D.I.1.(bb) and Section D.I.1.(dd).(ii)). Notwithstanding the above, whether termination based on insolvency-related events may be considered as an act circumventing the application of the statutory provisions of the EBL or the cherry-picking right of the Bankruptcy Administration, or may be subject to creditors' or the Bankruptcy Administration's right to challenge legal acts falling within certain periods prior to the opening of the bankruptcy should be analyzed.

in Article 200 of the EBL regarding the set-off in bankruptcy. As for the set-off element of close-out netting, the set-off in bankruptcy is accepted and permitted under Turkish law, subject to certain restrictions which we detail in Section D.I.1.(a).

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Early Termination for Insolvency-related Events

The EBL does not contain any provision with regards to *ipso facto* clauses which would allow the non-defaulting party to terminate the agreement, accelerate the indebtedness and take remedial action without the defaulting party's acquiescence in case certain bankruptcy-related events occur to the debtor. As the close-out netting concept and *ipso facto* clauses are not regulated under Turkish law, there is no clarity whether or not a contract terminated and netted according to the contractual close-out netting arrangements prior to or upon the Bankruptcy Decision is outside the scope of the application of statutory insolvency provisions except for concord (please see Section D.I.1.(bb) and Section D.I.1.(dd).(ii)).

According to the EBL, upon opening of the bankruptcy (the Bankruptcy Decision), all assets of the bankrupt entity shall constitute an estate (Article 184) and the bankrupt entity shall no longer be allowed to dispose of any of the assets included in the estate (Article 191). The bankruptcy shall be deemed opened for the bankrupt entity on the date on which the bankruptcy court decides on the bankruptcy (the Bankruptcy Decision). In its decision the bankruptcy court mentions the date, hour and minute on which the relevant bankruptcy open. All effects of bankruptcy become effective on the date mentioned in the decision.

(i) Under Turkish law, the contracts of the debtor do not terminate automatically upon opening of the bankruptcy proceedings, unless specifically prescribed in the laws as being automatically terminated upon bankruptcy of one of the parties to the contract[37].This is the case for running account agreements (*cari hesap sözleşmesi*), agency agreements (*acentelik sözleşmesi*), powers of attorney (*vekaletname*), insurance contracts (upon insolvency of the insurance Company), and financial lease agreements (upon insolvency of the lessee). Physical commodity trade contracts and financial derivative contracts are not contracts automatically terminating upon bankruptcy of one of the parties to such contracts under the laws in Turkey.
Although it is stated under Turkish law that the contracts of the debtor do not terminate unless specifically prescribed in the laws as being automatically terminated upon bankruptcy of one of the parties to the contract[38], there is also no express prohibition with regards to contractual early termination or automatic termination clauses based on insolvency-related events (except for concord) in the EBL and other laws. Therefore, one might argue that contractual early termination clauses based on insolvency-related events are valid and enforceable under Turkish law.

(ii) On the other hand one might argue that contractual early termination or automatic termination clauses circumvent the statutory insolvency provisions

[37] ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 399.

[38] ***Pekcanıtez/Atalay/Özkan/Özekes*** p. 399.

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of the EBL, in particular the cherry-picking right of the Bankruptcy Administration or the restrictions provided for set-off under Article 200 of the EBL.

Certain scholars are of the opinion that any set-off agreement made before the opening of the bankruptcy but the effects of which emerge after the opening of the bankruptcy by changing the obligations of the parties (*e.g.* by terminating these obligations), when the bankrupt entity is no longer entitled to dispose upon its assets included in the Bankruptcy Estate, is null and void[39]. Such agreements might be seen as circumventing the mandatory restrictions provided for set-off under Article 200 of the EBL, which are deemed to be in public benefit[40] (please see Section D.I.1.(gg) for explanations regarding Article 200 of the EBL). However, we are not aware of any precedent on this issue.

As explained above, the EBL does not contain any explicit prohibition with regards to contractual early termination or automatic termination clauses based on insolvency-related events except for concord, and there is no precedent or scholar opinion stating their invalidity. However, such early termination and automatic termination clauses are closely related to set-off (*i.e.* their principle purpose is to initiate and facilitate the set-off mechanism). Therefore, based on the scholar opinions (regarding the nullity and voidness of the set-off agreements) mentioned in the above paragraph, one may argue that contractual early termination or automatic termination clauses based on insolvency-related events would circumvent the statutory set-off provisions of the EBL. Furthermore, the insertion of the Concord Amendments, which invalidate termination reasons which are triggered by the request for concord, may be construed so as to strengthen the interpretation that a termination due to insolvency is circumventing the statutory netting provisions of the EBL.

Also, although there is no specific statutory provision or precedent stating that the insolvency provisions of the EBL including the cherry-picking right of the Bankruptcy Administration, institution of the Bankruptcy Estate are considered as concerning *ordre public*, if they are considered by the courts as concerning *ordre public*, contractual early termination or automatic termination clauses themselves may be found to be circumventing the statutory provisions of the EBL.

(iii) Another question may be whether only contracts terminated upon the actual Bankruptcy Decision, or also those terminated prior to the Bankruptcy

39 ***Develioğlu*** p. 195.

40 ***Develioğlu*** p. 195 and ***Ansay*** p. 246. Please note that the above mentioned scholars only discusses the set-off agreements made before the opening of the bankruptcy but effects of which emerge after the opening of the bankruptcy. They do not refer to nor discuss the validity of close-out netting provisions.

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Decision would be deemed to circumvent the statutory provisions of the EBL. One might say that even if the contract is terminated prior to the Bankruptcy Decision, the termination is still related to the bankruptcy and it affects the Bankruptcy Estate.

On the other hand, one could argue that only if the termination is effective upon the actual Bankruptcy Decision, this may lead to circumventing the set-off and cherry-picking and/or other statutory provisions of the EBL. Before the opening of the bankruptcy, there are no restrictions on the disposal rights of the debtor, unless any protective measures are taken and unless a Grace Period is granted for concord. Further, if such a termination of the agreement is undertaken by the debtor with the intention to hide or transfer its assets to third parties predicting that a bankruptcy proceeding would be initiated against him, such transaction may be subject to an avoidance action by the Bankruptcy Administration. According to this argument, therefore, as long as the termination occurs prior to the Bankruptcy Decision this may not be considered as a circumvention of mandatory insolvency provisions.

However, as explained above, even if the termination is effected prior to the Bankruptcy Decision (for example upon filing of a petition for bankruptcy, over-indebtedness of the debtor), whether such termination may be deemed as circumventing statutory provisions of the EBL is not clear under Turkish law. We are not aware of any precedent on this issue.

(iv) It is also worth mentioning that, as per the Concord Amendments, in the event that a Grace Period for concord is granted prior to the bankruptcy, the debtor who obtained the Grace Period for concord, will be entitled to terminate the continual obligation relationships which impede the concord target to be reached, subject to the approval of both the commissar and the court (the effective date of which being at the discretion of the debtor). If Individual Contracts are interpreted as continual obligation relationships that the debtor had the right to terminate under this provision of the EBL, and that the debtor terminated some but not all Individual Contracts pursuant to this provision, where the concord is not approved by the court in the end; then considering that the debtor would have already terminated the Individual Contracts that were in its detriment, it would no longer be possible to apply the close-out netting even assuming a termination clause upon an insolvency related event other than concord is accepted as valid and applicable as some of the Individual Contracts would have already been terminated. Also, in that case, the court will most likely decide on bankruptcy of the debtor and then upon opening of the bankruptcy, this time designation of certain insolvency, over-indebtedness-related early termination events may raise the question of whether such selection of a termination event would be interpreted as circumventing the cherry-picking right of the Bankruptcy Administration.

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(v) Furthermore, banks, capital market institutions and certain energy Companies such as electricity distribution companies and authorized supply license holders are regulated by the relevant regulatory agencies for their relevant market activities. Similarly, insurance companies are required to obtain licenses specific for their insurance type from the Undersecretariat of Treasury. Impairment in financial conditions of these entities[41] is stipulated as an event triggering the intervention of the relevant regulatory authority. Therefore, one may argue that where such entities are concerned, designation of certain insolvency-related early termination events may raise the question of whether such selection of a termination event would be interpreted as circumventing the regulatory authorities of such entities (please see Section D.I.1.(g)).

Cherry-Picking Right of the Bankruptcy Administration

According to Article 198 of the EBL, the cherry-picking right of the Bankruptcy Administration is recognized. The Turkish scholars also explain that the Bankruptcy Administration is the legal representative of the Bankruptcy Estate, accordingly, the Bankruptcy Administration is deemed to have the right to decide whether to assume or reject certain non-monetary obligations if the Bankru**p**tcy Administration deems they are profitable for the Bankruptcy Estate. In other words it is accepted that the Bankruptcy Administration has the power to disclaim unprofitable transactions and continue the profitable ones.

In Turkey, there is no specific provision in the laws on whether the Bankruptcy Administration would recognize the single agreement concept regarding individual agreements concluded under a framework agreement. Furthermore, we are not aware of any precedent in this respect. If the Bankruptcy Administration recognized that Individual Contracts concluded under the same framework agreement, *i.e.* the General Agreement formed part of a single agreement it may exercise its cherry-picking right for the framework agreement in its entirety, not separately for each Individual Contract. However, as the General Agreement will most likely include Individual Contracts under which the bankrupt party's obligations are both non-monetary obligations (*i.e.* where the bankrupt party is the seller of electricity) and monetary obligations (i.e. where the bankrupt party is the buyer of electricity), it is possible for the Bankruptcy Administration to consider each Individual Contract as a separate transaction without accepting the single agreement concept, and to exercise its cherry-picking right separately for the Individual Contracts, in which the bankrupt party has

[41] Even though the banks, most capital market institutions (such as Intermediary Institutions, Portfolio Management Companies, Collective Investment Corporation) and the insurance companies are not entitled to execute EFET General Agreement as per their relevant legislation, considering the future legislative amendments that may enable them as counterparties to EFET General Agreement we are providing the following information on the impairment in their financial conditions (please see Appendix A for detailed explanations on which types of counterparties are entitled to execute EFET General Agreement under Turkish law).

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non-monetary obligations and continuing those which will be to its favor.

Notwithstanding the above, according to energy legislation, energy market activities (including electricity market activities) are regulated by the Energy Market Regulatory Authority ("**EMRA**") and in the event that an electricity market license holder's bankruptcy becomes final, its license shall be revoked by the EMRA's Board[42]. The previous Electricity Market Law No. 4628 provided (until the enactment of the EML on 14 March 2013) that electricity market operation licenses were automatically terminated upon bankruptcy, which still is the case for natural gas market licenses[43]. However, the current EML provides that an electricity market license (including the electricity supply license, which is the license required in order to perform physical electricity trade contracts) is only revoked if the EMRA Board decides so after the bankruptcy of the license holder becomes final. If the automatic termination of the license upon bankruptcy was still in effect, whether the Bankruptcy Administration's cherry-picking right would continue or not would be arguable as the Bankruptcy Administration would not be able to perform physical electricity trade contracts without a supply license. However, we understand that the reason why the license is revoked after the bankruptcy becoming final only upon the EMRA's Board decision is that the EMRA intends to consult with the Bankruptcy Administration to see whether the Bankruptcy Administration would exercise its cherry-picking right or not. Therefore, it is most likely that the EMRA's Board would decide to revoke the license if the Bankruptcy Administration decides not to exercise its cherry-picking right.

Avoidance Action against Termination

Such termination together with calculation and payment of the termination amount may be subject to creditors' or the Bankruptcy Administration's right to challenge legal acts falling within certain periods prior to the commencement of the bankruptcy proceeding if it falls within the scope of Article 278, 279 or 280 of the EBL (please see Section D.I.1.(cc)).

(b) Assuming the parties have elected Automatic Termination to apply, are the provisions of the General Agreement terminating the General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in Article 10.5(c) of the General Agreement enforceable under the laws of Turkey or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?

Under Turkish law, the parties of an agreement are free to elect automatic termination upon the occurrence of a material reason. However, automatic termination may be considered as circumventing the application of the statutory provisions of the EBL, the

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42 Please see Section D.IX.a.(i) for explanations on license requirement in order to operate in the electricity market.

43 Natural Gas Market Law No. 4646 and dated 18 April 2001 Article 6/d states the bankruptcy of natural gas companies as a reason for automatic termination of the licenses.

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cherry-picking right of the Bankruptcy Administration, or may be subject to creditors' or the Bankruptcy Administration's right to challenge legal acts falling within certain periods prior to the opening of the bankruptcy (please see Section D.I.1.(a)).

(c) ***Would you recommend to elect Automatic Termination to apply upon a Material Reason described in Article 10.5(c) of the General Agreement or upon other events not specified therein?***

The main concern with respect to the automatic termination clause relates to whether it can be construed as circumventing the application of the statutory provisions of the EBL as explained in detail in Section D.I.1.(a). As explained in Section I.1.(dd).(ii), if the provisions of Article 10.5(c) are construed as applying to an event of concord, the automatic termination under Article 10.5(c) based on concord will be deemed invalid, thus the automatic termination shall not apply in case of a concord. As to a bankruptcy situation, we believe that it is not possible to provide an absolute relief by determining other specific events not specified in Article 10.5(c) of the EFET General Agreement to eliminate the risk of interpretation that automatic termination related to insolvency situations circumvents the statutory netting provisions of the EBL.

Furthermore, it is not possible to determine when the events set forth under Article 10.5(c) occurred exactly. Even if the contract is automatically terminated, as the terminating party would not be automatically aware of the termination reason and accordingly of the termination itself, it will probably continue its transactions with the counter-party, if so another new contract would emerge covering the transactions performed between the parties after the occurrence of the automatic termination until the time the party becomes aware of the occurrence of the termination reason. We believe that automatic termination, should not be elected to apply, therefore relying on the reasons sets forth under Article 10.5(c) as early termination reasons would be preferable. Regardless of whether you apply Article 10.5 (c) of the EFET Agreement as an automatic termination reason or early termination reason (bearing the risk that it may be deemed invalid in case of a concord as explained above) such termination may still be found null and void due to circumventing (i) the statutory insolvency provisions of the EBL, including but not limited to Article 200 of the EBL, the cherry-picking right of the Bankruptcy Administration or (ii) the relevant rights and authorities of the EMRA, the BRSA, the SDIF or the CMB with regards to certain types of companies (please see Section D.I.1.(g) for further details with respect to the authorities of such entities).

As for other Material Reasons not specified in Article 10.5(c) of the EFET General Agreement, we would recommend the addition of the following events:

a) for Parties subject to the electricity legislation, termination or annulment of a Party's license granted by the EMRA[44];

[44] Main reasons for the annulment of a license are as follows: providing unsubstantial documents to or misinform the EMRA and not correcting the misinformation after notice of the EMRA, the disappearance

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b) for electricity distribution companies and authorized supply companies[45], the EMRA's intervention to the management and supervision of a Party (in accordance with the Regulation on the Precautions Relating to Distribution and Supply Licenses in the Electricity Market);

c) for Turkish banks or Turkish branches of banks licensed under the Banking Law,
   i. the BRSA's annulment of the banks' operation permit,
   ii. transfer of their management and supervision to the Savings Deposits Insurance Fund,
   iii. the BRSA's application of the restrictive measures set forth in Article 70 of the Banking Law.

d) for Turkish capital markets institutions or investment institutions,
   i. the CMB's annulment of the relevant operation permit,
   ii. the CMB decision on compensating investors (*yatırımcıları tazmin kararı*)
   iii. the CMB's decision on gradual liquidation (*tedrici tasfiye kararı*),
   iv. the CMB's application of the measures set forth in Article 97 of the Capital Markets Law.

e) for Turkish insurance companies,
   i. annulment of the insurance companies' license,
   ii. transfer of their portfolio to another insurance company in the same insurance branch or to the Security Account (*Güvence Hesabı*) (an account created in order secure the damages of the insures to the extent of the determined amount), liquidation of the portfolio of such company, or
   iii. the application of other measures set forth in Article 20 of the Insurance Law by the Minister to whom the Treasury is bound.

Please note that above mentioned (c), (d), (e) items may only be applicable once banks, capital market institutions and insurance companies are able to perform electricity market activities which is not allowed under the existing legislation (please see Appendix A for further explanation).

of the conditions which were existing at the issuance of the license or determination that such conditions never existed. In the event that a company goes bankrupt, the license of the company is annulled by a decision of the EMRA Board. Finally, a company itself may also apply for termination of its license, in such case the EMRA terminates the license upon fulfillment of the conditions required in the legislation for the termination.

45 Authorized Supply Companies are supply license holding companies that have been demerged from the distribution companies and they are entitled to sell electricity (i) to eligible consumers across Turkey, (ii) to non-eligible consumers in their region, and (iii) they are obliged as 'last resort suppliers' to sell electricity to eligible consumers in their distribution regions whose power demands cannot be met by other supply companies, and to procure electricity in the amount to be determined by the EMRA Board annually from EÜAŞ for the consumers it procures electricity under last resort supply.

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Please bear in mind that if annulment of an electricity market license is due to bankruptcy of a company, the annulment will occur after the bankruptcy, in other words, at the time when the debtor is no longer able to dispose its assets. Therefore, providing a termination reason which would occur after the bankruptcy may be considered as circumventing the set-off prohibition provided in Article 200 of the EBL. Therefore please ensure that you have also chosen other items taking place before the opening of the bankruptcy (*i.e.* the Bankruptcy Decision date).

If automatic termination is chosen, as for the timing of the automatic termination, we recommend that the point in time when the termination becomes effective is not determined with reference to the opening of the bankruptcy (*i.e.* the Bankruptcy Decision date) but rather with reference to events taking place at earlier points in time, such as the filing date of the bankruptcy lawsuit and/or the occurrence of the additional events listed above (*i.e.* termination effective immediately upon the occurrence of such Material Reason). This would procure the automatic termination date to be determined as a date before the opening of the bankruptcy and therefore, it would mitigate (but not eliminate) the risk as to the automatic termination clause being construed as circumventing the cherry-picking right of the Bankruptcy Administration. On the other hand, due to Article 296 of the EBL prohibiting termination clauses based on concord, one should not relate the earlier timing to the application for concord, granting of Grace Period for concord or approval of concord either.

For the avoidance of doubt, our recommendations under this section of our legal opinion should be interpreted as a guideline to amend the standard wording of the EFET General Agreement in accordance with the issues raised in our report. As there is no precedent with respect to the application of the automatic termination and the close-out netting mechanism, we do not give any assurance with respect to the enforceability of the automatic termination clause based on insolvency related reasons or additional protection introduced by our recommendations.

Would it be necessary or advisable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in Article 10.5(c) of the General Agreement which would trigger the termination and/or (ii) by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in Article 10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in Article 10.5(c)(iv) of the General Agreement to provide for optimal timing of such termination under local law?

Please see our replies to Section D.I.1.(c) above. A certain grace period would not change our conclusion above.

If you are recommending that a grace period be made applicable in respect of Article 10.5(c)(iv) of the General Agreement, what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have

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instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated?

Please see our replies to Section D.I.1.(c) above.

If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing Article 10.4 of the General Agreement to implement such optimal termination timing.

Please see our replies to Section D.I.1.(c) above.

(d) ***Are the provisions in Article 11 of the General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Turkey or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?***

As explained in Section D.I.1.(dd).(iii), once the Bankruptcy Administration is appointed, it has an authority to accept or reject claims. Accordingly, if the creditor calculates the Termination Amount according to close-out netting provisions and applies to the Bankruptcy Administration to register this claim in the list of creditors (ranking list), the Bankruptcy Administration may reject the claim. If the Bankruptcy Administration rejects the claim of the creditor, the creditor may object to the rejection of the Bankruptcy Administration in by filing an objection to the list of creditors (ranking list) as explained below (please see also Section D.I.1.(dd).(v)).

In addition to the rejection right of the Bankruptcy Administration, creditors are also entitled to object to the list of creditors. The Bankruptcy Administration prepares a list of creditors. Pursuant to Article 235 of the EBL, creditors are entitled to submit their objections against the list of creditors before the court, which rendered the Bankruptcy Decision. The objection of the creditors has to be submitted within 15 days following the announcement of the list of creditors. Thus, through filing a lawsuit, creditors may seek a judgment against the Bankruptcy Administration's decision regarding the ranking of receivables. If the Bankruptcy Administration accepts a claim of a creditor which other creditors object, they will make their objection under the same form of lawsuit which is objection to the list of creditors. We believe that the reason behind the possible rejection or objections to the list may be to challenge the validity of the set-off by netting the positive and negative amounts under Article 11 of the General Agreement as explained in Section D.I.1.(gg).

Also, as explained in Section D.I.1.(dd).(ii), in case Grace Period for concord is granted to the debtor, then the same restriction for set-off is applied. Accordingly, the set-off of the positive and negative amounts in accordance with Article 11 will be invalid, if the General Agreement is terminated for a Material Reason not related to

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concord or insolvency related reasons. In this case, the terminating party will have to pay all the negative amounts and request the payment of all the positive amounts without setting-off negative and positive amounts from each other. If the terminating party, however, performs the set-off despite of the existence of this prohibition, the counter-party may initiate a lawsuit or an executing proceeding requesting the payment of all the negative amounts from the terminating party.

Also, please see Section D.I.1.(cc) for explanations regarding avoidance powers of the Bankruptcy Administration regarding the calculation and the payment of the Termination Amount.

(e) Do the laws of Turkey recognise that the close-out netting provisions in Articles 10 and 11 of the General Agreement apply to all Individual Contracts? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the General Agreement might impact termination and close-out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous Partial Close-Out.

In Turkey, there is no specific provision in the laws on whether the Bankruptcy Administration would recognize the single agreement concept regarding individual agreements concluded under a framework agreement, thus, the recognition of the single agreement concept would be up to the Bankruptcy Administration's discretion. If the Bankruptcy Administration recognized that Individual Contracts concluded under the same framework agreement, *i.e.* the General Agreement, formed part of a single agreement the administration may exercise its cherry-picking right for the framework agreement in its entirety, not separately for each Individual Contract. However, as the General Agreement will most likely include Individual Contracts under which the bankrupt party's obligations are both non-monetary obligations (*i.e.* where the bankrupt party is the seller of electricity) and monetary obligations (i.e. where the bankrupt party is the buyer of electricity), it is possible for the Bankruptcy Administration to consider each Individual Contract as a separate transaction without accepting the single agreement concept, and to exercise its cherry-picking right separately for each Individual Contract in which the bankrupt party has a non-monetary obligation continuing to which will be to its favor. We are not aware of any precedent in this respect.

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(f) ***Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Turkey or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?***

Pursuant to Article 58 of the EBL, which indicates the scope of the execution proceeding request, the debt subject to any kind of execution proceeding must be calculated in national currency. However, the article implicitly refers to Article 99 of the TCO. Article 99 of the TCO allows parties of an agreement to determine the debt in foreign currency and fulfill the payment in foreign currency. Where foreign currency is determined to be applied in an agreement, if parties to such agreement have not also agreed that the payment of the relevant debts will be made as "specific performance", the article entitles the creditor to opt on the date for the calculation of the foreign currency rate. Accordingly the creditor is entitled to either request (i) payment in kind; (ii) payment in national currency by applying the maturity date rate or (iii) payment in national currency by applying payment date rate.

This provision will also apply to the payments of an insolvent debtor. However, in the event of bankruptcy, by analogy to the provision stating that the non-monetary obligations are converted to into monetary obligations (in equal value) in Article 198, the foreign currency amounts shall convert to Turkish equivalent on the date of opening of the bankruptcy[46]. Contrary to the possibility of performance of the non-monetary obligation of the Bankruptcy Administration by using its cherry-picking right, it is not possible for the Bankruptcy Administration to choose to pay in foreign currency in kind as per Article 198, as it would result in creating a privilege (that does not exist in the EBL) over other creditors with Turkish currency[47].

(g) ***Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?***

As explained above, Turkish law does not contain any specific legislation that statutorily recognizes the close-out netting process. Therefore, there is no clear statutory distinction between different types of counterparties with respect to close-out netting.

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46 ***Pekcanıtez/Atalay/Özkan/Özekes*** *p. 399.*

47 11th Civil Chamber Court of Appeal, Decision dated 20 March 2017, numbered E.2015/13769 K. 32017/1635

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However, enforceability of close-out netting rights may differ for Companies that engage in activities in certain specific regulated sectors such as energy, banking, insurance and capital markets, as they may be considered as circumventing the statutory provisions that empower the above-mentioned entities with their regulatory powers against these companies. Where the financial situation (among many other circumstances others) of:

(a) certain energy Companies[48],

(b) banks,

(c) capital market institutions, or

(d) insurance companies

are concerned; the EMRA (for certain energy Companies), the BRSA and the SDIF (for banks) and the CMB (for capital market institutions) and the Ministry to which the Treasury is bound (for insurance companies) may have intervention rights with regards to the relevant Companies for improving their impaired financial situations and protecting the relevant market and the creditors (and other stakeholders) of the relevant companies.

According to energy legislation, market activities in the energy sector (*e.g.* purchase, sale or trading of natural gas or electricity or their transmission, distribution or wholesale) require the market participants to obtain licenses from the EMRA. Due to the current energy legislation, banks or capital market institutions cannot engage in such market activities without the required licenses. Currently, the banking and insurance legislations prevent banks and insurance companies to engage in activities other than those specified in the Banking Law and the Insurance Law. Article 57 of the Banking Law contains a specific provision with regards to commodity trade, preventing the banks to engage in commodity trading for commodities other than those traded under the Capital Markets Law and valuable metals, trade of which is allowed by the BRSA. As per the Capital Markets Law, most capital market institutions (such as Intermediary Institutions, Portfolio Management Companies and Collective Investment Corporations) must exclusively engage in activities set out in the activities permitted in the Capital Markets Law. Therefore, they would not be qualified to engage in commodity trade and execute EFET General Agreement. As per Article 3 of the Insurance Law, insurance and reassurance companies cannot engage in activities other than insurance or activities directly related to insurance. Thus, legislation amendments are needed in order for banks, insurance companies and the relevant capital market institutions to be able to engage in energy market activities. Please see Appendix A for detailed explanation on which types of counterparties are entitled to execute EFET General Agreement under Turkish law.

48 *i.e.* Natural gas transmission and distribution companies and electricity distribution companies and authorized (electricity) supply companies.

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Although the EMRA's intervention rights are relatively limited compared to those of the BRSA, the SDIF and the CMB, it is entitled to force certain energy Companies (*i.e.* natural gas transmission and distribution companies and electricity distribution companies and authorized (electricity) supply companies) to take any necessary measures for the betterment of the impaired financial situation of the relevant Company. Moreover, the natural gas market legislation stipulates the bankruptcy of natural gas market license holders among the reasons for the automatic annulment of their operation licenses. On the other hand, the Electricity Market legislation provides that the bankruptcy of an electricity market license holder results in its operation license to be terminated by an EMRA decision.

In terms of banks, Article 70 of the Banking Law provides that in certain circumstances where the financial situation of a bank is impaired, the BRSA may take certain protective measures, including the replacement of a bank's board members, general managers or other executives; or other measures that it deems appropriate in order to mitigate the effects of such impairment. In the event that such measures have not succeeded, the BRSA might annul such bank's operation permit and transfer its management and supervision to the SDIF[49]. Once the operation permit of a bank is annulled by the BRSA, the management and supervision of such bank shall be transferred to SIDF. For implementing its authorities vested by the Banking Law, the SDIF carries out a *quasi*-liquidation process, and liquidates the bank authorized by certain powers of the Bankruptcy Administration.

Likewise, Article 97 of the Capital Markets Law authorizes the CMB to take certain measures, including the replacement of a capital market institution's (such as intermediary institutions, investment companies, mutual funds are capital markets institutions) board members, or other measures that it deems appropriate in order to mitigate the effects of such impairment. Furthermore, the CMB is entitled to revoke the operation permit of capital markets institutions. Moreover, it can apply gradual liquidation (a *quasi*-liquidation process) to an investment institution (except for banks) in the event that such institution does not meet certain financial requirements[50].

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[49] If upon the supervisions and auditing of the BRSA, it has been determined, among others, that :

a) The bank has not taken the requested measures or, even if having taken these measures the financial structure has not been strengthened or, it is considered that it cannot be strengthened even if the measures are taken, and/or
b) The bank has not fulfilled its obligations as they fall due, and/or
c) The total value of the liabilities of the bank exceeds the total value of its assets.

The BRSA is entitled to revoke the operation permit of the bank and transfer its management and supervision to the SIDF.

[50] The CMB is entitled to decide to indemnify the investors of a capital markets institution in the event it determines that the financial status of the institution in question cannot meet certain financial requirements. The board can also render a liquidation decision regarding such institution, during which a gradual liquidation process (a *quasi*-liquidation process) is to be conducted by the Investors Indemnification Center, a body to be established for the process.

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Based on the above, where certain energy Companies, banks, or capital market institutions are concerned, enforceability of close-out netting rights may differ as they may be considered as circumventing the statutory provisions that empower the above-mentioned entities with their regulatory powers against these Companies. Please see Section D.I.1.(a) and Section D.I.1.(g) for our explanations regarding this issue.

2. Non-insolvency Related Material Reasons

Please discuss and advise on the issues outlined above under Section D.I.1.(c) et. seq and D.I.1.(f) above in the context of non-insolvency related Material Reasons

The non-insolvency related material reasons listed under Article 10.5 of the EFET General Agreement are enforceable in Turkey under the light of our explanations in D.I.1.(a).

(a) Are the rights of the Terminating Party to terminate and close-out the General Agreement enforceable in accordance with the terms of the General Agreement, irrespective of the insolvency of Party A?

Please see Section D.I.1.(a).

II. Multibranch Parties

1. Turkish Multibranch Party

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

Assumption: A Turkish Company conducting its business through branches located in Turkey

Under Turkish law, branches are bound with the headquarters of the Company (*i.e.* the Company that they have branched from, the main Company). Therefore, the headquarters of the Company (the main Company) and its branches constitute the same legal entity. As a result of this connection, a branch cannot have a separate commercial and financial (or otherwise) policy that is distinct from that of the main

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Upon the gradual liquidation decision, the disposition rights on the assets of the institution in question will exclusively belong to the Investors Indemnification Center. From the initiation of the gradual liquidation process until the final closing of the liquidation, no bankruptcy proceedings can be commenced against the institution.

The CMB is also entitled to revoke the operation permit of the capital markets institutions if it determines that the financial status of the institution in question cannot meet the necessary requirements and request the bankruptcy of the institution without applying the gradual liquidation of the institution. In this case the bankruptcy proceedings shall be conducted in accordance with the EBL.

Cash and capital markets instruments of the investors before a capital markets institution cannot be seized or pledged without the prior written approval of the investor nor can they be included in the Bankruptcy Estate and no preliminary injunction on such assets can be established.

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Company. They are entitled to conduct business within the scope of activity of the Company and enter into legal transactions as the Company itself. However, the profits and losses of the branch belong to the main Company. Similarly, the rights and liabilities of a branch belong to the main Company[51].

In the light of the foregoing, it is not possible for a branch to be a party to a General Agreement in its own capacity, without binding the main Company that it has branched from. Therefore, our conclusions above would not change in the existence of a Turkish company conducting its business by several branches.

Assumption: A Turkish company conducting its business through branches located outside Turkey

Where the Turkish Company's branch located outside Turkey is concerned, the Bankruptcy Administration would include the assets connected with such branch in the Bankruptcy Estate. However, whether the relevant foreign country recognizes the Turkish Bankruptcy Administration or recognizes or enforces any Turkish bankruptcy judgment depends on the laws of the relevant country. Furtermore, the existence of a bilateral agreement or reciprocity between the two countries would most likely be required[52].

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

Please refer to our explanations in Section D.I.1.(a) and Section D.I.1.(e).

2. Foreign Multibranch Party

(a) Would there be separate proceedings in Turkey with respect to the assets and liabilities of the Turkish Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Turkey defer to the proceedings in Country H, so that the Turkish assets and liabilities of the Turkish Branch would be handled as part of the proceedings for Party F in Country H?

Assumption: A foreign company conducting its business through branches located in Turkey

Our explanations above in Section D.II.1 are also applicable to a foreign company conducting its business through branches located in Turkey.

[51] ***Arkan*** p. 37.

[52] ***Taş Korkmaz*** , p. 47.

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Pursuant to Article 20/3-b of the Electricity Market License Regulation ("**EMLR**"), in order to carry out electricity trade activities, Party F has to incorporate a joint stock or a limited liability company in Turkey. Thus, such a foreign company's Turkey branch cannot engage in electricity market activities in Turkey. It is possible for Party F to have a Turkish branch, but such branch cannot engage in electricity activities or any other activities subject to a license or permit and/or Company establishment requirements[53]. Our explanations below are based on such assumption.

In order to be effective in Turkey, judgments of foreign courts need to be recognized or enforced in Turkey. If the authorized liquidator for the bankruptcy proceedings of Party F in Country H intends to carry out certain liquidation transactions in Turkey, by the virtue of the decision being a judgment of a foreign court, such bankruptcy decision should in principle, be recognized in Turkey. However, there is no specific legislation in Turkish law on whether foreign bankruptcy decisions may be recognized or enforced in Turkey. Whether foreign bankruptcy decisions which included assets of the Company in Turkey within the scope of the bankruptcy estate are enforceable or not is controversial among Turkish scholars. As per an opinion, based on the principle of territoriality[54] and unity of bankruptcy proceedings, foreign bankruptcy decisions are not enforceable in Turkey. However, there are certain Court of Appeal decisions accepting the enforcement of foreign bankruptcy decisions subject to the fulfillment of the conditions set forth under the Articles 50-63 of International Private and International Civil Procedural Law No. 5718 and dated 27 November 2007 ("**IPPL**")[55] (please see Section D.V.(a).(v).(b) for further details with respect to the conditions).

In practice, we believe that creditors may request that a separate bankruptcy lawsuit be initiated against the foreign Company for the related claim in Turkey, and, if necessary, preliminary injunction on the assets of the foreign Company in Turkey be granted. In fact, Article 154 of the EBL provides that creditors of a foreign company that has a branch established in Turkey can initiate bankruptcy proceedings against the foreign Company from the Turkish court where the relevant branch is located. However, it is worth pointing out that it is not possible to separately request the bankruptcy of the branch itself, as the branch does not have legal personality or assets that are distinct from the main Company, even if the main Company is located in a foreign country.

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53 In each case, whether there is a license and company establishment requirement should be checked.

54 ***Taş Korkmaz*** p. 49.

55 11th Civil Chamber of the Court of Appeal, Decision dated 25 January 2001 and numbered E. 2001/7981 K. 2002/466; 12th Civil Chamber of the Court of Appeal, Decision dated 22 February 2016 and numbered E. 2015/26937 K. 2016/4628.

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

Please see Section D.II.2.

(c) Would it make any difference if Party F has no branch located in Turkey, but has assets in Turkey?

(i) Immoveable Assets

Under Turkish law, a foreign company can possess immoveable assets in Turkey only if such is permitted pursuant to a specific legislation[56]. In the lack of such a specific legislation, foreign companies can only possess immoveable assets through their Turkish subsidiaries, indirectly[57]. There is no such restriction with respect to moveable assets.

(a) Party F has been permitted to possess assets in Turkey pursuant to a private statute

Under the EBL, bankruptcy proceedings against a foreign Company can only be carried out if such foreign Company has a branch in Turkey. In the event that such foreign Company does not have a branch in Turkey, the EBL does not render any Turkish bankruptcy office competent over the assets of such Company. Therefore, assets of a foreign Company that does not have a branch in Turkey can only be pursued by way of regular attachment of such assets by its creditors (*i.e.* such assets cannot be subject to a bankruptcy proceeding in Turkey).

56 Article 35 of the Land Registry Law No. 2644 ("**Land Registry Law**") permits foreign companies to possess immoveable properties in Turkey, only if specific legislation provides such a provision. Accordingly, the Law on the Encouragement of Tourism No. 2634 provides that the President of the Republic may exempt the acquisition of immoveable assets in certain areas from the foreign ownership restrictions of the Land Registry Law.

57 Article 36 of the Land Registry Law.

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(b) Party F has a Turkish subsidiary

In the event that Party F duly incorporates a Company in Turkey, there would be two separate and independent entities in case. Thus, separate bankruptcy proceedings would be carried out for each entity separately.

(ii) Moveable Assets

Please see our explanations in Section D.II.2.(c).(i).(a) and Section D.II.2.(c).(i).(b).

III. Collateral

Section D.III. (Collateral) is based on the following assumptions:

(i) Party A is at all times Transferor under the EFET Credit Support Annex.

(ii) The collateral is owned by Party A or Party A is authorized and empowered to transfer ownership in the collateral.

(iii) The questions under Section D.III (Collateral) relate to "transfer" of Eligible Credit Support (except for (c) and (f)). Although Eligible Credit Support may include both cash and Letters of Credit, as Letters of Credit –by their nature– are not subject to transfer but rather they are issued in favor Party B, we have assumed (except for (c) and (f)) that the Eligible Credit Support provided by Party A to Party B is cash.

(iv) The Eligible Credit Support is cash, which is denominated in a freely convertible currency and held in an account under the control of Party B maintained in the jurisdiction of the relevant currency (please also see our explanations on currency in Section D.IX.1.(a).(i)).

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

In accordance with Turkish conflict of laws rules, the transfer of ownership of cash amounts is governed under laws of the state where the cash amounts is located at the time of the transaction.

(b) Would the laws of Turkey characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?

The Turkish law recognizes the transfer of property as a means of collateral (*mülkiyetin teminat amaçlı devri*). In such a transfer, the transfer itself is unconditional therefore the transfer would not be re-characterized as creating a security interest, unless the courts determine the transaction to be collisional and decide that the

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genuine intention and agreement of the parties is to transfer the money as collateral without transferring its title.

Based on the letter of the Credit Support Annex (*i.e.* Article 7), which provides for the transfer of the ownership of the money, and in the absence of any explicit contradicting agreement of the Parties, there should be no reason for the transfer to be re-characterized as creating a security interest. On the other hand, as the title of the cash is transferred in this structure, the transfer of the collateral as cash may be deemed as the repayment of part or whole of the Termination Amount which was not yet due at the time of the transfer, and challenged as invalid under Article 279 of the EBL (please see Section D.I.1.(bb). In such a case, it is possible for the parties to claim that the counter-party did not make such repayment by being aware of the insolvency of the bankrupt party, but the transfer of collateral is performed on a regular basis in accordance with the Credit Support Annex.

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

Party B will not need to take any action or fulfill any further requirements or procedures for the continuation of the ownership interest over the Eligible Credit Support provided in cash.

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

Party A's right to substitute the collateral in accordance with Article 6 of the EFET Credit Support Annex is only a contractual right and is subject to (i) Party B's approval, which Party B cannot unreasonably withhold and (ii) the condition that the replacement Eligible Credit Support is of the same or higher value.

Without the consent of Party B, such contractual right does not entitle Party A to affect the transfer of the replacement Eligible Credit Support to Party B, and neither does it procure the re-transfer of the title of the initial Eligible Credit Support (which it had formerly transferred to Party B) to Party A.

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

Our explanations with respect to the termination of the EFET General Agreement apply to the termination of the EFET Credit Support Annex as well. Please see Section D.I.1.(a) for further details.

Assuming that Turkish Law will apply to the transfer of the title of the Credit Support provided in the form of cash (please see Section D.III.(a) above for further details), transfer of the title (ownership) of a collateral that has been provided, but is not yet physically transferred is possible. Turkish Law recognizes de jure transfer of movables (in this context, Credit Support provided in cash will be considered as a movable), as long as such non-transfer is based on a specific legal relationship. Paragraph 1 of Article 3 of the Credit Support Annex contains a specific provision in this respect, providing that Eligible Credit Support demanded, but not yet received by a Party prior to Valuation Time shall be deemed to be held by it, provided that the transfer of such eligible Credit Support is due on or after such Valuation Time. Therefore, inclusion of the collateral provided and not yet transferred in the calculation of a net amount payable under Article 11 of the General Agreement as "other amounts payable" is valid. However, we believe it is possible that this may be subjected to avoidance action under Article 280 of the EBL with the argument that the parties have the intention to decrease the rights of the creditors or favor a creditor over others, and such netting results in the decrease of the rights of the creditors.

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

As explained in further detail in Section D.III.(b) and (e) above (and subject to our explanations regarding the insolvency in Section D.I.1), it is possible to transfer the title of a property as a means of collateral. Such transfer will be unconditional and Party B will be entitled to the relevant cash collateral.

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

Our explanations with respect to avoidance in Section D.I.1.(cc) also apply to collateral provided by Party A.

The collateral provided by Party A to Party B may be deemed by Turkish courts to be exempted from the avoidance powers of the Bankruptcy Administration rules as explained in Section D.I.1.(cc) in the event that they are considered to fall within the exemption provided in Article 279 /1 of the EBL Law. As mentioned in Section D.I.1.(cc).(iii) above, the EBL provides that pledges that the debtor has effected in accordance with a pledge undertaking which it has made prior to the one-year look back period are not subject to the avoidance powers of the Bankruptcy Administration.

Although the letter of the law grants such exemption to "*pledges*", it is possible for Turkish courts to subject the collaterals provided by Party A (by way of transfer of title as a means of collateral as explained in further detail in Section D.III.(b) above) to the same exemption by way of analogy as such analogy is generally recognized under Turkish Law.

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

The EFET Credit Support Annex is an appropriate form in terms of the transfer of cash collateral as it is recognized under Turkish law that it is possible to transfer the title of a property as a means of collateral. For further details, please see Section D.III.(b) above).

(i) ***Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?***

No, we do not have other specific recommendations on this subject.

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IV. Parent Company Guarantee

Section D.IV (Parent Company Guarantee) is based on the following assumptions:

(i) With respect to a Party (the "**Principal Obligor**"), the parent company of that party (the "**Guarantor**") undertakes to pay when and if the Principle Obligor fails to pay any amounts when due pursuant to the terms of the General Agreement (including any applicable grace period) ("**Default**").

(ii) The other, non-defaulting, Party and the beneficiary under the guarantee (the "**Beneficiary**") may demand payment from the Guarantor of any outstanding amount pursuant to (i) above, immediately upon the occurrence of the Principal Obligor's Default without having to first take any action against the Principal Obligor, in particular, without having to:
   a. make any demand to the Principal Obligor, other than issuing the initial invoice in accordance with the terms of the General Agreement;
   b. take any legal action against the Principal Obligor; or
   c. file any claim in the Principal Obligor's insolvency.

(iii) Upon the receipt of the Beneficiary's demand, a copy of the unpaid invoice and any breakdown of any additional outstanding amounts due to the Beneficiary, such as late payment interest, the Guarantor shall promptly pay the amount specified in the demand to the Beneficiary.

(iv) The liability of the Guarantor under the guarantee is limited to that of the Principal Obligor under the General Agreement and any cap set out in the guarantee document.

(v) The guarantee is provided in the form of a written document signed by an authorised representative of the Guarantor.

(vi) The guarantee is governed by Turkish law and any disputes in connection with or claims under the guarantee are to be referred to and resolved by the Turkish courts.

(vii) The Guarantor has provided an address that the Guarantor can be served at in Turkey but is not necessarily established in Turkey.

(a) Are there any specific statutory formalities that should be (or recommendable as good practice for the benefit of the Beneficiary) complied with in order to create a valid guarantee document?

Parent company guarantee is not a defined concept under Turkish law. A parent company guarantee may qualify as a guarantee or a surety depending on its content and formulation. If a guarantee is given for security of a debt, it is defined as surety like guarantee contract (*kefalet benzeri garanti sözleşmesi/teminat amaçlı garanti sözleşmesi*). In order to distinguish whether a document is a guarantee or a surety, the Court of Appeal adopts certain criteria[58]. The main criterion adopted by the Court of

[58] Court of Appeal the Assembly on the Unification of Conflicting Judgments, Decision dated 11 July 1969 and numbered E. 1969/4 K. 1969/6.

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Appeal is whether the Guarantor's payment guarantee is of independent nature of the Principal Obligor's payment obligation.

In case the Guarantor's payment guarantee is independent of the Principal Obligor's obligation, the contract shall be deemed as a guarantee contract, whereas in cases where the Guarantor's payment guarantee is dependent on the Principal Obligor's obligation and debt, (i.e. the payment guarantee shall be valid as long as Principal Obligor's obligation to pay validly exists), therefore is secondary, the contract shall be construed as a surety contract. In a guarantee, the Guarantor will be responsible as if it is the Principal Obligor, irrespective of the principal debt. On the other hand, the surety's obligation is of secondary nature which is dependent on the validity of the principal debt. The surety is obliged to claim any plea that the Principal Obligor may have and can have recourse to the Principal Obligor once it has made the payment.

Based on the assumptions given in this Section above, it is possible to argue that such parent company guarantee is independent from the principal debt as it is provided that the Beneficiary may demand payment from the guarantor without having to first take any action against the Principal Obligor. However, in order to emphasize the principal nature of the Guarantor's obligation and clearly specify such document as guarantee under Turkish law, we recommend that the following additional wording is included in the parent company guarantee:

"The Guarantor's obligation is independent from the Principal Obligor's obligation or debt."

"The Guarantor waives its right to claim any plea or raise objection (which the Principal Obligor may claim against the Beneficiary)".

"The Guarantor's obligation is regardless of the termination of the contract executed between the Beneficiary and the Principal Obligor or any other reason which may invalidate the guaranteed performance of Principal Obligor".

"Guarantor agrees to make any payment due hereunder unconditionally, upon first written demand without set-off or counterclaim and without any legal formality such as protest or notice being necessary, regardless of any conflict between the Principal Obligor and the Beneficiary or the legal consequences of such a conflict, and waives all privileges or rights which it may have as a guarantor, including any right to require Company to proceed against or enforce any other rights or security or claim payment or to exhaust remedies against the Principal Obligor or any other person before claiming from the Guarantor"[59,60].

[59] Although it is not a requirement for the parent company guarantee to be unconditional and payable-at first-demand, it is recommended to obtain an unconditional and payable-at-first-demand parent company guarantee as a good practice for the purpose of strengthening the possibility of the parent company being construed as a guarantee agreement.

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Whereas a statutory requirement of a surety is the determination of the amount of liability of the surety, the determination of the exact amount covered by the guarantee is not obligatory. Nevertheless, the Court of Appeal rules that "the risk to be borne by the guarantor with the guarantee must, at least, be *determinable* in order for the guarantor to be held liable for the guarantee[61].

Although there are other certain specific statutory formalities for a surety[62] under Turkish Law, there are no specific statutory formalities that should be complied with in order to create a valid guarantee document. However, it is recommendable as good practice for evidence purposes for the benefit of the Beneficiary to have a written document bearing handwritten signature of the Guarantor.

As per Article 5 of the Law Regarding Electronic Signature No. 5070, security agreements cannot be executed with electronic signature (for the electronic signature requirements please see Section D.VI.(2).(a).(ii)). Although the concerned article may be interpreted in a way that only security agreements for which the law provides a formal form or procedure becomes invalid when being sealed with electronic signature, a contrary interpretation, which is that all security agreements (including guarantee agreements where no formal form is required) sealed with electronic signature will be invalid, is also possible. Therefore, in order to eliminate the risk of a parent company guarantee to be deemed invalid, it is recommendable not to seal the parent company guarantee with electronic signature, but with hand written signature.

(b) Are there any specific statutory provisions that should be expressly set-aside, varied or referred to, or any specific statement/wording based on any such statutory provisions that should be expressly included, in the document of the guarantee in order to increase the chances of an effective enforcement of the guarantee as may be expected by the Beneficiary based on the assumptions?

The contracts of guarantee are not specifically regulated under TCO; therefore there is no statutory provision which should be expressly set-aside, varied or referred to for the effective enforcement of the guarantee. However, in order for a parent company guarantee to be construed as a guarantee and not a surety; and to eliminate the risk of being deemed as invalid on the ground that it does not fulfil the validity conditions stipulated in Article 583 of TCO (please see footnote 61) for surety, we recommend that the independent nature of the guarantee should be emphasized in the document as explained in Section D.IV.(a).

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60 19th Civil Chamber of the Court of Appeal, Decision dated 3 May 2002 and numbered E. 2001/2083 K. 2002/3340.

61 Court of Appeal General Assembly of Civil Chambers, Decision dated 4 July 2001 and numbered E. 2001/19-534 K. 2001/583.

62 As per Article 583 of the TCO, a surety should be executed in a written form and the surety should specify, in his/her own handwriting and in figures, the exact amount which the surety will be liable for as well as the date of surety; otherwise the surety shall be deemed as invalid.

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V. General Enforceability

(a) Is the General Agreement and any of the above Annexes (including the EFET Credit Support Annex) enforceable under the laws of Turkey in accordance with its own terms? We would like you to specifically discuss the provisions on (i) non-performance due to Force Majeure (Article 7 of the General Agreement); (ii) remedies for non-performance (Article 8 of the General Agreement); (c) limitation of liability (Article 12 of the General Agreement); and (d) any other provisions which need to be commented on according to the law of Turkey, including whether these provisions could be further expanded or strengthened under the laws of your jurisdiction.

In our view, subject to the assumptions, qualifications and other comments of this opinion, the General Agreement, and the Annexes would be legal, valid, binding and enforceable under the laws of Turkey.

(i) Non-performance due to Force Majeure

In principle, Turkish law provides that, in order to be liable for the non-performance of obligations, it is imperative for the debtor to be at fault in relation to such non-performance. If no fault can be attributed to the debtor for the non-performance of a debt, it is not possible to hold such debtor liable for the non-performance of the relevant debt.

Force majeure is a concept recognized under Turkish law and is among those events that render the debtor free of fault. Under Turkish law, the effects of *force majeure* apply even if a contract does not include specific *force majeure* clauses. In order for an event to be considered as *force majeure* it should:

(a) be unforeseeable on the execution date of the agreement;

(b) have occurred beyond the control of the parties;

(c) be unpreventable by any measures nor due care of the relevant party;

(d) render the performance and/or any other contractual obligation impossible.

Parties to a contract may agree on *force majeure* clauses in their contract, according to the principle of freedom of contract. Therefore, Article 7 of the General Agreement is valid under Turkish law.

In addition, the parties may agree on any event to be considered as *force majeure*, however, in the event that the parties agree to consider as *force majeure* what cannot objectively be considered a *force majeure* event, this would constitute a limitation of liability. Therefore, determination of a subjective event as a *force majeure* event should be considered within the ambit of Turkish limitation of liability rules. Please see Section D.V.(a).(iii) below for further information of limitation of liability in

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Turkish law.

(ii) Remedies for Non-performance

Article 8 of the General Agreement provides that if the party obliged to deliver electricity fails to perform its obligation for reasons other than *force majeure* or the other party's non-performance, the non-delivering party is obliged to pay damages.

Article 8 of the General Agreement provides for a method for the calculation of damages which the other party may suffer. According to the freedom of contract principle, the parties to a contract may agree methods to calculate the damages they would suffer in the event of default. However, such method needs to be objective in order to allow the calculation of the actual (real) damage to be suffered by the parties. Otherwise, such calculation arrangement would constitute an agreement that limits the liability of the parties and render such method to be subject to limitation of liability rules. Please see Section D.V.(a).(iii) below for limitation of liability in Turkish law.

Based on our analysis, we believe that Article 8 of the General Agreement provides for an objective calculation method and is therefore enforceable.

Under Turkish law, a liquidated damages provision agreed by parties to a contract would be enforceable, in accordance with the principle of freedom of contract. Thus the parties may agree on a method of calculation of indemnification with respect to failure of the contractual obligations[63].

The method of calculation provided in Article 8 of the General Agreement, is based on the actual purchase price of the replacement electricity. This provision is in line with Article 213 of the TCO, stipulating the remedy obligation of the non-performing party of a sales-contract. According to Article 213 of the TCO, the non-defaulting party may calculate damages on the basis of the relevant market or exchange price, if the good is traded on an exchange, or it has a market price. The non-defaulting party shall calculate the indemnification based on the actual purchase price of replacement electricity, if the good is not traded on any exchange or has a market price.

(iii) Limitation of Liability

Article 12.2 of the EFET General Agreement sets forth the limitation of liability of each of the parties with respect to its obligations and responsibilities, provided that the non-performance of such obligations and responsibilities does not occur due to gross negligence, intentional default or fraud of a party or its employees, officers, contractors and/or agents used by such party in performing its obligations under the General Agreement.

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[63] ***Erdem***, p.141 *et seq*.

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Under Turkish law, as a principle, liability is based on the debtor's fault. On the other hand, pursuant to Article 115(1) of the TCO, parties may agree on limitation of liabilities unless occurred due to gross fault (*culpa lata*: gross negligence, intentional default or fraud).

In addition, under Turkish law, there is no difference between various damage types regarding the application of limitation of liability provision (*i.e.* direct or consequential damages), if it is within the limits stated under Article 115 of the TCO. Any agreement limiting the liability due to gross fault would not be valid according to Turkish law regardless whether it limits the liability regarding direct or consequential damages. Please note that under Turkish legislation, the liability may only be limited at most in accordance with the above explanations and it is not possible to limit the penal liability of the parties (*e.g.* in the event of personal injury or death) .

Article 116(1) includes a provision similar to Article 115(1). The said article, after regulating that a party is liable for the compensation of the losses given to the other party during the execution of work by its agents (such as its employees, officers etc.), sets forth that this liability may be wholly or partially limited with a prior agreement.

Nevertheless, as per Article 115(3) of TCO, if a service, profession or crafting (art) requiring specialization is to be conducted with a permission given by the law or authorized agencies, then the agreement for limiting the liability of the debtor arising out of negligence shall be strictly null and void; in other words, in such a case, parties cannot limit liability for negligence whatsoever. Article 116(3) echoes Article 115(3) for the liability arising out of negligence of agents such as its employees, officers etc. Accordingly, it is not possible to limit liability arising out of the negligence of the debtor's agents.

In order for an agreement to fall under the scope of these provisions: **(i)** a service, profession or crafting should be conducted, **(ii)** it should require specialization and **(iii)** be subject to a permission to be given by the law or authorized agencies.

It might be argued that as electricity trade is subject to a licensing requirement (please see Section (D).IX.(a).(ii)) and requires specialization, agreements relating to such activities, *e.g.* General Agreement and Individual Contracts, may fall under these provisions. Accordingly, one may argue that limitations on liability provided in Article 12 of the General Agreement would be null and void. However, we believe that electricity trade activity between two electricity trader companies cannot be considered as a "service" [64], "profession" or "crafting" requiring specialization.

[64] There are certain scholar opinions characterizing agreements regarding electricity sale and activities related thereto (without making any distinction between agreements regarding electricity trade activities and supply agreements for consumption) as service agreements. According to this opinion, one may argue that electricity trade activities constitute "service". Nevertheless, this opinion does not constitute a prevailing opinion and the majority of the scholars and Court of Appeal characterize these agreements as sale agreements, and in line with this prevailing opinion, one may conclude that electricity trade activities do not constitute service but merely sale activities.

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Therefore, we are in the opinion that electricity trade activities between trader companies cannot be construed as falling under the scope of such definition, and limitations under Article 12 of the General Agreement should be seen as valid under the Turkish law. However, please note that there is not any precedent on the issue.

The duty to mitigate damages corresponds to a general principle of Turkish law which is provided under provisions regarding torts and which sets forth a cause of reduction[65] with respect to the indemnification requested. Pursuant to such principle, the debtor of the indemnification shall not cause any increase of damage but minimize the damages subject to indemnification.

(iv) Choice of Foreign Governing Law

Please see Section D.VIII.(a).(i) for our explanations on governing law.

(v) Language

The Law regarding the Compulsory Usage of the Turkish Language in the Commercial Enterprises No. 805 and dated 10 April 1926 ("**Law No. 805**") contains the following requirements regarding the usage of the Turkish language:

An agreement executed between two Turkish Companies/enterprises

All Turkish Companies/enterprises are obliged to conduct their transactions, make their communications and execute the agreements that they conclude in Turkey [66] with other Turkish parties in the Turkish language.

An agreement executed between a Turkish Company/enterprise and a foreign company/enterprise

Foreign Companies/enterprises are required to use the Turkish language in their correspondence, transactions and communications with Turkish parties and in documents to be submitted to governmental authorities in Turkey[67]. In this case, foreign entities may use another language in addition to Turkish (*i.e.* such correspondence, transactions and communications can be done in dual language), however, they should sign under the Turkish version. Even if they sign under the foreign language version, the Turkish version shall prevail (regardless of whether or not the parties have agreed that the English language will prevail).

The Law No. 805 does not specifically refer to "agreements" under the above

65 Article 52 of the TCO.

66 Please note that it is not clear whether the Law No. 805, with the wording of "in Turkey", refers to agreements concluded within the borders of Turkey or agreements to be implemented in Turkey, and the matter is under discussion among the scholars.

67 Please note that the above footnote applies here as well.

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mentioned provision concerning foreign companies. As to whether the terms "correspondence, transactions and communications" and "documents to be submitted to governmental authorities" stated in this provision cover "agreements" or not is not clear and is under discussion among scholars. There are opinions[68] and a Court of Appeal decision[69] stating that the Turkish language requirement stated in the Law No. 805 regarding foreign companies excludes "agreements" and that a foreign company may execute an agreement with a Turkish company in a foreign language. There are other scholars suggesting that, although not referring specifically to the agreements, the Law No. 805 obliges foreign companies to execute their agreements in Turkish as well, based on the fact that foreign companies are obliged to conduct their transactions in Turkish, and agreements fall under the scope of the term "transaction" in legal sense[70]. There are also certain Court of Appeal decisions in which the Court of Appeal applied Turkish language requirement in disputes arising from agreements between a foreign company and a Turkish company[71], and concluded that according to Law No. 805, such agreements shall be executed in Turkish language and otherwise is invalid.

The provisions of the Law No. 805 are mandatory[72]. Non-compliance with such provisions is subject to a monetary fine. Also, in the case of failure to comply with such law, the agreement shall "not be taken into consideration in favor of non-complying parties". The meaning of "not being taken into consideration in favor of non-complying parties" is not clear and is under discussion among scholars. As per one opinion, such wording indicates that the entire agreement would be considered invalid, whereas another opinion is that in the event of a dispute arising from an agreement signed in a foreign language contrary to Law No. 805, if there are more than one possible interpretation for determining the meaning of any of the provisions, the interpretation in favor of the company/enterprise drafting such provision in the foreign language will not be taken into consideration. Another scholar opinion is that, in such a case, the provisions in the foreign language will be deemed as not being included in the content of the agreement and the dispute will be resolved as if these provisions do not exist[73]. A separate opinion is that parties' objection of the agreement being invalid due to Law No. 805 should be rejected on the grounds that such an

68 ***Kırca***, p.1934, ***Reisoğlu***, p.104.

69 11th Civil Chamber of the Court of Appeal, Decision dated 7 October 1986 and numbered E. 1986/4231 K. 1986/5032.

70 ***Bahtiyar***, p. 1739.

71 11th Civil Chamber of the Court of Appeal, Decision dated 26 September 2017 and numbered E. 2016/5836 K. 2017/4270; 11th Civil Chamber of the Court of Appeal, Decision dated 28 February 2014 and numbered E. 2014/1385 K. 2014/3815; 11th Civil Chamber of the Court of Appeal, Decision dated 4 March 2013 and numbered E. 2012/4088 K. 2013/3972.

72 11th Civil Chamber of the Court of Appeal, Decision dated 1 December 2016 and numbered E. 2015/11036 K. 2016/9260.

73 ***Kırca***, p.1941.

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obligation may be seen as contrary to the principle of honesty, and the agreement should stand as it is.

The Court of Appeal, in a vast number of its decisions, accepts that there is at least an agreement between the parties, especially if the obligations are performed, but decides as if the signed agreement is invalid[74]. Moreover, the Court of Appeal generally deems arbitration clauses invalid[75] if signed in a foreign language, but there are some exceptional cases in which the Court of Appeal decided that the court of first instance should evaluate whether the objection of a party due to the invalidity of such arbitration agreement constitutes a violation of the principle of good faith[76].

Please note that the provisions of the Law No. 805 are also considered as concerning *ordre public*. Accordingly, even if the applicable law chosen in an agreement is foreign law, the provisions of the Law No. 805 may still have to apply to the agreement due to their intervening nature[77] (please see the assumptions below for the application of Law No.805 as a rule of *ordre public*).

We are especially interested in provisions that you may believe infringe upon the ordre public in Turkey and that may be challenged by the courts in Turkey irrespective of the law that governs the General Agreement.

Assumption 1: **A dispute arising out of the General Agreement is settled by a Turkish court**

This question needs to be evaluated differently as per the law which governs the General Agreement:

a) If the General Agreement is governed by Turkish law:

The intervention of *ordre public* on freedom of contract can be found in Article 26 and Article 27 of the TCO. As per the above-mentioned provisions, *"[p]arties can freely determine the content of their agreements within the limits provided by law*.", however, if the governing law of an agreement is Turkish law, agreements **(i)** which contradict (a) the mandatory provisions of law, (b) *ordre public*, (c) personal rights or **(ii)** have an impossible subject-matter are null and void. If the agreement's content is partially invalid, it does not affect the validity of the rest. However, if it is clearly

74 11th Civil Chamber of the Court of Appeal, Decision dated 22 February 2018 and numbered E. 2017/4747 K. 2018/1344; 11th Civil Chamber of the Court of Appeal, Decision dated 1 December 2016 and numbered E. 2015/11036 K. 2016/9260.

75 11th Civil Chamber of the Court of Appeal, Decision dated 26 September 2017 and numbered E. 2016/5836 K. 2017/4270; 11th Civil Chamber of the Court of Appeal, Decision dated 28 February 2014 and numbered E. 2014/1385 K. 2014/3815.

76 11th Civil Chamber of the Court of Appeal, Decision dated 16 March 2012 and numbered E. 2012/3122 K. 2012/4073.

77 ***Kırca***, p.1942, ***Bahtiyar***, p.1732.

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understood that without inclusion of such null and void parts in the agreement, the agreement would not be executed, the entire agreement would be null and void.

We believe that none of the provisions of the General Agreement is contradictory to the mandatory provisions of Turkish law (please see Section D.V.(a).(v) for the discussion on whether the liability can be limited in electricity trade agreements) and *ordre public* assuming that the applicable law of the General Agreement is Turkish law. However, as the Law No. 805 is of a mandatory nature and concerns *ordre public*, the court is obliged to apply and to determine whether the parties applied the Law No. 805. Accordingly, the breach of the Law No. 805 can even result in the interpretation by the court of the invalidity of the General Agreement as explained above under Section D.V.(a).(v).

b) If the General Agreement is governed by a foreign law:

As per Article 6 of the IPPL, directly applicable rules of the Turkish legal system shall apply to a contractual relationship regardless of the governing law and conflict of law provisions.

Generally, legal norms that have emphasis on public interest as they assign social and economic duties are named as "directly applicable rules". The objective of the directly applicable rules is to protect the public interests. In order to meet such objective, they apply irrespective of the law chosen by the parties or the law determined as per the conflict of law rules. In other words, directly applicable rules are substantive legal rules that apply mandatorily without the need to establish a statutory rule in this respect. Examples of such rules are found in the laws that limit foreign exchange and foreign trade, restrictions and prohibitions stipulated by the money and cartel regulations, import-export bans, regulations on the protection of cultural assets and on embargo. For instance, as per some scholars, the provisions of the Law No. 805 are considered to be directly applicable before the Turkish courts. Therefore, they would apply even if the General Agreement is governed by foreign law[78].

As per Article 5 of the IPPL, if a provision of the foreign law to be applied in a certain case is clearly contrary to the *ordre public*, the said provision shall not be applied, and where it is deemed necessary, Turkish law shall be applied. Accordingly, if the conditions set forth in the said provision are in place, even if foreign law is applicable, Turkish law may be applied by the Turkish courts. The Court of Appeal, although rarely having evaluated the matter, provided in one of its decisions that merely being contrary to *ordre public* cannot be a reason for disregarding the foreign law and applying the Turkish law; such a result may only arise if being "clearly contrary to the

[78] If the governing law is not Turkish law, the parties to the contract are not bound by the mandatory provisions of the Turkish laws, except for directly applicable provisions as per Article 6 of the IPPL as explained above.

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ordre public" is intolerable as per the Turkish *ordre public*[79]. Therefore, the provision of foreign law which General Agreement is subject to should be considered carefully for each concrete case.

Assumption 2: **A dispute arising out of the agreement is settled in a foreign court or a foreign arbitration mechanism**

a) If the General Agreement is governed by foreign law:

In the event that the governing law is a foreign law and a foreign court or arbitral tribunal is authorized to settle the dispute, the foreign court or arbitral tribunal may evaluate that the Law No. 805 is of a characteristic of directly applicable law of a third country to the dispute even though the governing law is not Turkish law, if it is granted with such a discretion as per its laws or its conflicts of law provisions requires so. However as per the international law, this is a very exceptional application[80]. Accordingly, in such a case, the foreign court or arbitral tribunal will likely not apply the Law No. 805 as Turkish law is not the governing law. The question, in such a case, is whether such decision will be recognized or enforced by the Turkish courts.

As per the IPPL, foreign court decisions and foreign arbitral awards need to be recognized or enforced by Turkish courts in order to be executed. Article 54 of the IPPL sets forth the conditions for the recognition of foreign court decisions which are finalized in accordance with the laws of that foreign state, and hereunder, *inter alia*, not being expressly contrary to the *ordre public* of Turkey is stipulated. Similarly in Article 62 of the IPPL, which lists the grounds for refusal of recognition and enforcement of foreign arbitral awards in Turkey, an award being contrary to the public morality or *ordre public* of Turkey is provided as a ground for refusal.

Scholars characterize *ordre public* as arbitrary. In general terms *ordre public* is described as "rules that maintenance and observance of which serves to public interest".

Subjects that closely concern public benefits, the public conscience and general morals are regarded within the concept of *ordre public*.

Whether a foreign court decision or arbitral award is contradictory to the *ordre public* should be evaluated on a case-by-case basis. It is accepted by both the scholars and the Court of Appeal that the *ordre public* should not be interpreted in a way to remove the application of foreign governing law. The effect of *ordre public* in enforcement and recognition of foreign arbitral awards or foreign court decisions is of exceptional character. Turkish courts may only reject enforcement or recognition of a decision, if the decision itself is against Turkish *ordre public*. Please note that there is no case law

79 2nd Civil Chamber of the Court of Appeal, Decision dated 29 February 2012 and numbered E. 2011/10335 K. 2012/4239.

80 ***Nomer/Şanlı,*** p.64.

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on whether a decision in which the non-application of Law No. 805 would breach the Turkish *ordre public*. However, we would like to point out that the Turkish courts have a tendency to review the merits of the foreign decisions when reviewing whether the decision is against Turkish *ordre public*. Therefore, we believe, that there is a low risk that a Turkish court may reject to recognize or enforce the foreign arbitral award or court decision merely on the grounds that the Law No. 805 is a directly applicable law and is of *ordre public* and a decision given by a court/arbitral tribunal non-applying the Law No. 805 would violate Turkish *ordre public*.

b) If the General Agreement is governed by Turkish law:

We believe that the answer would not change and our explanations above under Assumption 2(a) would also be valid for the recognition or enforcement of a decision, if the General Agreement is governed by Turkish Law and the foreign court decision or arbitral award disregarded the Law No. 805.

(b) Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?

No, we do not have other specific recommendations on this subject.

VI. Confirmation Practice

1. Binding Individual Contract

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

Under Turkish law, there is no written form requirement for an Individual Contract to be valid. It is possible to enter into oral agreements as well as written agreements.

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

An Individual Contract agreed upon orally becomes legally binding and enforceable at the time of agreement unless the parties agree otherwise.

(c) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

Please note that, as per Article 21 of the TCC, in the event that a party sends a confirmation letter to the other party after an agreement is concluded verbally and the other party does not respond to it affirmatively or negatively in eight days, the content of the confirmation letter is deemed to be in compliance with the agreement constituted verbally. In such case, the confirmation letter shall be deemed to reflect the content of the agreement and in the event that the verbal agreement is not in compliance with the confirmation letter, the confirmation letter shall prevail.

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(d) Is the reference to the relevant General Agreement sufficient for the inclusion of the Individual Contract in the General Agreement?

Yes. It is sufficient for the inclusion of the Individual Contract in the General Agreement if the Individual Contract provides that is a part of the General Agreement.

2. Means of Evidence

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

(i) General Information about Evidence Concept under Turkish law

Under Turkish Civil Procedural Law, two forms of evidence are accepted: (i) conclusive evidence; and (ii) discretionary evidence. Although the Civil Procedural Law does not explicitly define such forms as "conclusive" or "discretionary", these definitions are unanimously accepted by the scholars[81].

Accordingly, conclusive evidence is a form of evidence that is regulated by law, which the court does not have any discretion upon. Deeds, oaths and final judgments are conclusive evidence.

Discretionary evidence, on the other hand, is to be evaluated by the court whether it could be used to evidence the claim or not. The Civil Procedural Law lists witness statements, expert reports and survey among examples of discretionary evidence. Such list is not exhaustive; therefore the courts are entitled to accept all kinds of documents as discretionary evidence.

(ii) Deed

The Civil Procedural Law requires the parties to the agreement to prove the existence of the agreement with a "deed" (a written document containing hand-written signatures of the parties) if the relevant transaction has a value above *circa* TL 3,660[82].

Turkish law recognizes the concept of electronic signatures. As per the Law Regarding Electronic Signature No. 5070, secure electronic signatures have the same legal effect as the hand-written signatures (except for security agreements), unless there is a statutory requirement for an official form or a special process for the execution of the relevant document (agreement, deeds, *etc*.) Furthermore, Article 15 of the TCO

81 ***Pekcanıtez/Atalay/Özekes*** p. 604 *et seq.*

82 Approx. Euro 592 as of 13 March 2019.

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provides that a secure electronic signature has the same evidential value as a hand-written signature. Similarly, Article 205 of the Civil Procedural Law provides that the electronic data constituted with the secure electronic signature have the effect of a deed and these data are deemed as final evidence. The court is obliged to assess the secure nature of such data *ex officio*.

As per the Law regarding the Electronic Signature No. 5070, the electronic certificate is the record connecting the signature holder's identity information and its signature verification and is obtained *via* electronic certificate providers. The electronic certificates granted by foreign electronic certificate providers are valid in Turkey, provided that there is an international or bilateral agreement executed between Turkey and the country where the certificate provider is from. Apart from the existence of such an agreement, if the electronic certificates of the foreign electronic certificate provider are accepted by a Turkish certificate provider, such certificates are deemed as qualified electronic certificates as per the Law regarding the Electronic Signature No. 5070.

Broadly speaking deed (*senet*) is a written document containing hand-written signature(s) of the relevant parties which indicates the intent. It has been accepted among scholars that a deed is a written document which is drafted and signed by a person against whom this document can be used as an evidence, and which leads to legal results[83].

The content of a deed is not determined in the Civil Procedural Law but it has been accepted by the legal doctrine that a deed must contain at least the following features:

(a) A deed must be materialized to be recognized by third parties;

(b) It must be in written form;

(c) It must contain the intent regarding the fact in question;

(d) Finally, the deed must bear the signature of the drafter(s).

If one of these features is missing in the document, such documents will be deemed as preliminary evidence and not as a deed.

(iii) Preliminary Evidence Concept

There are certain exceptions to the rule of evidence *via* deed. Accordingly, facts that normally need to be evidenced *via* deeds can be evidenced *via* preliminary evidence together with witnesses or other forms of discretionary evidence.

Preliminary evidence is a document that, while it cannot prove a claimed fact, indicates the possibility of the existence of a fact. It needs to be sent or submitted by

83 ***Pekcanıtez/Atalay/Özekes*** p. 612.

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the person against whom this document is claimed.

In the event that there is a dispute with respect to a claim (*e.g.* regarding the existence or terms or conditions of an agreement) and because of the value of the agreement requires it to be proven with a deed, evidence such as voice recordings, handwritings, photos and videos are considered as preliminary evidence to prove the validity of the claim if they are submitted to the court together with discretionary evidence(s).

(iv) Evidence Agreement

In principal, if the Civil Procedural Law requires for a specific evidence to prove a fact, such fact cannot be proven with other forms of evidence. However, as per the Civil Procedural Law, parties may execute a written evidence agreement listing the forms of evidence to be used in a dispute[84]. An evidence agreement does not have to be a separate agreement. It may be included as a clause in an agreement. The court is obliged to take the evidences listed in the evidence agreement into consideration in a dispute *ex officio*[85]. Such an agreement may both provide that the forms of evidence listed in the agreement will be additional to those required by the law ("**Non-Exclusive Evidence Agreement**") or it may restrict the scope of the forms of evidence that the law requires and only provide that the form of evidence determined in the evidence agreement will be used in a dispute ("**Exclusive Evidence Agreement**"). In other words, the form of evidence provided for in a Non-Exclusive Evidence Agreement will be additional to the forms of evidence set forth by the law (allowing the court to evaluate the evidence provided for in the evidence agreement together with the evidence set forth by the law), whereas only the form of evidence determined in an Exclusive Evidence Agreement will be used in a dispute and the forms of evidence set forth by the law will not be applicable. In case there is no clarity in terms of whether an evidence agreement is exclusive or non-exclusive, such agreement will be deemed as a Non-Exclusive Evidence Agreement (Article 23.1 of the EFET General Agreement would be considered as a Non-Exclusive Evidence Agreement, but not as an Exclusive Evidence Agreement).

(v) Tape Recording

Under Turkish law, recording and/or disclosing a conversation without the consent of all its participants to such conversation is a criminal offence and such records are not valid evidence accepted by the court. Article 23.1 of the EFET General Agreement contains a provision ensuring that the parties obtain necessary consent from their employees.

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84 ***Pekcanıtez/Atalay/Özekes*** p.607.

85 15th Civil Chamber of the Court of Appeal, Decision dated 4 October 2018 and numbered E. 2018/2883 K. 2018/3600; 15th Civil Chamber of the Court of Appeal, Decision dated 31 October 2018 and numbered E. 2018/2843 K. 2018/4186.

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In the event that all parties of a conversation consent to the recording of such conversation, the record can be used as discretionary evidence. However, in the event that taped recordings are submitted to the court as evidence, the court may (in principal) require additional discretionary evidence if the relevant transaction's value is above TL 3,660[86], unless there exists an evidence agreement that provides otherwise.

(vi) Witness' Statement

Witness statements are discretionary evidence[87]. They can be used as additional evidence to preliminary evidence in order to prove the legal transaction over TL 3,660[88].

However, in the event that a party submits a deed to prove the fact in question, the counterparty cannot use witness statements as evidence although the amount of the fact is under TL 3, 660[89]. Thus regardless of the amount of the legal transactions, claims against deeds must be proven with a deed; unless an evidence agreement exists there that provides otherwise.

(vii) E-mail or other Electronic Message or Transaction Entry System and or Facsimile

E-mails, other electronic messages, transaction entry systems and facsimiles are documents which can be submitted by the recipient to the court as discretionary evidence.

(viii) Conclusion

In the event that the competent court or place of arbitral tribunal is foreign, the foreign court/arbitral tribunal shall first determine the law that will decide which evidence is permissible, in accordance with the conflict of laws rules, and then decide which evidence is permissible. Please note that, according to the Turkish conflict of laws rules, evidence is evaluated by *lex fori* (by the laws of the authorized courts)[90]. If the General Agreement is subject to the jurisdiction of Turkish courts, or the General Agreement is not subject to the jurisdiction of Turkish courts but the validity of the evidence is to be decided in accordance with Turkish law (for instance, according to the conflict of laws rules of the authorized jurisdiction or the parties' agreement on the selection of Turkish law as the procedural law to be applied to the General Agreement), it is advisable that the Individual Contracts be constituted in written forms containing hand-written signatures of the parties either as Individual Contracts

86 Approx. Euro 592 as of 13 March 2019.

87 ***Pekcanıtez/Atalay/Özekes*** p. 645 *et seq.*

88 Approx. Euro 592 as of 13 March 2019.

89 Approx. Euro 592 as of 13 March 2019.

90 ***Nomer/Şanlı*** p.376 *et seq.*

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or written confirmations. In this case, secure electronic signature may also be used for Individual Contracts. However, if it is preferred to conclude an Individual Contract verbally or *via* fax or e-mail, it is advisable to include an Exclusive Evidence Agreement in the EFET General Agreement specifying that in the event that an Individual Contract is concluded verbally or *via* fax or e-mail; the telephone records, fax or e-mail messages shall be accepted as exclusive, final and binding evidence in disputes which may arise from the Individual Contracts.

VII. Core Provisions

(a) Would any of the elections contemplated by the General Agreement or any of the above Annexes (including the Credit Support Annex) change the substance of your conclusions reached under Section D.I.1. and Section D.I.2.? As far as the Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

No, they would not. Please see Section D.III.(d) for our explanation regarding the election to allow substitution with or without consent.

(b) Considering your conclusions reached under Section D.I.1 and Section D.I.1.3 above, what are the provisions of the General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in those paragraphs (each such provision a "Core Provision")?

We understand that "Core Provisions" are such provisions of the General Agreement of which amendment may change our opinion rendered herein.

We believe that the following provisions are essential that a material alteration thereof could affect the conclusions reached in this Opinion:

Article 1.1 (*Subject of the Agreement*)

Article 4.1 (*Primary Obligations for Delivery*)

Article 6 (*Delivery, Measurement, Transmission and Risk*)

Article 7 (*Non-Performance Due to Force Majeure*)

Article 8 (*Remedies for Failure to Deliver or Accept*)

Article 10 (*Term and Termination Rights*)

Article 11 (*Calculation of the Termination Amount*)

Article 12 (*Limitation of Liability*)

Article 13 (*Invoicing and Payment*)

Article 19 (*Assignment)*

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Article 22 (*Governing Law and Arbitration*)

Article 23 (*Miscellaneous*)

(c) ***Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") change the substance of your conclusions reached under Part D.I or D. II such as, but without limitation, by invalidating the netting provisions in the EFET General Agreement due to its inclusion under the broader netting provisions of the CPMA?***

N/A.

VIII. Governing Law, Arbitration and Jurisdiction

(a) ***Would the parties' agreement on the governing law, submission to arbitration or jurisdiction (Article 22 of the General Agreement) be upheld in Turkey, and what would be the consequence if it were not?***

(i) Governing Law

a. *When the Turkish Courts have the jurisdiction*

When a dispute is brought before a Turkish court and there is a foreign element in the legal relationship, and it is required to determine the governing law in accordance with conflict of law rules, the IPPL shall apply to the selection of governing law. According to Article 24 of the IPPL, the parties may freely choose the applicable law to the agreement.

The definition of foreign element, however, is not provided under the IPPL.

The Court of Appeal, scholars and various laws offer different definitions of foreign element. According to the first approach, there must be an objective foreign element in the relationship in order to be able to choose the applicable law. This approach emphasizes geographical and personal elements in a relationship in determining the foreign element such as one of the parties to the transaction being foreign (being a foreign citizen, residing in a foreign country, having its business place in foreign country *etc.*), the execution (whether the execution of a contract in a foreign country is sufficient to give the relationship a foreign character is controversial) or performance place of the contract being a foreign country, the place where the legal relationship is emerged being a foreign country the subject matter of the contract, the place of goods, performance of the services being in a foreign country, in other words, the contract requiring cross-border flow of goods, services, money. This approach is widely accepted by scholars and also the Court of Appeal. The Court of Appeal's Assembly of

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Civil Chambers[91] defines the concept of foreign element among others as (i) one or both of the parties to a legal transaction being foreigner; (ii) the place of execution or performance of an agreement being a foreign country; (iii) subject matter of an agreement being in a foreign country; (iv) debtor-creditor relationship being emerged in a foreign country.

Some scholars emphasize that foreign element exists if a legal transaction or an agreement is in connection with more than one jurisdiction[92]. The new approach among scholars focuses on material and economical character of the transaction rather than an objective foreign element in the relationship. According to these scholars if a transaction concerns international trade, it should be accepted as having a foreign element even if no objective foreign element is found in the relationship[93]. According to this approach, if an agreement economically impacts more than one jurisdiction, it is considered as of international character.

Some other scholars also accept that selection of foreign law as applicable law *per se* makes such relationship of a foreign character[94]; as per these scholars, Article 24 of the IPPL, which is the law regulating the selection of governing law, does not restrict parties to select foreign law as applicable law. The Court of Appeal also adopted this view in some of its decisions.

Despite the fact that those scholars and the Court of Appeals Assembly of Civil Chambers[95] accept that selection of foreign law as applicable law *per se* makes such legal relationship of a foreign character[96], as per certain scholars[97], in order to select a foreign law as applicable law to an agreement, the agreement has to include an objective foreign element and the mere fact that the parties choose a foreign applicable law itself does not constitutes a foreign element.

Another opinion has been suggested by scholars, specifically for cases where there is an agreement between two Turkish parties in which the parties select the provisions of a foreign law as applicable provisions in the agreement, without having any other element which would make such legal relationship of a foreign character. These scholars do not interpret this situation as a selection of governing law, instead they emphasize that it is incorporation of foreign laws' provisions to an agreement.

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91 Court of Appeal General Assembly of Civil Chambers, Decision dated 6 May 1998 and numbered E. 1998/12-287 K. 1998/325.

92 ***Nomer/Şanlı*** p.5.

93 ***Toker***, p. 995.

94 ***Aygün***,p. 1037, ***Nomer/Şanlı***, p. 307.

95 Court of Appeals General Assembly of Civil Chambers Decision dated 6 May 1998, numbered E.1998/12-287 K. 325.

96 ***Nomer/Şanlı*** p. 307.

97 ***Çelikel/Erdem*** p. 322.

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There is a difference between these concepts since mandatory rules of Turkish law still apply to a legal relationship in case it is seen as incorporation. According to these scholars, Turkish parties are free to choose the provisions of a foreign law as per the freedom of contract principle, even if there is no other objective foreign element (*e.g.* place of execution of the contract being in Turkey, and the place of performance and resident addresses of the parties being in Turkey), however in that case the agreement should still be in line with the mandatory rules of Turkish law, especially the provisions relates to the limits of freedom of contract, *i.e.* Article 26 and Article 27 of TCO[98].

The Court of Appeal also adopts a similar approach in some of its decisions stating that there is no regulation in Turkish law restricting selection of foreign law between Turkish parties, and there is no requirement to have the foreign element in place in a legal relationship in order to select governing law; therefore, Turkish parties are free to choose a foreign law as governing law due to the principle of freedom of contract[99]. The limit of such a selection, as per the Court of Appeal, is that these provisions of foreign law incorporated are not contrary to *ordre public*[100].

The arbitrations taking place in Turkey and having a foreign element, or the disputes where the parties, arbitrator or arbitral tribunal select the International Arbitration Law No. 4686 dated 21 June 2001 ("**IAL**") as procedural law to be applied to the arbitration are subject to the IAL. In order to determine its scope of application, the IAL makes a definition of foreign element. According to the IAL, foreign element is in place if; (i) the residence or business places of the parties are in different countries, (ii) the residence or business places of the parties are in a country different than the arbitration place or the performance place of the contract or (iii) any of the parties to the contract is a foreign capital Company or it is necessary to use foreign loan or security for the performance of the contract or (iv) the contract requires cross border flow of capital or goods.

Law No. 4501 stipulates that if a foreign element is in place, a dispute arising out of a concession contract may be subject to arbitration. When determining in which cases a concession contract may be subject to arbitration, the Law No. 4501 brings a foreign element definition. Foreign element under Law No. 4501 refers to circumstances where (i) at least one of the parties to the (concession) contract is a foreign capital Company at in accordance with the regulations on the encouragement of foreign capital or (ii) the implementation of the (concession) contract shall necessitate foreign capital, or conclusion of foreign loan or security agreements.

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98 ***Özdemir Kocasakal***, p. 34.

99 11th Civil Chamber of Court of Appeal, Decision dated 7 December 2006 and numbered E.2006/8585 K. 2006/12877.

100 11th Civil Chamber of Court of Appeal, Decision dated 7 December 2006 and numbered E.2006/8585 K. 2006/12877.

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As seen above, foreign element definitions brought by the IAL and the Law No. 4501 are broader than the foreign element definition accepted by the Court of Appeal and most of scholars. The IAL adopts a material and economical approach in determining the foreign element. More specifically, we have not come across any Court of Appeal Decision or scholar opinion defining the foreign element in a way to cover the specific examples, where any of the parties to the contract is a foreign capital company or having the necessity of using foreign loan or security for the performance of the contract as covered under the IAL and the Law No. 4501. In this regard, one might argue that foreign element definitions provided in such laws only apply to situations where such laws are applied and cannot be used in other situations. Another argument might be, however, as foreign element is not defined in the IPPL, although they are specific to the laws that they are provided in, foreign element definitions of the IAL and the Law No. 4501 may still be used by way of analogy even if the IAL or the Law No. 4501 is not applicable in the case, especially for commercial disputes. Therefore, whether or not the foreign element definition of IAL and the Law No. 4501 can be used while choosing a foreign law as a governing law even if the IAL or the Law No. 4501 is not applicable in the case is not clear under Turkish law.

b. *Disputes Resolved by an Arbitral Tribunal or a Foreign Court*

In case the dispute is subject to foreign or domestic arbitration or to the jurisdiction of foreign courts, in other words, where the dispute is not subject to the jurisdiction of Turkish courts, as the conflict of law rules are not applicable in such cases, the discussion made above (i.e. Section **Hata! Başvuru kaynağı bulunamadı.**(a)(i)(a)) regarding the foreign element would not apply. Therefore, we believe that Turkish courts should not able to reject the recognition or enforcement of a foreign court decision or foreign arbitral award or set aside a domestic arbitral award due to the mere fact that the governing law is selected as a foreign law when there is no foreign element in the relationship. In other words, if the dispute is not subject to the jurisdiction of Turkish courts, the parties can freely choose the governing law regardless of whether there is a foreign element or not in the legal relationship.

(ii) Arbitration

Parties to an agreement are free to include an arbitration provision and choose the seat and venue of arbitration to be held outside Turkey.

In Turkey, the recognition and enforcement of foreign arbitral awards is regulated under the New York Convention and the IPPL. In general, awards given in countries which are not signatories of the New York Convention would be enforced under the IPPL[101]. Enforcement grounds listed in Article 62 of the IPPL mainly follow Article V

[101] Turkey has ratified the New York Convention with two reservations. One of those reservations is a reciprocity reservation, and the other one is a commercial transactions reservation, according to which Turkey will apply the New York Convention only to the disputes of a commercial nature as per Turkish law. Therefore, in case of a dispute which does not fulfill the requirements arising out of these

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of the New York Convention[102]. According to Article 62 of the IPPL, the court would reject[103] an enforcement request if any of the following conditions exist:

- No arbitration agreement was made or no arbitration provision was included in the underlying agreement,
- The arbitral award was contrary to the public moral and *ordre public*,
- The dispute subject to arbitration was not compatible with the arbitration according to the Turkish laws,
- One of the parties was not properly represented before the arbitrators,
- The defendant was not informed about the selection of the arbitrators or was deprived from defense rights,
- The arbitration agreement or clause is contrary to the law that it is subjected to by the parties, or if no applicable law is determined under the law of the state where the arbitral award was rendered,
- The selection of the arbitrators or the procedure applied was contrary to the agreement between the parties, in the absence of such an agreement, to the law of the state where the arbitral award was rendered,
- The award was rendered on a matter outside the scope of the arbitration agreement or clause, or the award exceeded the scope of the agreement or clause,
- The award has not been finalized, has not acquired executory force or has not become binding under the law that it was subjected to, under the laws of the state where the award was made or under the procedure applied to the award, or it was cancelled by a competent authority in the country in which the award was made.

The arbitrations taking place in Turkey and having a foreign element (as defined under the IAL), or the disputes where the parties, arbitrator or arbitral tribunal select the IAL as procedural law to be applied to the arbitration are subject to the IAL. The parties may choose any other procedure such as ICC Rules.

reservations, the enforcement of the award rendered on such a dispute will not fall under the New York Convention but under the IPPL.

102 ***Çelikel/Erdem***, p. 676.

103 The IPPL mainly follows New York Convention. However, Article (V) of New York Convention uses the wording of "*may reject…only if*" while regulating the reasons for non-enforcement, while Article 62 of the IPPL provides that the awards "*cannot be rejected unless*" the reasons listed in the said provision. Therefore, even if, as claimed by some of arbitral community, New York Convention's wording provides a discretionary standard rather than a binding one, the wording of the IPPL does not leave room for such an interpretation.

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In this case, the mandatory rules of the IAL shall continue to be applied to the arbitration proceedings taking place in Turkey with respect to disputes that contain a foreign element, regardless of the arbitration rules chosen by the parties. According to the IAL, there is a foreign element in a dispute if one of the circumstances set forth in the IAL exists (for such circumstances, please see Section D.VIII.(a).(i)). If the seat of arbitration is in Turkey, the mandatory provisions of the IAL shall obligatorily apply to the dispute having a foreign element (as defined under IAL), and the arbitral award is automatically deemed as a Turkish award. In such a case, the enforcement procedure stipulated in New York Convention or the IPPL does not apply. An award subject to the IAL may not be appealed. The only legal action to challenge an arbitral award given under the authority of the IAL is a setting aside proceeding.

The grounds for the setting aside are specifically listed in the IAL. Such grounds being similar to grounds for refusal of enforcement of an arbitral award under the New York Convention are as follows: (i) the incapacity of the parties, invalidity of the arbitration agreement under the law to which the parties subjected it, or in the absence of such an agreement, under the Turkish law, (ii) breach of the procedure on the selection of arbitrators determined by the parties or provided in the IAL, (iii) arbitrators' decision on their competency that is contrary to law, (iv) breach of authority by the arbitrators, (v) unequal treatment of the parties by the arbitrators, (vi) failing to conduct the arbitral proceedings in compliance with the parties' agreement as to the procedure, or in the absence of such an agreement, with the provisions of the IAL as to the procedure provided that such non-compliance affected the substance of the award (vii) exceeding the time limit of the arbitration, (viii) incompatibility of the subject matter of the dispute with arbitration pursuant to Turkish law and (ix) violation of public policy.

As per the IAL, it is also possible for the parties to waive their rights to apply to the setting aside proceedings if both of the parties to an agreement reside out of Turkey[104]. The setting aside proceedings suspend the execution of the award. It is possible to appeal the court decision given upon the setting aside claim.

Arbitrations taking place in Turkey and without a foreign element (as defined under the IAL) shall be subject to the provisions of the Civil Procedural Law. The parties may choose any other procedure such as ICC Rules. In this case, the mandatory rules of the Civil Procedural Law shall continue to be applied to the arbitration proceedings taking place in Turkey with respect to disputes that do not contain a foreign element (as defined under the IAL), regardless of the arbitration rules chosen by the parties. Arbitral awards given under the authority of the Civil Procedural Law are subject to set aside proceeding according to the provisions of the Civil Procedural Law. The possible grounds for setting aside of an arbitral award are provided in the Civil Procedure Law similarly with the grounds for the same listed in the IAL.

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[104] ***Akıncı**,* p. 264*;* It is not possible to waive the setting aside right for only one party since legislator aims to prevent inequality between the parties (*please see **Akıncı***, p. 263)

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As a separate issue, please note that under Turkish Law, in executing an arbitration agreement or an agreement including an arbitration clause by an authorized representative, a special authority is required to be vested in persons who will sign such documents on behalf of the company; otherwise, such arbitration clause may be deemed invalid. However, scholars suggest that members of the board of directors do not need such a special authority to execute an arbitration agreement since they are authorized to represent the company for the entire business and legal issues which are in the scope of the company's objectives and fields of business[105].

The TCO does not foresee any statutory form for such authorization; thus, one may argue that it is possible to authorize such persons orally or in a written form. However, some scholars suggest that an authorization should be subject to the form of the main agreement. As per this opinion, as the arbitration agreement is required to be in written form under Turkish law, such an authorization should be made in a written form as well (where it is subject to Turkish law)[106]. In either case, as the existence of a valid authorization is thoroughly scrutinized by the arbitral tribunals and Turkish courts, in order to eliminate any dispute on whether the signatory of such agreement was authorized to sign an agreement with arbitration clause or not, we highly recommend that you authorize such persons by following the authorization procedures set forth in the TCC, or at least by a board of directors' resolution taken specifically with regard to the authorization of persons signing that particular agreement, as well as you request the submission of the legal documents providing such authorization from the Companies with which you will execute EFET General Agreement and/or Individual Contracts or other agreements with arbitration clause.

Under Turkish law, as of 1 January 2019 due to the amendments made in the TCC, recourse to mediation before initiating a lawsuit has been provided as mandatory for cases listed under Article 4 of the TCC and cases stipulated in any other law as a commercial case[107], in which a request for compensation or payment of a certain amount is sought. Nevertheless, another amendment is made in the Civil Procedural Code, in parallel to the abovementioned amendment in the TCC, and as per this amendment, in case there is an arbitration agreement between the parties, or arbitration or other means of alternative dispute resolution mechanisms are required as per the special codes, recourse to mediation is not mandatory.

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[105] ***Aydemir*** p. 295.

[106] The arbitration agreements should be in a written form in order to validly exist under Turkish law; however, written form requirement is interpreted broadly.

[107] As which cases constitute a case falling under this mandatory mediation requirement is beyond the subject matter of this Opinion and the letter of the relevant provision is currently under discussion among scholars, we have not analyzed here the cases falling under such a scope.

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(iii) Jurisdiction

As per Article 47 of the IPPL (a conflict of law provision), except in cases where the jurisdiction of a Turkish court is determined according to exclusive jurisdiction principle, the parties may agree on the jurisdiction of a court of foreign state over a dispute that contains a foreign element[108] (please see Section D.VIII.(a).(i) for explanations on foreign element).

Article 47 of the IPPL regulates that Turkish courts have exclusive jurisdiction over the disputes related to employment contracts and employment relations as well as consumer and insurance contracts. Also, as per certain scholars and Court of Appeal decisions, Turkish courts are deemed to have exclusive jurisdiction on, inter alia, real rights on immovable assets[109] and activities falling under the authority of Turkish execution offices[110]; thus, an agreement conferring jurisdiction to foreign courts or offices on those matters cannot eliminate the jurisdiction of Turkish courts and execution offices thereon.

As per Article 47 of the IPPL, in case there is a jurisdiction agreement authorizing a foreign court, the competent Turkish court shall have jurisdiction over the case only if the foreign court decides that it has no jurisdiction on the case or if any objection to the jurisdiction of the Turkish court on the grounds that a jurisdiction agreement exists has not been raised in the Turkish court before which the lawsuit is instituted. Turkish courts do not *ex officio* consider a jurisdiction agreement. Nevertheless, the Court of Appeal, in some of its decisions, decided that, even if the jurisdiction agreement is valid, the objection as to the jurisdiction of Turkish courts should be rejected on the grounds that as the proceedings to take place in Turkey would be more efficient and accessible to the objecting party (residing in Turkey), raising jurisdictional objection would be against the rule of honesty[111].

In addition to the foregoing, as per Article 47 of the IPPL, in order for a jurisdiction agreement to be valid before the Turkish courts, it should be proven with written evidence. Although some scholars suggests that even if the jurisdiction agreement has not been executed in writing, its existence and thus validity may be proven by means

[108] The Court of Appeal and the Regional Courts of Justice, while reviewing the agreements conferring jurisdiction to foreign courts, questions the fulfillment of this requirement of having a foreign element in place thoroughly (*please see* 11th Civil Chamber of Court of Appeal, Decision dated 18 November 2015 and numbered E. 2015/5193 K. 2015/12216; 16th Civil Chamber of İstanbul Regional Court of Justice, Decision dated 8 November 2018 and numbered E. 2017/4352 K. 2018/2381).

[109] ***Çelikel/Erdem***, p. 533*, see also* 13th Civil Chamber of the Court of Appeal, Decision dated 29 January 2013 and numbered E. 1993/408 K. 1993/560 and Court of Appeal General Assembly of Civil Chambers, Decision dated 6 May 1998 and numbered E. 1998/12-287 K. 1998/325.

[110] ***Nomer/Şanlı***, p*. 450, see also* Court of Appeal General Assembly of Civil Chambers, Decision dated 6 May 1998 and numbered E. 1998/12-287 K. 1998/325.

[111] 11th Civil Chamber of the Court of Appeal, Decision dated 20 February 2009 and numbered E. 2007/12254 K. 2009/1912; 11th Civil Chamber of the Court of Appeal, Decision dated 6 March 2009 and numbered E.2008/5454 K. 2009/2604.

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of any written evidence[112], there are decisions of higher courts emphasizing the written form as a condition for validity[113]; therefore it is advisable to have a written agreement in order to eliminate the risk of the agreement being deemed as invalid.

In order to be valid, the Court of Appeal requires the jurisdiction agreement to fulfill the conditions stipulated under the Civil Procedural Law in any case, although the Civil Procedural Law should not be applicable where the conflict of law rules stipulated in the IPPL, *i. e.* Article 47 of the IPPL, are applicable. Accordingly, as per the Court of Appeal, the jurisdiction agreements should fulfill, *inter alia*, the following conditions[114]: (i) it is in written form, (ii) there is a determinable legal relationship from which the dispute arises and (iii) it specifies the court to which the parties confer jurisdiction[115]. Therefore, it is advisable to specify exact place of jurisdiction authorized by the parties in order to avoid any doubt (e.g. specify the courts as "courts of Geneva, Switzerland" rather than "courts of Switzerland").

As per the IPPL, in order to be enforced and executed in Turkey, foreign court decisions should be final pursuant to the foreign law under the authority of which the decision is rendered. The enforcement decision of a Turkish court is subject to the following conditions under Article 54 of the IPPL:

- existence of an agreement, on a reciprocal basis between Turkey and the state where the court decision is given or a de facto practice or a provision of law or de facto application enabling the authorization of the execution of final decisions given by a Turkish court in that state,
- the court decision has been given on matters not falling within the exclusive jurisdiction of the Turkish courts or, provided that it is contested by the defendant, the decision has not been given by a state court which has accepted himself competent even if there is not a real relation between the court and the subject or the parties of the case,
- the court decision is not openly be contrary to *ordre public*,
- the party against whom enforcement is requested has not objected to the enforcement before the Turkish court based on the foregoing grounds that the concerned party was not duly summoned or represented before the court pursuant to the laws of that foreign state or the court that has given the judgment, or was not represented before that court, or the court decision was not rendered in his/her absence in a manner contrary to these law.

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112 ***Nomer/Şanlı***, p. 452.

113 16th Civil Chamber of İstanbul Regional Court of Justice, Decision dated 8 November 2018 and numbered E. 2017/4352 K. 2018/2381.

114 11th Civil Chamber of the Court of Appeal, Decision dated 28 October 2015 and numbered E. 2014/15681 K. 2015/11244; 11th Civil Chamber of the Court of Appeal, Decision dated 17 February 2016 and numbered E. 2015/7244 K. 2016/1657.

115 16th Civil Chamber of İstanbul Regional Court of Justice, Decision dated 8 November 2018 and numbered E. 2017/4352 K. 2018/2381; 11th Civil Chamber of the Court of Appeal, Decision dated 25 November 2015 and numbered E. 2015/5517 K. 2105/12591.

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The foreign court decisions, related to which an affirmative enforcement decision rendered, are to be executed as decisions rendered by a Turkish court. Nevertheless, as per Article 57 of the IPPL, decisions on enforcement (regardless of being a dismissal or acceptance decision) are appealable as per the general provisions, and appeal suspends the execution.

The fact that the validity of the jurisdiction agreement is not stipulated as a condition for enforcement of court decisions may be interpreted in a way that if the foreign court accepts its jurisdiction, Turkish enforcement court cannot reject the enforcement on the ground that the jurisdiction agreement is not valid.

IX. Regulatory Regime

(a) Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant General Agreement or of the Individual Contracts?

(i) Currency or Exchange Control Laws

Transfer of over certain amounts of money is regulated under the Decree Law No. 32 regarding the Protection of Value of the Turkish Lira ("**Decree Law No. 32**"). According to Decree Law No. 32, the banks are obliged to inform the authorities determined by the Ministry of Treasury and Finance related to money transfers to outside of Turkey exceeding USD 50,000 or the equivalent in Turkish Liras.

Presidential Decree (No. 85) on the Amendments to the Decree Law No. 32 ("**Presidential Decree**") was published in the Official Gazette dated 13 September 2018 and numbered 30534 and sets out certain restrictions on foreign currency use in certain type of contracts. A secondary legislation was announced regarding the Presidential Decree in the Official Gazette dated 6 October 2018 and numbered 30557 ("**Communiqué on the Exemptions**"), and certain provisions of this Communiqué on the Exemptions were amended with an amendment communiqué which was published in the Official Gazette dated 16 November 2018 and numbered 30597 ("**Amendment on the Communiqué on the Exemptions**").

The Communiqué on the Exemptions and the Amendment on the Communiqué on the Exemptions mainly regulate the exemptions of the restrictions introduced by the Presidential Decree. In order to determine whether or not General Agreement and/or Individual Contracts fall under the restrictions set forth with the Presidential Decree, or, benefit from the exemptions provided by the Communiqué on the Exemptions and the Amendment on the Communiqué on the Exemptions, the legal nature of the General Agreement and/or Individual Contracts should be determined as per the Turkish law.

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Electricity is generally characterized as movable property under the Turkish law by scholars[116] and the Court of Appeal[117], even though there are contradictory opinions among scholars. In addition, electricity sale contracts are generally characterized as sale contracts for movables by the Court of Appeal[118]. Although there are certain some scholars characterize electricity sale contracts as service contracts, lease contracts or sui generis contracts, their view constitutes a minority view in the Turkish doctrine[119]. We are of the opinion that, electricity constitutes movable property and the contracts regarding electricity sale are sale contracts for movables (please also see Section D.I.1.(bb)).

As per the Presidential Decree, the contract price or other payment obligations in contracts regarding the sale of movable property cannot be determined in foreign currency or indexed to a foreign currency; however, according to the Communiqué on the Exemptions and the Amendment on the Communiqué on the Exemptions, contracts regarding the sale of movable property are exempted from the restrictions envisaged in the Presidential Decree.

Therefore, it is possible to determine the contract price or other payment obligations in EFET General Agreement and/or Individual Contracts in foreign currency or index them to a foreign currency.

(ii) Energy Legislation

Pursuant to the Electricity Market Law No. 6446 ("**EML**"), electricity market activities consist of generation, transmission, distribution, wholesale and retail, market operation as well as import and export activities. To carry out any market activity including the physical electricity trade, market participants are required to obtain licenses from the EMRA. Each activity and each facility is subject to separate licenses; however, the export activity can be conducted by generation licensees and supply licensees, while the import activity can be conducted by supply licensees. Import and export activities of such legal entities are regulated under their respective

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116 ***Eren***, p.*57,* ***Serozan***, p. 139.

117 Court of Appeal General Assembly of Civil Chambers, Decision dated 21 February 2018 and numbered E. 2017/4-1367 K. 2018/249; 13th Civil Chamber of the Court of Appeal, Decision dated 12 January 1981 and numbered E. 1980/6544 K. 1981/60.

118 Court of Appeal General Assembly of Civil Chambers, Decision dated 21 February 2018 and numbered E. 2017/4-1367 K. 2018/249; 13th Civil Chamber of the Court of Appeal, Decision dated 12 January 1981 and numbered E. 1980/6544 K. 1981/60.

119 Please be informed that, the service contracts and lease contracts for movables also fall within the limitations provided by the Presidential Decree; they cannot be executed in foreign currency or indexed to foreign currency. The Communiqué on the Exemptions, as amended by the Amendment on the Communiqué on the Exemptions, provides exemptions for services contracts as well. Accordingly, service contracts cannot be executed in foreign currency or indexed to foreign currency, except for the services contracts executed with non-Turkish citizens, (ii) executed within the context of export, transit trade or sale and deliveries deemed as export, and foreign currency earnings services and activities, (iii) regarding the services to be performed abroad by Turkish residents, (iv) executed between Turkish residents regarding electronic communication starting in Turkey and ending abroad or vice versa, and (v) executed between Turkish residents regarding electronic communication starting and ending abroad.

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supply or generation licenses and do not require separate licenses, provided that an approval of the EMRA is obtained upon positive opinion of the Ministry of Energy and Natural Resources.

The types of licenses, the activities to be performed within the scope of the licenses and the general provisions that the licenses shall be subject to are set forth in the EML. The details for licensing are explained in the EMLR.

In order to obtain a license for the activities stated above, a Company must be a joint stock or limited liability company incorporated in Turkey as per the TCC. The Company to be established in Turkey may be an affiliate or a subsidiary of the foreign Company. Please note that establishing only a branch of a foreign company would not be sufficient in order to perform any electricity market activity in Turkey.

X. Other Provisions

(a) *Recommendations for the EFET member Companies to consider (for example to fully optimise the General Agreement for a specific purpose such as to support limited trading between two entities both organised and doing business solely in your jurisdiction).*

Please find below certain issues to be considered concerning the Turkish electricity market:

(i) Stamp Duty

The EFET General Agreement and its Annexes and especially each Individual Contract are subject to stamp tax by virtue of the Stamp Tax Law No. 488 ("**Law No. 488**"). Stamp duty applies to a wide range of documents, including but not limited to agreements, financial statements and payrolls. Stamp duty is levied as a percentage of the highest monetary amount stated on (or calculated from the figures/formula stated in) the documents at different rates.

For the time being, the stamp duty rate for most documents is 0.948%. For arbitration agreements and settlement agreements that do not contain any monetary amount the stamp duty is a fixed amount, TL 72.20[120] as of 1 January 2019. The upper limit of the stamp duty is TL 2,642,810.00 [121] as of 1 January 2019.

The Law No. 488 provides that all parties to a paper that is subject to stamp duty are jointly liable for the payment of the stamp duty, regardless of the parties' agreement on the stamp tax liability (tax subject to recourse to the party contractually liable). Therefore, even if an agreement contractually obliges a specific party for the payment of the stamp duty arising from such agreement, all signatories to such agreement will

120 Approx. Euro 11.67 as of 13 March 2019.

121 Approx. Euro 427,326.52 as of 13 March 2019.

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be liable to pay the stamp duty with penalty in the event that the obliged party fails to pay it. In the event that such a party (a party that is contractually not liable from stamp duty) pays the stamp duty, it may recourse the relevant payment amount to the party that is contractually liable to pay the stamp duty.

Individual Contracts exchanged by e-mail deserve a unique analysis. Article 1 of the Law No. 488 defines *papers* (subject to stamp duty) as the ones issued in writing and by way of signing[122], having the capacity to evidence or demonstrate any issue as well as documents "created in magnetic environment", i.e. in the form of electronic data by way of electronic signature. According to the abovementioned article, the exchange of any hand written signed original Individual Contract between the parties as attached to an e-mail shall be subject to stamp duty; moreover, one may argue that even if a hand written original offer is not sent to the counter-party and the counter-party only returns the signed copy of the Individual Contract as an attachment to an email, the document might still be considered as a signed contract and be subject to stamp duty.

Notwithstanding the foregoing, the electronic documents which are not signed by using electronic signature are not subject to stamp tax, according to the tax ruling issued by the Ministry of Finance (dated 23.05.2013 and numbered 765). According to this ruling, one may argue that no stamp duty would apply to an offer sent as an email message in the body of an email and accepted with an acceptance as an email message in the body of an email as there would be no signed electronic document that can be subject to stamp duty. However, tax rulings are not binding and the Ministry of Finance is known to issue contradicting tax rulings on the same issue; thus, the tax authorities may rule out that such e-mails, Individual Contract thus executed, are subject to stamp duty.

Furthermore, according to Article 3 of the Tax Procedural Law No. 213, "the true nature" of a transaction is essential in determining whether the transaction/fact is subject to a tax or not, which is applied by certain tax advisors in a very strict manner. According to such strict interpretation, one may argue that even if a contract is concluded by email exchanges or faxes without containing signature or stamp of the parties, the true nature of such transaction was to conclude a signed contract and not signing a contract was only to avoid stamp duty so that according to the true nature of the document it should be subject to stamp duty.

Law No. 488 has been subject to significant changes with the enactment of the Law Amending Certain Laws for the Purpose of Improvement of the Investment Environment No. 6728 dated 15 July 2016, which was published in the Official Gazette dated 9 August 2016 and numbered 29796 ("**Amendment to Law No. 488**"). Prior to enactment of the Amendment to Law No. 488, when the parties executed multiple copies of a *paper (*as per Article 1 of Law No. 488, please see above), each copy was separately subject stamp duty. With the exemption that Article 23 of the

[122] or marked by a marking in lieu of signature.

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Amendment to Law No. 488 introduces, for the papers that are subject to proportional stamp duty, only one copy of such papers executed in multiple copies will be subject to stamp duty.

Furthermore, as per the Law No. 488, amendments on the papers, which contain monetary amounts, are also subject to stamp duty and the rate applicable to the amendment will be the rate applicable to the concerned paper. An exemption to this rule has been provided with the Amendment to Law No. 488. Accordingly, if the stamp duty is paid from the upper limit and only amends the amount but not any other provision of such a paper, this rule will not be applicable for the increased amount.

Law No. 488 also provides a stamp duty exemption to certain documents that are executed outside Turkey. Accordingly, documents that are drafted or issued in foreign countries and foreign embassies and consulates in Turkey will not be subjected to stamp duty unless they are:

(i) submitted to government offices or,

(ii) transferred or endorsed or,

(iii) their provisions are made used of or utilized in any manner

in Turkey.

Therefore, we believe that the execution of an EFET General Agreement between a foreign company and a Turkish company in relation to the delivery in Turkey, since it will be utilized in Turkey, will not be exempted from the stamp duty.

Furthermore, Article 11/11 of the EML exempts papers regarding transactions made within the scope of organized electricity markets from stamp duty. On the other hand, over the counter market transactions do not enjoy any similar exemption.

(ii) Notices

Under the TCC, the notices and notifications between merchants for putting the other party in default, terminating the contract, or revoking the contract should to be made *via* notary public or return receipt requested mail or with registered electronic mail system by using secured electronic signature. The Court of Appeal interprets this rule as an evidence requirement[123]; thus, a declaration of intention as to the termination or revocation of a contract or for putting the other party in default without using any of the above-mentioned methods are also deemed valid and sufficient to lead to the same results which would emerge if those methods provided under TCC had been used. [124].

[123] Court of Appeal General Assembly of Civil Chambers, Decision dated 12 March 1997 and numbered E. 1996/11 951 K. 1997/178.

[124] Court of Appeal General Assembly of Civil Chambers, Decision dated 25 May 2016, and numbered E. 2014/19-861 K. 2016/632; 11th Civil Chamber of the Court of Appeal, Decision dated 6 November 2006 and numbered E. 2005/10582 K. 2006/11292.

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However, as per certain scholars; the letter of the relevant provision falls short for interpreting the rule as an evidence requirement and it may also be interpreted as a validity requirement[125]. In order not to face a consequence of deemed invalidity of such notices and notifications, one should accept the rule as a validity requirement.

Article 10.2 of the General Agreement provides for a written termination notice. Also, Article 10.3 of the General Agreement provides that Early Termination notice may be made by telephone if confirmed in writing within two business days. According to Turkish law, giving notice by telephone may not be interpreted as constituting a valid notice for termination.

Please note that, in the event that the competent court or place of the arbitral tribunal is foreign, the foreign court/arbitral tribunal shall decide on the law to apply to the form of a legal transaction (such as termination notice) as per the conflict of laws rules. If the law to apply to the form of a legal transaction is Turkish Law as per such conflict of laws rules, then it is advisable to provide the concerned notices in accordance with the above mentioned provision.

In the event that the competent court is a Turkish court, pursuant to the Turkish conflict of laws rules (Article 7 of the IPPL), the law applicable to the form of legal transactions can be (i) the law of the country where the transaction is made or (ii) the applicable law to the legal transaction (*i.e.* the applicable law chosen in the agreement). In the event that the applicable law chosen in the agreement does not require a validity form for notices, then such a notice made in accordance with the applicable law chosen in the agreement would be valid before Turkish courts.

In the event that the Agreement is executed between two Turkish parties in Turkey, the applicable law is Turkish Law (except otherwise agreed by the parties, and also please see Section D.VIII.(a).(i)) and the competent court is also Turkish courts, it is advisable to provide termination notices *via* notary public return receipt requested mail or with registered electronic mail system by using secured electronic signature.

[125] ***Arkan*** p. 154-155.

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Appendices and Enclosures

Appendix A

Types of Counterparties

Corporations (*e.g.*, a limited liability company, stock corporation or Societas Europaea) Partnerships (*e.g.*, a general or limited partnership):

Only corporations (limited liability company and joint stock company established under Turkish law) are qualified to execute the EFET General Agreements, provided that they are holding supply or generation licenses as per the EMLR and not prohibited to engage in electricity trade as per other legislations (please see explanations on banks, intermediary institutions and insurance companies below).

Banks/Credit Institutions: Banks and credit institutions cannot be engaged in any sale and purchase activity of any goods or immovable properties except for valuable mines trade of which is allowed under the BRSA as per the Banking Law. Therefore, they cannot execute EFET General Agreements.

Investment Services Provider/Investment Firms/Investment Fund Management Companies:

We understand that the equivalents of these are "capital market institutions" as defined under the Capital Markets Law. The capital markets legislation provides that most capital market institutions (such as Intermediary Institutions, Portfolio Management Companies and Collective Investment Corporations) must exclusively engage in activities set out in the activities permitted in the Capital Markets Law. Therefore, they would not be qualified to engage in commodity trade and obtain electricity supply licenses, preventing them to be counterparties to the EFET Agreement.

Insurance Companies: As per the Insurance Law, the insurance companies are not entitled to engage in any activity other than insurance. Therefore, they are not entitled to be counterparties to the EFET General Agreement.

Other Financial Institution (please specify): Financial lease, factoring and financing companies, which are regulated under the Financial Lease, Factoring and Financing Companies Law numbered 6361, are not entitled to engage in activities other than their main activities

Municipalities or Counties:

As neither municipalities nor counties do qualify as companies, they cannot be counterparties to the EFET.

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Associations of Local Government:

No such type of association of local government exists in Turkish legislation. However, municipalities may form an association for enhancing cooperation in between them. To the best of our knowledge, no such associations have a provision in their by-laws regarding forming a corporation or conducting business activities. Therefore, it is unlikely for existing municipality associations to be a party to the General Agreement.

Publicly-owned Corporations:

Publicly-owned corporations may be qualified as counterparties as long as they are in the form of capital companies established in accordance with Turkish laws and have electricity supply or generation licenses. EÜAŞ is one of the examples to such counterparties to the EFET General Agreement.

Quasi-Governmental Entities (please specify):

As the quasi-governmental entities such as the EMRA, the BSRA do not qualify as companies, they cannot be counterparties to EFET General Agreement.

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Appendix B

Transactions under the EFET General Agreement

Commodity Forward: A transaction in which one party agrees purchase from or sell to the other party a specified quantity of a Commodity at a future date in exchange for payment of an agreed price to be set on a specified date in the future. The transaction may either be settled by physical delivery of the quantity of Commodity in exchange for the specified price or it may provide for cash settlement with the payment calculation based on the quantity of the Commodity and settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Spot: Some jurisdictions recognize a subset of Commodity Forward transactions with an extremely short tenor (*i.e.* the period of time between entry into the transaction and its settlement) which can be as short as the same day or as long as one or more days (in accordance with the local definition of the term, if any). Such a "Commodity Spot" transaction typically contemplates settlement by only physical delivery of the quantity of Commodity. A spot trade or contract is not defined under Turkish laws. A spot transaction or contract being a form of a sale contract falls within the scope of our opinion. Please see Section D.I.1.(bb) for our explanations.

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. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.

"**Commodity**" means electricity or emission allowances rights. There are certain references to emission allowance under Turkish legislation. For instance, Article 3(h) of the Environment Law numbered 2872 sets forth "utilization of the market-based mechanisms such as carbon trading" as an economic instrument to be used for protection of the environment. However, there is no specific legislation regarding the classification of the emission allowance. It is expected that emission trading activities be covered in the organized markets in the near future. Emission allowance transactions

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made as Over-the-Counter transactions are likely to be considered as contractual right. We see no restriction for the parties to define emission allowances rights as commodities and trade them under the EFET General Agreement.

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