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Legal Opinion Regarding the Enforceability under German law of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

MUN-#5965583-v2

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1 Scope

1.1 You have requested a legal opinion on the enforceability of close-out netting provisions of the EFET General Agreement concerning the Delivery and Acceptance of Electricity (the “EFET General Agreement”), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (the “EFET Credit Support Annex”) and other related legal issues as outlined in your questionnaire. In this respect, you were particularly interested in

- the validity and enforceability of other provisions of the EFET General Agreement like the limitation of liability or the consequences of a force majeure event (“General Enforceability”),

- the general conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for confirmation to be eligible for evidencing a binding Individual Contract (“Confirmation Practices”),

- the validity and enforceability of the EFET General Agreement that have been modified by the parties (“Core Provisions”),

- the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen (“Governing Law, Arbitration and Jurisdiction”) and

- the existence of specific licensing requirements or currency or exchange control laws that might impact the enforceability of the Individual Contracts entered into under the relevant EFET General Agreement (“Regulatory Regime”).

1.2 This Legal Opinion is directed to you solely for your benefit and the benefit of the EFET members. As this Legal Opinion is, inter alia, made for banking and regulatory purposes, it may be made available to the competent financial regulatory authorities as well as to the members of the EFET Legal Committee and its professional advisors.

2 Documents considered

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

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

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

- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published April 3, 2012),

- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018),

- EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005),

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

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

- EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013),

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

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

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

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

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

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

For purposes of Part C.VI (Core Provision) only:

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

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

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

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

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

3 List of Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
AGB-Gesetz	Code governing the use of general terms and conditions (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*)
AWG	Foreign Trade Act (*Außenwirtschaftsgesetz*)
AWV	Foreign Trade Regulation (*Außenwirtschaftsverordnung*)
BAFA	Federal Bureau for Economy and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*)
BaFin	Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*)
BGB	Civil Code (*Bürgerliches Gesetzbuch*)
BGH	Federal Court of Justice (*Bundesgerichtshof*)
BGHZ	German Supreme Court Reporter for Civil Matters (*Entscheidungssammlung des Bundesgerichtshof in Zivilsachen*)
BKartA	Federal Cartel Agency (*Bundeskartellamt*)
BNetzA	Federal Network Agency (*Bundesnetzagentur*)
BVerfG	Federal Constitutional Court (*Bundesverfassungsgericht*)
CDR 565	Commission Delegated Regulation (EU) 2017/565
CIR 1348/2014	Commission implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Art. 8(2) and Art. 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency
CRR	Capital Requirements Regulation
DIS	German Arbitration Institute
EC	European Commission
ECJ	European Court of Justice
EGBGB	Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*)
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
EnWG	Energy Industry Act (*Energiewirtschaftsgesetz*)
ESMA	European Securities and Markets Authority
EU	European Union
GewO	German Trade Code (*Gewerbeordnung*)
GWB	Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*)
GWG	Money Laundering Act (*Geldwäschegesetz*)
HGB	Commercial Code (*Handelsgesetzbuch*)
ICC	International Chamber of Commerce

InsO	Insolvency Statute (*Insolvenzordnung*)
KWG	Banking Act (*Kreditwesengesetz*)
MaStRV	Ordinance on the Registration of Energy Industry Data (*Verordnung über die Registrierung energiewirtschaftlicher Daten*)
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MTF	Multilateral Trading Facility
NJW	*Neue juristische Wochenschrift*
OTC	over-the-counter
OTF	Organized Trading Facility
RegE	German governmental legislative draft (*Regierungsentwurf*)
REMIT	Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale market integrity and transparency
RTS 20	Commission Delegated Regulation 2017/529 with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business
SCC	Stockholm Chamber of Commerce
StPO	Code of Criminal Procedure (*Strafprozessordnung*)
StromStG	Power Taxation Act (*Stromsteuergesetz*)
TSO	Transmission System Operator
UCP 600	Uniform Customs & Practice for Documentary Credits
UN	United Nations
VAG	Supervision of Insurance Undertakings Act (*Versicherungsaufsichtsgesetz*)
ZInsO	*Zeitschrift für das gesamte Insolvenzrecht*
ZPO	Code of Civil Procedure (*Zivilprozessordnung*)

4 Assumptions

4.1 We worked and rendered our Opinion under the following General Assumptions:

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in Germany ("Party A"). None of the Parties qualifies as a consumer (*Verbraucher*) within the meaning of Section 13 BGB.

- Party A is a corporation, financial institution or other entity as further described in Appendix A.

- In case any authority or power of attorney has been granted in connection with the EFET General Agreement, or any Individual Contracts or decisions thereunder, such authority or power of attorney has the capability of, thereby considering all applicable laws, legally binding the respective persons and/ or entities represented by said authority or power of attorney, and has not been revoked prior to the ultimate execution.

- Neither of the Parties to the General Agreement is entitled to claim, in relation to itself or its assets, immunity from suit, attachment, execution or any other pertinent legal processes.

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

- Each EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of your jurisdiction, for which you are requested to opine on in this Legal Opinion) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B. Where such Individual Contracts are governed by laws other than the laws of Germany, this Opinion is given exclusively in respect of those Individual Contracts which are capable, according to their governing laws, to be included in the General Agreement. The Individual Contracts constitute valid and legally binding obligations of the Parties thereto.

- None of the terms stipulated by the General Agreement, safe as provided for within the specifications in the election sheet contained therein, will be varied, waived or discharged and all subsequently concluded Individual Contracts will be entered into in accordance with the rights and obligations as contained in the General Agreement.

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

4.2 In addition, we assume the following:

- The Eligible Credit Support, thereby following the stipulation of Section 3 para. 2 EFET Credit Support Annex, only takes the form of cash transfers or letters of credit.

- All necessary steps and requirements for the valid and legally binding creation of the Eligible Credit Support, required pursuant to the laws applicable to the creation of the Eligible Credit Support, have been duly noted and fulfilled.

- The rights of each relevant transferor in connection with the provision of Eligible Credit Support are not subject to any lien, right of rescission, counterclaim, set-off or any other defense.

- The present Opinion is solely given in respect of the following counterparties:

  (i) Corporations

  All legal entities incorporated as Stock Corporation (*Aktiengesellschaft*)[1], European Stock Company (*SE*)[2], or limited liability company (*GmbH*)[3].

  (ii) Partnerships

  All legal entities or form of arrangement lacking legal personality, thereby including General Partnerships (*offene Handelsgesellschaft*) as well as Limited Partnerships (*Kommanditgesellschaft*).[4]

  (iii) Banks/credit institutions

  All legal entities organized as a corporation, partnership or any other legal form, the principal business of which is to conduct commercial banking activities, in particular credit institutions (*Kreditinstitut*)[5] as well as European CRR institutions[6].

  (iv) Investment services provider/investment firms

  All legal entities organized as a corporation, partnership or any other legal form, that do not conduct commercial banking activities but deal in and/or manage securities and/or financial instruments as agents for a third party (they may also conduct such activities as a principal).[7]

  (v) Insurance companies

  All legal entities organized as a corporation, partnership or any other legal form, which are referred to as insurance company (*Versicherungsunternehmen*)[8] that is licensed to carry on insurance business.

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[1] German Stock Corporation Act (*Aktiengesetz*).
[2] German Act on the Introduction of the European Company (*Gesetz zur Einführung der Europäischen Gesellschaft*).
[3] German Act on Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit begrenzter Haftung*).
[4] German Commercial Code (*Handelsgesetzbuch*).
[5] As defined in Section 1 para. 3d sentence 1 of the German Banking Act, the home member state, as defined by Art. 2 EU Directive 2001/24/EC on the reorganization and winding up of credit institutions, of which is Germany.
[6] As defined by Art. 4 para. 1 no. 1 EU Regulation 575/2013 on prudential requirements for credit institutions and investment firms, the home member state of which is a state of the European Economic Area (EAA).
[7] Financial service institutions within the meaning of Section 1 (1a) KWG.
[8] Within the meaning of Section 1 para. 1 no. 1 VAG.

(vi) Investment fund management companies

All legal entities without legal personality established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by its managers. They may be unregulated or regulated and are typically referred to as ‘Collective Investment Scheme’ in EU legislation.

(vii) Municipalities or counties

All legal entities established to administer local government functions in a particular region within a sovereign state or state of federal sovereign.

(viii) Associations of local government

All legal entities, thereby comprising local authorities, which seek to promote the local government, maintain communication between officers of the different local authorities to develop best practice, and represent the interests of the local government within the national government.

(ix) Publicly-owned corporations

All legal entities wholly or majority-owned by a sovereign. This category may include entities active entirely in the private sector without any specific public duties.

Finally, a number of questions contain individual assumptions which will be outlined in the respective answer.

5 Executive Summary

The following Executive Summary is a presentation of our main conclusions but does not form part of the Opinion and is given for purposes of convenience.

Close-out netting is a recognized concept and as such enforceable under German law. It can be contractually agreed upon and applied under an EFET General Agreement if certain prerequisites are respected:

- Contractual termination rights based on non-insolvency-related termination events need to be exercised prior to the opening of insolvency proceedings and are generally enforceable according to the following terms.
- Insolvency-related termination rights are only enforceable if they relate to privileged transactions. Such transactions are legally privileged if they constitute either fixed term transactions or financial transactions. As such, said transactions benefit from the safe harbor provision.[9]
- Standard electricity trading transactions documented under the EFET General Agreement constitute, as a rule[10], fixed term transactions. Consequently, such transactions would benefit from the safe harbor provisions, irrespective of whether they constitute financial transactions in addition.
- Standard electricity trading transactions for physical settlement would only constitute financial transactions if they were concluded via a multilateral trading facility or if they were not concluded for commercial purposes and had the characteristics of other derivative financial instruments.
- Non-privileged transactions continue to be legally valid and effective after the opening of insolvency proceedings and become subject to the selection right of the insolvency administrator. According to this right, the insolvency administrator can on its own discretion decide to honor or refuse individual transactions. Creditors of refused transactions become creditors of the overall insolvency estate.
- Privileged transactions can be terminated upon the occurrence of an insolvency-related termination event, either by notice or by Automatic Early Termination[11].
- According to statutory provisions, privileged transactions which are not terminated, either because a termination notice was not served or Automatic Early Termination was not opted for to apply, will automatically end upon the opening of the insolvency proceedings.[12]
- In case the privileged transactions were contractually terminated, the termination amount can be validly determined and enforced according to the provisions in the EFET General Agreement.
- Privileged transactions which are not contractually terminated become subject to Section 104 of the German Insolvency Regulation. The termination amount will be established according to the process and methodology as stipulated therein which are materially comparable to the principles contained in the EFET General Agreement[13].

[9] Section 104 para. 1 InsO.
[10] Absent bespoke contractual provisions to the contrary such as introducing non-firm delivery and offtake obligations for example related to asset availability or stochastic infeed.
[11] Section 104 para. 4 InsO.
[12] Section 104 para. 1 InsO.
[13] Section 104 para. 2,3 InsO: see Section I. 1. d) (iii) at p. 18 of this Opinion.

6 Legal Opinion

I. Enforceability of Close-out Netting

We would like you to distinguish between (1) a termination and close-out based on an event that constitutes a Winding-up, Insolvency or Attachment[14] and (2) other non-insolvency related Material Reasons.

1. Winding-up, Insolvency or Attachment

a) ***Please provide a short overview of the relevant insolvency proceedings, laws and terminology*** applicable to Party A and the contract types listed in Annex III. This overview should be ***provided in a separate annex to your opinion.***

<u>I.1.a): Overview of the relevant insolvency proceedings, laws and terminology</u>

We prepared an overview on the relevant insolvency proceedings which is provided in **Annex I** (Overview over the relevant insolvency proceedings) to this Opinion. This Annex includes a flow chart (Proceedings – Graphical Presentation).

We also prepared a glossary for the applicable terminology which is provided in **Annex II (**Terminology) to this Opinion. Annex II consists of overviews with regard to (i) procedural law related terminology, (ii) participant-related terminology and material law related terminology.

b) ***When rendering your opinion on the enforceability of close-out netting in the context of an insolvency proceeding, you should discuss whether the termination of the Agreement, the calculation of the Termination Amount or its payment is voidable, challengeable or in any way deletable by a liquidator, receiver or third party or the court.***

<u>I.1.b): Challenge and avoidance rights</u>

The termination of the Agreement, the calculation of the termination amount or its payment or any other legal act – irrespective of whether it is performed by the insolvent party or its creditor – which may occur during the life time of an EFET General Agreement – including but not limited to legal acts performed in a termination situation – might become subject to the insolvency administrator's challenging rights. In this regard, one needs to differentiate between the rights of the insolvency administrator relating to legal acts and/or events taking place either

- in the course of the insolvency proceeding itself and/or
- those having taken place **prior** to the institution of the insolvency proceedings.

a) Acts effected in the course of the insolvency proceeding

With respect to acts effected in the course of the insolvency proceedings, i.e. the exercise of Automatic Early Termination, termination by notice as well as the calculation of the respective termination amount, the insolvency administrator is not only entitled but obliged to verify whether the legal limitations and procedures of the insolvency code have been complied with. If not, he is entitled (and obliged) to reject the respective act of the creditor. For example, if the termination amount includes non-privileged transactions or was not calculated in line with the contractual provisions, the insolvency administrator will reject the ultimate termination amount. All acts administered by the insolvency administrator can be made subject to subsequent review

[14] As defined in Section 10.5(c) EFET General Agreement.

by the competent civil law court. The mere opening of insolvency proceedings, however, does not automatically imply that the insolvency court is ultimately competent to review all actions of the insolvency administrator. If the challenged action (or omission) of the insolvency administrator relates to the insolvency estate directly (i.e. in the case at hand the Automatic Early Termination or the calculation and disbursement of the respective termination amount), the trial court (*Prozessgericht*) is the competent civil law court (cf. Section 19a ZPO).[15]

b) Acts effected prior to the institution of insolvency proceedings

With regard to acts having taken place prior to the institution of the insolvency proceeding, the insolvency administrator is generally entitled and obliged to establish whether any single legal act or transaction of the debtor with any given creditor can be **contested**. To that end, the insolvency administrator is entitled to review legal acts having taken place up to ten years before the ultimate initiation of insolvency proceedings.

(i) Such contestation rights by the insolvency administrator according to Sections 130 through 146 InsO require pursuant to Section 129 InsO that there are “legal acts”, which are made prior to the opening of insolvency proceedings and which are “disadvantaging” the insolvency creditors.[16]

- The term ‘**disadvantage**’ within the meaning of Section 129 InsO is interpreted broadly by the courts as well as legal literature and comprises both direct and indirect disadvantages for the collectivity of insolvency creditors. Direct disadvantages include, in particular, transactions in which the consideration granted in exchange for an asset is lower than the actual value of the asset itself[17] and thereby lowering the value of the insolvency estate. However, a legal act is not directly disadvantageous if and to the extent the creditor receives a consideration amounting to at least the equal value of the asset and where this consideration is in general available to satisfy the creditors.[18] **Cash transactions** are privileged pursuant to Section 142 para. 1 InsO. However, the privilege of cash transactions is not applicable in the light of the netting provisions under EFET, as the offsetting of claims is not considered to be a cash transaction.[19] Indirect disadvantages cover, inter alia, disadvantages suffered by creditors based on the mere fact that the enforceability of claims in relation to the insolvency estate is made more onerous (i.e. by aggravation or delay of the exploitability of the asset).[20] For said indirect disadvantage to arise it is sufficient to establish whether, in the course of the insolvency procedure, additional circumstances arose which can be considered as having a disadvantaging effect.[21]

- Legal acts which relate to the provision of **margin** in the form of collateral according to Section 1 para. 17 KWG and aimed to restore the relation between provided collateral and the secured obligations are **not** subject to challenge rights.[22]

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[15] Andres in Andres/Leithaus, *InsO*, 4th edition 2018, Section 2, recital 3.
[16] Section 129 para. 1 InsO.
[17] BGH decision IX ZR 64/02 dated 13 March 2003.
[18] E.g. BGH decision IX ZR 64/02 dated 13 March 2003; Kayser in *Münchener Kommentar zur Insolvenzordnung*, volume 2, 3rd edition 2013, Section 129, recital 117.
[19] BGH decision IX ZR 104/07 dated 11 February 2010; *Dauernheim* in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 7, recital 67.
[20] Dauernheim in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 7, recital 17.
[21] BGH decision IX ZR 237/91 dated 12 November 1992; Dauernheim in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 7, recital 24.
[22] Section 130 para. 1 sentence 2 InsO.

- The term “**legal act**” is again interpreted broadly by the courts and legal literature and comprises any exercise of will (*Willensbetätigung*) – including real acts – irrespective of whether the ultimate legal effect was intended or not.[23] With that, the mechanism of an Automatic Early Termination is not a legal act whereas the agreement to conclude an EFET General Agreement containing such Automatic Early Termination clause constitutes such legal act. With regard to the calculation of the Termination Amount according to Section 11 of the General Agreement, the better arguments support the view that this contractual determination of the amount payable between the parties does itself not constitute a legal act. To the extent there is no discretion exercised by the parties in determining the commercial elements of the termination, it is merely the automatic calculation of predetermined factual parameters.

- In general, it is not relevant whether the legal act is a legal act of the debtor or a third party, e.g. a creditor. However, certain legal grounds of contest (i.e. Section 132 para. 1, 2, Section 133 para. 1 sentence 1, Section 134 para. 1, Section 142 InsO) provide only for contesting of legal acts of the debtor. Indirect benefits circumventing a direct payment are considered as legal acts of the debtor and thus be challenged as such legal acts. For example, where a debtor instructs his debtor (i.e. a third party debtor) to pay not to him (the debtor) but instead to a creditor of the debtor (while this creditor will later become the insolvency administrator’s opponent regarding contestation rights)[24], legal acts of an intermediary providing indirect benefits (e.g. financial service provider) may only be contested vis-à-vis the intermediary to the extent the intermediary obtains own benefits from the transaction[25].

(ii) Intention or awareness of disadvantaging the creditors

In addition to the requirement of a “legal act” and a “disadvantage”, there needs to be, in general, some subjective element (e.g. intention or awareness of disadvantaging the creditors) within a certain challenge period in order for a legal transaction to be reviewable. The details with regard to the respective subjective element and the respective challenge periods are as follows:

All transactions, having taken place up to **ten years** prior to the request of the opening of insolvency proceedings, effected by the debtor with the clear **intention** and purpose of disadvantaging his creditors, are fully reviewable by the insolvency administrator. That being said, it is **imperative** that the other party was aware of the debtor's malice intention on the date of said transaction.[26] Such awareness is presumed if the other party knew of the debtor's **imminent illiquidity**[27] and that the underlying transaction constituted a disadvantage to the creditors.[28] A debtor lacks such intention if, at the time of completion of the transaction, the debtor was convinced, based upon specific objective circumstances, that he will be able to satisfy all his creditor’s claims in the foreseeable future.

[23] E.g. BGH decision IX ZR 102/03 dated 14 December 2006, decision IX ZR 86/08 dated 9 July 2009; *Dauernheim* in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 7, recital 11.
[24] Riedel in *Praxishandbuch Insolvenzrecht*, Band 2, part 7/3.1.2; Kayser in *MüKomm InsO*, 3rd edition 2013, Section 129 margin no. 35 InsO.
[25] Schmidt in Karsten Schmidt, *Insolvenzordnung*, 19th edition 2016, Section 129 margin no. 41 InsO.
[26] Section 133 para. 1 sentence 1 InsO.
[27] See Section 18 (2) InsO.
[28] Section 133 para. 1 sentence 2 InsO.

The review period decreases to four years if the legal act of the insolvent party represents a security or satisfies or facilitates the satisfaction of rights of the creditor.[29] If in such case the legal act further relates to a claim which was **owed by the debtor and due for the creditor**, the required subjective element to contest the legal act is the knowledge of **factual illiquidity** instead of imminent illiquidity.[30] If the creditor has entered into a payment agreement or an accumulation for payment with the debtor, it is assumed that the creditor had **not** had any knowledge of the factual illiquidity of the debtor.[31]

Legal transactions of the debtor constituting a direct disadvantage to its creditors may also be contested. Statutory limitation periods stipulate that all relevant transactions concluded during the **last three months** prior to the request of opening insolvency proceedings are fully reviewable, however, only if the debtor was **illiquid**[32] on the date of said transaction, and if the other party was **aware** of such illiquidity on this very same date.[33]

Furthermore, legal transactions effected by the debtor which grant or facilitate a **security**[34] or **satisfactory rights** to insolvency creditors who are not actually legally entitled to said security or satisfaction[35] may be contested. This is however only possible if:

- The transactions were made during the **last month** prior to the request to open insolvency proceedings (i.e. without a subjective element),

- the transactions were made during the **second or third month** prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of such transaction (i.e. without a subjective element), or

- the transactions were made during the **second or third month** prior to the request to open insolvency proceedings, if the other party was **aware** of the disadvantage the insolvency creditors would face as a result of such transaction.[36]

Lastly, all legal transactions of the debtor, which grant or facilitate a security or satisfactory right owed by the debtor[37], made during the last three months prior to the request of opening insolvency proceedings, may be contested if the debtor was **illiquid** on the date of such transaction, and if the other party was **aware** of such illiquidity on this date.[38]

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[29] Section 133 para. 2 InsO.
[30] Section 130 para. 3 sentence 1 InsO.
[31] Section 133 para. 3 sentence 2 InsO.
[32] Section 17 InsO.
[33] Section 132 para. 1(1) InsO.
[34] Cash transfers under a CSA are privileged as provision of margin under Section 130 para. 1 sentence 2 InsO and not subject to contestation if the provision of margin is owed under the CSA to restore the balance between the secured exposure and the collateral already provided.
[35] The so-called "*inkongruente Deckung*", Section 131 InsO.
[36] Section 131 para. 1 InsO.
[37] The so-called „*kongruente Deckung*", Section 130 InsO.
[38] Section 130 para. 1 InsO.

c) ***In particular, please clarify whether or not there is a distinction in time with respect to a creditor's right 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.1.c): Creditor's rights at various stages of the proceedings

Creditor's rights are affected differently during the various stages of the regular insolvency proceedings (see stages of the regular insolvency proceeding in Annex I – Overview over the relevant insolvency proceedings, including a graphical presentation). The **application to open insolvency proceedings**[39] and/or interim insolvency proceedings generally **do not yet** affect the creditor's rights (exceptions are set out below). Opposed to that, the **decisive event** regarding the creditor's rights in view of insolvency claw back rights (which were set out above) and in view of the fate of ongoing and/or continuing contracts or agreements is set by the **order to open the insolvency proceedings**[40].

As a basic principle, **Section 103 InsO** stipulates the insolvency administrator's right to vote upon the **cancellation** – irrespective of any notice period stipulated in the contract – or **continuation** of ongoing contracts in his/her sole capacity, provided, however, such contracts have not been entirely fulfilled by either party to the contract. The insolvency administrator's decision is based on the assessment of whether the contract will be beneficial to the insolvency estates or not.[41] If the insolvency administrator votes for the **continuation** of the contract, the claims under the contract will become debts incumbent on the estate, and will hence be cashed out to the respective creditors preferentially.[42]

If the insolvency administrator votes for the **cancellation** of the contract, the contract will be terminated and the corresponding claims will turn into normal insolvency claims, i.e. without any preferential right of distribution[43].

The insolvency administrator's right to either continue or cancel ongoing contracts is, however, limited if and to the extent the insolvency code stipulates the fate of specific contracts.[44] In the case at hand, **Section 104 InsO** is of elevated importance. Said Section stipulates an **statutory termination** of all ongoing contracts concerning the delivery of goods having a market or exchange price and which are delivered subject to a fixed date; additionally, Section 104 para. 1 InsO also applies to transactions concerning financial transactions having a market or exchange price, even if not made subject to a fixed date.[45] Details regarding the exact definition, legal basis and implications of said transactions are discussed below and under Annex II – Transaction Types.

[39] Section 13 InsO.
[40] Section 27 InsO.
[41] Contractual provisions to exclude or limit the rights of the insolvency administrator according to Section 103 InsO in anticipation of an insolvency situation are invalid according to Section 119 InsO, reiterated by BGH IX ZR 314/14, WM 2016, 1168; the Federal Supreme Court stated that a contractual termination and close-out netting clause in a master agreement for financial derivative transactions is invalid pursuant to para. 119 InsO, to the extent it deviates from the statutory principles enshrined under the **old version of Section 104 InsO**; BT-Drucks. 18/9983, p. 9.
[42] Section 53 and 55 InsO.
[43] Section 103 para. 2 InsO.
[44] Section 103 InsO.
[45] Please note that Section 104 InsO has been revised completely with effect from 29 December 2016 as a reaction to the decision of the BGH IX ZR 314/14 dated 9 June 2016, which ruled that a settlement arrangements in share option transaction are in violation of the old version Section 104 InsO and therefore void and – as a consequence – triggers the insolvency administrator's right to vote for the continuation or cancellation of the agreement, see margin no. 41.

d) We are also interested in whether the insolvency law provides for a "safe harbor" for certain contract types and/or entities and whether the contract types listed in Annex III and which of the entities listed in Assumptions 4.2 (i)-(ix) would benefit from such provision.

I.1.d): Safe harbor provisions for privileged transactions according to Section 104 para. 1 InsO

(i) General principles

As stated in Question I.1.d), certain transactions are privileged and, as a result, are treated differently from the general principles of German insolvency law, in particular they are not subject to the selection rights of the insolvency administrator but subject to statutory termination.[46] As outlined above, the general principles are the following: As a rule, all not yet fully settled bilateral contracts concluded with an insolvent counterparty remain in full force and effective even after the opening of insolvency proceedings, thereby becoming subject to the subsequent selection right of the insolvency administrator regarding the continuation or cancellation of such contracts.[47] In general, contractual provisions which exclude or limit the selection right of the insolvency administrator are null and void.[48] In order to avoid these statutory consequences, individual contracts must either be terminated

- for **non-insolvency-related termination events prior** to the opening of the insolvency proceedings,
- upon **insolvency-related termination events** well before a concrete insolvency scenario could become reasonably expected[49] or
- must fall under categories of transactions which are privileged according to Section 104 InsO (and for which Section 103 InsO does not apply).

In order to qualify for the legal privilege of Section 104 para. 1 InsO, the underlying individual contracts need to constitute either

- financial transactions.[50]

or

- fixed date transactions[51].

aa) Financial transactions

The definition of a **financial transaction** in Section 104 para. 1 sentence 2 InsO contains a non-exhaustive list[52] of contracts falling into this category.[53] In any case, the definition includes all contracts which constitute financial instruments under MiFID II or under the respective German implementation of MiFID II in the *Kreditwesengesetz* (KWG). Consequently, all electricity transactions for financial settlement and which are not spot

[46] Section 104 para. 1 InsO.
[47] Section 103 InsO.
[48] Section 119 InsO.
[49] Limited of course by the necessity that the invoked material termination clause does contractually cover the event in question.
[50] Section 104 para. 1 sentence 2 InsO.
[51] Section 104 para. 1 sentence 1 InsO; for further explanation see Annex III - Transaction Types.
[52] See Report of the Legal Committee of the parliament to Section 118 RegE, imprinted within Kübler/ Prütting '*Das neue Insolvenzrecht'*, edition I, p. 295.
[53] As of the enactment of the *Gesetz zur Änderung der Insolvenzordnung und zur Änderung des Gesetzes betreffend die Einführung der Zivilprozessordnung* (Third Act amending the Insolvency Regulation and the Act introducing the Civil Procedure Code), adopted on 22 December 2016 (BGB I p. 3147).

contracts qualify per se as financial transaction.[54] Electricity transactions for physical settlement under an EFET agreement will only qualify as financial transaction under specific additional prerequisites. According to Annex I C no. 6 MiFID II, commodity derivative contracts for physical settlement only fall under the catalogue of financial instruments if they are traded on a regulated market[55], an MTF[56] or an OTF[57]. Derivative contracts on REMIT wholesale energy products[58] are exempt from MiFID II if they are traded on an OTF and must be physically settled.

Under the assumption that the individual transactions under the EFET electricity agreement qualify as REMIT wholesale energy products, they would only fall under MiFID II if they were traded at a regulated market or an MTF as opposed to an OTF or purely bilateral trading. Therefore, presumably only a minority of EFET electricity transactions would qualify as financial instruments, if any. However, electricity transactions not yet settled which qualify as financial transactions do fall under the privilege of Section 104 para. 1 InsO directly. They do not need to constitute a fixed term transaction in addition.[59]

In addition, Eligible Credit Support within the meaning of the EU financial collateral directive[60] including cash fall under the definition of financial transactions according to Section 104 InsO and form part of the privileged transactions.[61]

bb) Fixed date transactions

As further outlined under Annex III - Transaction Types, irrespective and independent from its qualifications under the financial transaction definition, such transactions could qualify as **fixed date transactions** according to German civil law[62]. In addition to *absolute fixed date transactions* and in line with legal literature we consider a *relative fixed date transaction* sufficient for the purpose of Section 104 InsO[63].

A transaction is a relative fixed date transaction if the delivery date is of such particular importance to the parties that any delay could not be cured and would render the original obligation impossible and consequentially void.

Whether transactions under an EFET General Agreement qualify as fixed dated transactions has to be assessed on the level of Individual Transactions and depends upon the intention of the parties, the economic and physical characteristics of the underlying product and the contractual provisions, in particular with regard to primary delivery and acceptance obligations and the contractual remedies for respective failure.

- With regard to the economic and physical characteristics of electricity transactions on a wholesale level, it can be concluded that the exact time of delivery constitutes a fundamental element of the product definition. As the transportation grid as physical point for delivery and acceptance of electricity, must be in physical balance all time, under- or over deliveries have to be substituted or replaced in real time. Subsequent delivery of the same product is therefore physically impossible.

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54 See Annex III Transaction Types for detailed information as to how electricity qualifies as a ‘good‘ in the sense of Section 104 InsO.
55 Art. 4 para. 1 no. 21 MiFID II.
56 Art. 4 para. 1 no. 22 MiFID II.
57 Art. 4 para. 1 no. 23 MiFID II.
58 Art. 2 para. 4 REMIT.
59 Ahrens/Gehrlein/Ringstmeier (AGR), Flöther/ Wehner, Section 104 InsO, margin no. 12.
60 Directive 2002/47/EG of 6 June 2002.
61 Section 104 para. 2 no. 6, "financial securities within the meaning of Section 1 subsection (17) KWG".
62 See Section 323 para. 2 no. 2 BGB and Section 376 para. 1 HGB.
63 Jahn/Fried in *Münchener Kommentar zur Insolvenzordnung*, volume 2, 3rd edition 2013, Section 104, margin no. 37.

- The same conclusion holds true from an economic perspective. The electricity traded on a wholesale level has a corresponding market value which is transparent and subject to changes in real time. Electricity not delivered creates a financial loss to the off-taker which as trader would have hedged his position by reselling the electricity to the market or other third parties. Such loss could not be compensated by subsequent delivery as at the time of subsequent delivery a different market prize would prevail.

- The above mentioned characteristics of electricity as a traded wholesale energy product are accurately reflected by the contractual provisions.

Neither the Primary Obligations for Delivery and Acceptance of Electricity in Section 4 nor the provisions in Section 6 about *Delivery, Measurement, Transmission and Risk* permit to deviate from a fixed date to restore the mutual contractual obligations. Irrespective of that termination for Material Reasons pursuant to Section 10.3 of the **entire** General Agreement requires a notice, it is more relevant that **Section 8** (*Remedies for Failure to Deliver and Accept*) of the General Agreement does **not require or foresees any grace or notice period**. Therefore we think that the Individual Contracts can be considered as relative fixed date transactions, subject to any provisions to the contrary in the Individual Contracts.[64]

(ii) Other requirements

The privilege under Section 104 para. 1 InsO is only available to contracts which are of bilateral nature, not being fully settled[65] until the opening of insolvency proceedings, or due shortly thereafter, and which are either financial transactions or relate to commodities succumbing a market or exchange price.

aa) General requirements

These general requirements (**bilateral, not fully settled, dated, existence of a market or exchange price**[66]) are usually fulfilled in case of electricity transactions under the EFET General Agreement.

Firstly, the EFET General Agreement is considered to be a **bilateral agreement**, as it is made for the exchange of electricity against cash. The same is true for any individual transaction thereunder.

Secondly, the EFET General Agreement is typically concluded for an infinite period of time, hosting an indefinite number of individual transactions. Conclusively, it is safe to assume that not all rights and obligations are already fully settled in case of one party becoming insolvent, given that some might become due afterwards. If it were any different, there would be no need to apply close-out netting in the first place. However, the transactions as such must be **dated** and the delivery must, as a rule, become due at a fixed date after the opening of insolvency procedures in order for the respective transaction, or the governing master agreement, to qualify for the privilege established under Section 104 para. 1 InsO.

Finally, it is also safe to assume that, as a rule, there will be an **electricity market or exchange price** for both a financial as well as a physical electricity transaction.

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[64] Liesenhoff in Horstmann/Cieslarczyk, *Energiehandel, ein Praxishandbuch*, p. 494 et seqq. margin no. 89 in connection with margin no. 25 et seqq.
[65] AGR, Flöther/ Wehner, Section 104 InsO margin no. 7; *FK-InsO*/ Wegner, edition 8, Section 104 margin no. 5; *KK-InsO*/ Marotzke Section 104 margin no. 3; Nerlich/Römermann, Balthasar, *Insolvenzordnung*, Section 104 margin no. 13.
[66] Section 104 para. 1 InsO.

The necessity of a market or exchange price reflects the original legal intention to maintain the hedging strategies of the market participants even in the presence of insolvency scenarios. In this respect, the non-insolvent party should be entitled, or even be encouraged, to replace its transaction with the insolvent counterparty at a market price, and thereafter securing its hedge at the prevailing market conditions.[67] The requirement of a market or exchange price could therefore be interpreted in a **narrow sense,** being deemed to be fulfilled if there is any possibility to replace the transaction with the insolvent counterparty with regard to its volume, price and commodity.[68] The existence of a particular liquid organized market or trading venue is not required.

bb) Single agreement clause not a prerequisite for the application of 104 InsO

In light of the recently enacted statutory law under Section 104 InsO, the single agreement concept is fully recognized under German law, albeit not being mandatory to effect close-out netting for privileged transactions. Please see the answers to questions I.1.k) and l) below for details in this regard.

The existence of a master agreement containing a single agreement clause is, however, **not** a prerequisite for the application of Section 104 InsO. Irrespective of whether bundled under a master agreement or entered into on a bilateral basis, transactions which meet the general product-related requirements stemming from Section 104 para. 1 InsO are privileged. Such privilege means that insolvency-related termination is possible and the selection right of the insolvency administrator does not apply.

Section 104 para. 3 InsO does, however, acknowledge the existence of master agreements containing a single agreement clause with the effect that all individual transactions under such master agreements form one transaction within the meaning of Section 104 para. 1 InsO and can hence be terminated as if they were one single transaction.[69] Additionally, Section 104 para. 3 sentence 2 InsO even acknowledges that the same consequences apply if the master agreement contains privileged and non-privileged individual transactions at the same time. In this case, however, the termination would only affect the privileged transactions, and the non-privileged transactions would be subjected to the general principles.

<u>Legal effects of the application of Section 104 InsO</u>

(iii) Termination and determination of a compensation claim according to Section 104 para. 2 InsO

As stated above and according to a direct application of the law, privileged transactions are not subject to the selection right of the insolvency administrator and would therefore end up automatically at the opening of insolvency proceedings. Consequently, all primary claims for delivery of the good become automatically void and convert into a monetary compensation claim. This compensation claim is determined by the market or the exchange value of the terminated individual contract and will be established according to

- the market or exchange price for a replacement transaction entered into immediately, at the latest 5 business days after the opening of the proceeding or

[67] Comparable to Section 118 RegE, imprinted in Kübler/Prütting *Das neue Insolvenzrecht*, volume 1, p. 292.
[68] Breutigam/Blersch/Goetsch, *Berliner Kommentar zum Insolvenzrecht*, Section 104 margin no. 11 InsO.
[69] See Kübler/Prütting/Bork,Tintelnot, *InsO – Kommentar zur Insolvenzordnung*, Section 104 margin no. 41 et seqq. InsO.

- if no replacement transaction is concluded, the market or exchange value of a fictitious replacement transaction which could have been concluded at the second business day after the opening of the proceedings.

In the event that, due to various market reasons, a replacement transaction cannot be concluded, the market or exchange value of the terminated transaction has to be determined in a fair and appropriate manner[70].

(iv) Permissible deviations from Section 104 InsO by way of contractual arrangements (Section 104 para. 4 InsO)

- Statutory law under Section 104 para. 4 InsO provides that the parties could validly enter into deviating contractual arrangements if such arrangements are compliant with the material principles of the law.[71] They can in particular agree that insolvency-related termination can occur prior to the opening of insolvency proceedings, in particular being triggered by the **filing** for such procedure,

- include all individual transactions into such termination, becoming originally due after the termination date but prior to the opening of insolvency proceedings,

- the valuation date is established in relation to the contractual termination instead of the opening of insolvency proceedings,

- a replacement transaction can occur up until the 20th business day following the ultimate contractual termination, if so required for a value saving winding up of the portfolio and

- in the absence of actual replacement transactions, the respective valuation date can be chosen between contractual termination and the end of the 5th business day thereafter.

The EFET General Agreement allows the stipulation of such deviations. This includes the termination event (filing for insolvency instead of opening of insolvency proceedings, thereby including grace periods), valuation date and valuation methodology.

Additional deviations are possible if they do not contradict the **material principles** of the law.[72] Even though Section 104 para. 4 InsO remains silent on such general principles, it can be concluded that deviations which contribute to an orderly and market-compatible winding up are accepted. Section 104 InsO has been introduced in favour of market participants using master agreements and applying the principles of close-out netting, rather than to protect the insolvency estate of the insolvent counterparty.[73] Against this background, arrangements which would allow the non-insolvent counterparty to take undue speculative positions to the disadvantage of the insolvency estate, for example leaving it unclear if and when transactions would be terminated or valuated, would violate such material principles. As none of the provisions of the EFET General Agreement falls under this category, they can be viewed as valid and enforceable.

[70] See details in Section 104 para. 2 InsO.
[71] Section 104 para. 4 InsO was updated on 29 December 2016 to be in line with BGH 9 June 2016-IX ZR 314/14, ZInsO 2016,1299.
[72] BGH WM 2016, 1168; the Federal Supreme Court stated that a contractual termination and close-out netting clause in a master agreement for financial derivative transactions is invalid pursuant to Para. 119 InsO, to the extent it deviates from the statutory principles enshrined under the old version of Section 104 InsO; BT-Drucks. 18/9983, p. 9.
[73] BR-Drucks. 548/16, p. 6; BT-Drucks. 18/9983, p. 9 et seqq.

e) We would also like to know whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.).

I.1.e): Publicly available information about the proceedings

In the course of insolvency proceedings, certain information is disclosed publicly. Pursuant to Section 23 InsO, provisional measures taken by the insolvency court by means of a court resolution are disclosed on the internet.[74] Such resolution usually contains the date and time outlining as of when the provisional measures shall take effect; in case the resolution does not disclose said point in time, the respective measure shall be effective as of noon.[75] The request to initiate insolvency proceedings will, however, not be disclosed to the public. In case the insolvency proceedings are opened by means of a court resolution, said resolution will also be disclosed to the public.[76]

f) In addition, please provide a general description of limitations in your jurisdiction, if any, applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the EFET General Agreement; (b) between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the EFET General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement. Please base your opinion on the following additional assumptions:

- ***The relevant EFET General Agreement is governed by any law (including English or German law or the laws of your jurisdiction).***
- ***After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the insolvency laws of your jurisdiction and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty.***

I.1.f): General Requirements for set-off

Set-off is a defined legal term under German statutory law. It is defined as a way to settle and extinguish existing obligations without transferring good title, but by off-setting an extinguishing and corresponding obligation of the same nature and value.[77] Statutory set-off requires that the mutual obligations are effectively due and of a similar nature. Such similarity is given in all cases of corresponding payment claims, rendering mutual payment obligations the most prominent practical example for the application of set-off.

Set-off is exercised by means of the so-called set-off declaration (*Aufrechnungserklärung*). Such set-off declaration only takes effect in the presence of a set-off situation (*Aufrechnungslage*) and in the absence of a prohibition to declare set-off (*Aufrechnungsverbot*).

[74] Section 9 para. 1 sentence 1 InsO; see www.insolvenzbekanntmachungen.de.
[75] Section 27 para. 3 InsO.
[76] Section 27 para. 1 InsO.
[77] Section 387 et seqq. BGB.

Limitations to set-off

Apart from a number of mandatory statutory exemptions[78], set-off is subject to the contractual freedom and, in particular with a view to the due date and mutuality, parties are to a large extent free to contractually construct a set-off situation (*Aufrechnungslage*). Relevant legal exemptions include the provision to set-off against damages relating to tort or – for example – against the equity injection obligation of a shareholder.

Mutuality requirement and insolvency related limitation to set-off

Furthermore, statutory law provides for restrictions on deviations from the mutuality requirement. As a rule, set-off can only take effect between two parties which themselves hold corresponding claims of similar nature, and the set-off situation cannot contractually be expanded by including claims of or against third legal entities, including group affiliated entities. Such group settlement clause (*Konzernverrechnungsklausel*) usually contains the provision that a group entity (as debtor) is entitled towards its counterparty to settle its debt with a claim, another group entity has against the counterparty, or the group entity (as creditor) is entitled towards its counterparty to settle its claim with a debt, another group entity is obliged to pay against the counterparty.[79] As a consequence, such clause would allow for set-off even in the absence of a set-off situation insofar as the mutuality requirement is not met. The Federal Court of Justice ruled that a settlement pursuant to such group settlement clause which is declared by the group entity (as debtor) **after** the opening of insolvency procedures is **invalid**.[80] Please note in this regard that the inversely case (i.e. if the group entity is the creditor) has not been decided by the Federal Court of Justice, however, legal literature and the jurisdiction of the Higher Regional Courts deem such settlement also invalid.[81] The settlement may also be invalid in the event the creditor obtains the possibility to settle the mutual claims by a contestable act pursuant to the insolvency contestation rights.[82]

In insolvency scenarios, set-offs are not affected by statutory and insolvency law if the set-off situation was existent or established **prior** to the **opening** of insolvency proceedings.[83] Under this prerequisite, set-off can even be declared thereafter. To be distinguished therefrom[84], set-off is invalid if

- the mutuality of the claim against the insolvent party was established **after the opening** of the insolvency proceedings, for example, if the obligation was established after its opening,
- a creditor in the insolvency proceeding has become the debtor of the insolvent party after the opening of insolvency proceedings,
- the creditor in the insolvency proceedings has acquired its claim, i.e. corresponding debt owed by the insolvent party, from another creditor after the opening of insolvency proceedings,
- the creditor in the insolvency proceedings has obtained the opportunity to set off its claim via a legal act which is **contestable** pursuant to insolvency law[85] (irrespective of whether it is actually contested or not) (if contested it is irrelevant whether or not the set-off is declared prior to or after the opening of the insolvency proceedings), or

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[78] See Sections 392 et seqq. BGB.
[79] Schwahn, *Konzernverrechnungsklauseln in der Insolvenz*, NJW 2005, 473.
[80] BGH decision IX ZR 224/03 dated 15 July 2004 and decision IX ZR 152/04 dated 13 July 2006.
[81] Higher Regional Court of Cologne decision 2 U 168/03 dated 10 November 2004; Schwahn, *Konzernverrechnungsklauseln in der Insolvenz*, NJW 2005, 473; Brinkmann in Kübler/Prütting/Bork *Kommentar zur Insolvenzordnung*, volume 3, November 2018, Annex Section 135, recital 54.
[82] E.g. BGH decision IX ZR 150/16 dated 3 May 2018; Dauernheim/Schörnig in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 5, recital 196.
[83] Section 94 InsO.
[84] Section 95 para. 1 sentence 3, 96 para. 1 InsO.
[85] See I.1.b) in this Legal Opinion.

- a creditor in the insolvency proceedings whose claim against the insolvent party is to be satisfied from the free property, i.e. not subject to the insolvency regime, of the debtor.

Thus it is in general not possible to create a set-off situation after the opening of insolvency proceedings which have not been existent before. Opposed to that, a set-off is in general valid if a creditor in the insolvency proceeding acquired its claim from another creditor prior to the opening of insolvency proceedings. However, depending on the circumstances, such acquisition of a claim prior to the insolvency proceeding might itself be contestable and as a consequence (i.e. as the claim was acquired by a legal act which is contestable), the set-off was invalid pursuant to Section 96 para. 1 no. 3.[86]

By way of exception, the prohibitions of set-off outlined above shall not preclude the disposal of financial collateral within the meaning of Section 1 para. 17 of the German Banking Act and where set-off is effected no later than on the day of the opening of insolvency proceedings[87]. Insolvency-related close-out netting can be understood as a methodology to create a set-off situation insofar as all rights and obligations of the outstanding, and not yet due, individual contracts are converted into mutual due (payment) claims of similar nature (i.e. to exchange cash). Essential elements of such a conversion and/ or creation of a set-off situation is the possibility to terminate and convert pre-existing individual contracts for electricity deliveries without violating the rights of the insolvency administrator to exercise his selection right pursuant to Section 103 InsO to vote for continuation or cancellation of contracts. The pertinent legal privilege according to Section 104 InsO has already been explained above. As insofar this set-off situation provides for the necessary mutuality of claims and exists prior to the opening of an insolvency proceeding, the application of termination and the conversion into a single termination amount is in line with statutory requirements under general set-off rules as well as insolvency related limitations.

g) Automatic Termination:

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

<u>I.1.g) a): Applicability of Automatic Early Termination</u>

In order to effectively pursue close-out netting of individual contracts under the EFET General Agreement, thereby respecting its terms and conditions, it is necessary that the contractual clause on termination

- effects termination <u>**prior**</u> to the opening of an insolvency proceeding[88] and
- is in line with the general principles of mandatory insolvency law.[89]

[86] Riedel in *Praxishandbuch Insolvenzrecht*, Band 2, Teil 7/2.5.
[87] Section 96 para. 2 InsO.
[88] In order to avoid falling under the realm of statutory law.
[89] Section 104 para. 4 InsO.

If it were any different, an insolvency-related termination, irrespective of whether served by notice or automatically, would be considered void and the privileged contracts under the General Agreement would become subject to the statutory netting procedures as described above. The termination date (filing for insolvency vs. opening of insolvency proceedings), the valuation date and the valuation responsible party would be applied according to statutory provisions and in deviation from the EFET contractual clauses.

In order to meet both prerequisites, a viable option and widely practiced is to opt for **Automatic Early Termination** taking effect upon the **filing** for insolvency proceedings. Even if assuming that termination by notice would be **equally effective**, Automatic Early Termination is more prone in ensuring that the relevant triggering event is not missed. This becomes all the more true when considering that it releases the market participants from the need to constantly monitor their counterparties, a task which could quickly turn into a burdensome exercise with good prospects of being unsuccessful as information about imminent insolvency applications is usually not shared beforehand or being widely transparent thereafter.

Regarding the second prerequisite: The **filing** for the opening of insolvency proceedings in relation to one's own assets is a legally explicitly permissible deviation pursuant to Section 104 para. 4 InsO and therefore in line with the material principles of statutory insolvency law.[90] Also, the filing will be recorded and the respective date and time can serve as reference to determine further steps in converting the outstanding individual transactions and to determine as well as actually charge the consequential termination amount.

When considered in the light of **third party institutions,** the situation is different. Not only does Section 104 para. 4 no. 1 InsO not mention third party applications as a tolerable deviation, it could also lead to unwanted consequences, as obviously unfounded and/ or frivolous third party institutions may lead to the automatic termination of entire portfolios. Therefore, if the parties want to apply Automatic Early Termination with regard to third party institutions, a reasonable grace period to exclude unfounded and frivolous third party applications is recommended. Realistically, such grace period should not be shorter than ten, and not longer than 14 days. A period that is too short would not serve the purpose of getting a meaningful response from the insolvency court, whereas a grace period that is too long could be viewed as a non-permissible deviation to statutory law or might bypass the actual opening of the insolvency proceedings. In case of the latter, the contractual close-out netting mechanism would fall apart, as the termination would be deemed as not having occurred prior to the opening of the insolvency proceedings and the portfolio would therefore become subject to statutory netting.[91]

As a result, a grace period between ten and 14 days appears to be a reasonable choice, despite the fact that there will be no guarantee that within this time period, an unreasoned third party institution would be rejected or a well-founded application would have yet resulted in the actual opening of the proceedings. However, it has to be stated that Automatic Early Termination for third party institutions combined with a grace period covering a timeframe from ten to 14 days are widely used throughout the market and offer the benefit of a clearly determinable point in time when to evaluate the open trading positions as well as to enter into eventual replacement transactions.

As after the enactment of the new Section 104 InsO which provides for statutory netting even if no contractual termination has occurred prior to the opening of the insolvency proceeding, there is less legal need to designate a termination event well ahead of the actual opening of the insolvency proceeding, Automatic Early Termination could, for example, also be linked to the beginning of the day of the opening of the insolvency proceeding. Such contractual Automatic Early Termination used as a back stop would not exclude serving a discretionary termination

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[90] Section 104 para. 4 sentence 1 InsO.
[91] Section 104 para. 2 sentence 2 InsO.

notice upon other material termination events under the General Agreement **prior** to the Automatic Early Termination taking effect.

However, **additional transactions** or other legal acts performed or entered into with the later insolvent counterparty **after a filing** for the opening of an insolvency proceeding has already been served, present a higher risk of contestation by the insolvency administrator as the imminent illiquidity the counterparty is already evidenced by concrete legal action aimed at leading into an insolvency proceeding[92].

A further alternative would be to render Automatic Early Termination solely applicable to the objective existence of a Material Reason to open up insolvency proceedings. Such triggering event is considered as being in line with the material principles of the law and would therefore ensure that the portfolios are terminated well ahead of the actual opening.[93] The obvious downside of said triggering event, however, is that it could become difficult to determine the exact point in time at which grounds for insolvency have in fact materialized and upon which the termination amount has been calculated.

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

<u>I.1.g) b): Grace period</u>

Recapping what was stated in the answer to the previous question, and by assuming that Automatic Early Termination was opted for to apply in case of third party institutions, it is advisable to add a grace period in order to rule out clearly frivolous and unsubstantiated petitions. Such grace period should not be less than ten days and not exceed 14 days.

c) 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?

<u>I.1.g) c): Timing of Automatic Early Termination</u>

See above for details. In line with the non-exhaustive list of permissible deviations from Section 104 para. 4 InsO, there is no single optimal timing for Automatic Early Termination to take effect, however, the **filing of an application** to open an insolvency proceeding is a safe and viable option. It should be, however, mentioned that, given that the filing of insolvency petition is not made public by the respective insolvency court, there is a risk that the Automatic Early Termination will occur without each party to the EFET General Agreement being aware of such circumstance thus resulting into deliveries between the parties lacking a contractual basis and potentially becoming subject to retroactive unwinding under the general rules of unjust enrichment[94]. On the other hand, triggering events which occur later in the process but still prior to the actual opening of the insolvency proceeding leave more room for discretionary management of the contractual portfolio including serving termination by notice, however, such legal acts occurring after the filing and directly in the run-up to the insolvency proceeding present an increased risk of successful contestation by the insolvency administrator[95].

[92] See Section 130 para 1 no.2 InsO which allows the contestation of acts performed after the filing for the opening of the insolvency proceeding if the creditor was aware of either the illiquidity of the debtor or the filing for the opening of the insolvency procedure.
[93] Section 104 para. 4 sentence 1 no. 1 InsO.
[94] Under Section 812 et seq. BGB.
[95] See Section 130 para. 1 no. 2 InsO.

d) ***Please supply specific language for purposes of customizing Section 10.4 of the EFET General Agreement to implement your recommendation and the optimal termination timing.***

I.1.g) d): Additional / alternative wording proposals

If a reasonable grace period is applied to third party institutions, no additional specific language is needed to customize Section 10.4 of the EFET General Agreement. However, if the parties do not agree on such grace period, frivolous and/or obviously unjustified third party applications could lead to unwanted termination of existing trading portfolios. To avoid this from happening, the applicability of Automatic Early Termination could be either ruled out entirely or the scope of actions where Automatic Early Termination applies could be limited in Section 10.4 or respective elections as follows:

"The applicability of Section 10.5(c) (iv) shall be limited to

- *own institutions of the party and - if applicable its relevant supervisory authority - or*
- *such party is in a situation which meets the material preconditions to open such proceedings."*

In line with current practice, such wording could as well be introduced to narrow the definition section of Section 10.5(c) (iv) as follows and replace the provisions on a grace period*:*

"And either the party itself, or - if applicable - its relevant supervisory authority, has presented the petition, such Party is insolvent or is otherwise in a position which justifies the institution of such insolvency proceedings."

e) ***Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in Section 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Germany or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?***

I.1.g) e): General validity of the Automatic Early Termination clause

As outlined above, the automatic termination of an EFET General Agreement, including all Individual Contracts thereunder, is valid and enforceable only if exercised

- for non-insolvency-related termination events prior to the opening of the insolvency proceedings,
- upon insolvency-related termination events well before an insolvency scenario could become reasonably expected or
- if exercised upon insolvency related termination events in an insolvency scenario the transactions must fall under the categories of transactions which are privileged according to Section 104 InsO, and

- prior legal acts of debtor and creditor relating to the transactions under the General Agreement as well as the conclusion of the General Agreement itself containing an Automatic Early Termination cannot be successfully contested by the insolvency administrator.[96]

If the General Agreement contains both privileged and non-privileged transactions at the same time, such termination would only affect the privileged transactions.[97] In the absence of Automatic Early Termination or a termination by notice, privileged transactions would, upon the opening of the insolvency proceedings, automatically be netted in accordance with the statutory provisions.[98]

<u>Challenge rights of the insolvency administrator with respect to Automatic Early Termination</u>

Irrespective of whether the termination was triggered via Automatic Early Termination or insolvency-related termination events, every legal act conducted by the debtor and the creditor, having taken place up to a maximum of ten years before to the opening of the ultimate insolvency proceedings, can – under specific additional prerequisites and if found to be detrimental to the insolvency estate as well as other creditors – be subject to contestation by the insolvency administrator. Such contestable legal acts can be, inter alia, the conclusion of the General Agreement, the inclusion of insolvency-related termination events, the application of Automatic Early Termination as well as every single individual transaction thereunder. However, these contestation rights are, according to German law, considered to fall under the general rights and obligations of an insolvency administrator and are hence in no way a particularity of commodity or commodity derivative trading under the EFET General Agreement. It is, however, important to note that the mechanisms of Automatic Early Termination do not constitute a “legal act” and are as such not subject to challenge rights of an insolvency administrator.

h) Assuming you recommend not to elect Automatic Termination (as defined in Section 10.4 of the EFET General Agreement) upon the occurrence of an event described in Section 10.5(c) of the EFET General Agreement:

a) would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in Section 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?

<u>I.1.h) a): Termination events for termination by notice</u>

See above for a detailed explanation. Exercising insolvency-related termination rights in case of an actual insolvency is only permissible with respect to privileged transactions. Non-privileged transactions become subject to the selection right of the insolvency administrator. For all non-insolvency-related termination events, a termination can be served by any notice equaling to Automatic Early Termination and is valid and enforceable if served prior to the opening of insolvency proceedings.

Termination by notice of privileged transactions upon insolvency-related termination events and in an actual insolvency scenario can be linked to the filing of an application for insolvency proceedings, the opening of the insolvency proceeding or any termination event which constitutes a permissible deviation from Section 104 para. 4 InsO. None of the termination events should occur after the opening of an insolvency proceeding.

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[96] See under I.1.b).
[97] Section 104 para. 3 sentence 2 InsO.
[98] Section 104 para. 3 sentence 1 InsO.

b) ***are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in Section 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Germany or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?***

I.1.h) b): Challenge rights with respect to Material Reasons to terminate

Apart from the requirement to restrict insolvency-related termination events to privileged transactions, the above mentioned legal acts are as a rule permissible and the related obligations can be enforced. However, as explained above, all legal acts between Party A and Party B, i.e. creditor and debtor, are subject to potential challenge rights by the insolvency administrator according to the general rules.

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

I.1.i): Calculation and enforceability of the termination amount

Section 11 of the EFET General Agreement will in any case be valid and enforceable if the termination was served due to non-insolvency-related events and as such become effective prior to the opening of insolvency proceedings. If the agreement and the individual contracts thereunder are terminated for insolvency-related events upon the actual occurrence of said events, such termination would only be valid and enforceable with respect to privileged transactions. In that case, the privileged transactions could be converted into a settlement amount in line with the provisions of Section 11 EFET General Agreement. As outlined above, Section 11 of the EFET General Agreement does, in fact, deviate from the statutory provisions contained within Section 104 para. 4 InsO, thereby prescribing a different methodology for the establishment of a termination amount. However, this alteration is in line with the permissible deviations as outlined under Section 104 para. 4 InsO.

Secondly, with a view on contestation rights according to Section 129 et seqq. InsO, the determination of the termination amount, absent any particular discretion in calculating elements of it, constitutes a factual operation rather than a “legal act” and is as such not subject to contestation.

j) ***Do the laws of Germany recognize that the close-out netting provisions in Sections 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party?***

I.1.j): Challenge rights with respect to the termination amount

As previously explained, the close-out netting provisions in Sections 10 to 11 of the EFET General Agreement would only apply to those individual contracts which have been validly terminated. An insolvency-related termination in an insolvency scenario would only affect privileged transactions. All other contracts cannot be validly terminated upon the occurrence of an insolvency-related event, and will hence become subject to the selection right of the insolvency administrator.

As any other legal act between creditor and debtor, the conclusion of individual contracts under the EFET General Agreement can become subject to challenge by an insolvency administrator according to the General Rules.

k) 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?

I.1.k): Single agreement concept

In light of the statutory law in Section 104 InsO, the single agreement concept is recognized under German law, despite not being mandatory to effect close-out netting.[99] Close-out netting for insolvency-related reasons is valid and enforceable for privileged transactions, irrespective of whether these transactions are concluded bilaterally on a bespoken basis or whether they form part of an overarching master agreement. A master agreement with a single agreement clause, however, eases the assessment of whether the underlying transaction does, in fact, meet the requirements of Section 104 para. 1 InsO. In particular, this holds true with respect to the general requirements of dated transactions, transactions relating to commodities or financial transactions with a market or exchange price in addition to constituting either fixed date transactions or financial transactions.

l) If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

I.1.l): Deviations from the single agreement concept

The single agreement concept had particular importance under the old German Insolvency Code.[100] In the absence of any further legal privilege it was necessary to ensure that every single transaction was terminated prior to an insolvency-related event, thereby then separated from the insolvency estate in an already terminated and cash-converted manner. In the absence of this, the insolvency administrator could have exercised his selection rights with the consequence of differentiating between *in the money* and *out of the money* individual contracts.

With the introduction of the statutory netting provisions for privileged transactions, such bundling under a single agreement concept does no longer have the same importance. Statutory netting under Section 104 para. 3 InsO, as well as the permissible contractual deviations therefrom, is now applicable irrespective of whether the individual transactions are bundled under a general agreement or concluded bilaterally on a bespoken basis.[101]

If the general agreement contains individual transactions which have either not been terminated because the termination (irrespective of by means of Automatic Early Termination or termination by notice) was invalid due to the fact that the transactions did not qualify as privileged transactions, or a termination had not been served in the first place, the respective consequences are as follows:

- The termination with respect to privileged transactions is valid and enforceable and these transactions form part of the contractual netting procedure.

- Not terminated privileged transactions cease to exist and automatically convert into payment claims according to the statutory provisions.[102]

[99] As opposed to the situation prior to the enactment of the current version of Section 104, see Section 104 para. 1, 3 InsO .
[100] See old version of Section 104 InsO, valid until 22 December 2016.
[101] Section 104 para. 4 InsO.
[102] Section 104 para. 1 sentence 1 InsO.

- Non-privileged transactions remain legally effective and become subject to the subsequent selection right of the insolvency administrator. Upon the decision of the insolvency administrator, they need to be either honored by the creditor or become claims against the insolvency estate. Close-out netting according to the EFET General Agreement or Section 104 InsO does not apply.

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

<u>I.1.m): Denomination of payments</u>

According to Section 45 InsO, all cash payment claims against the insolvency estate must be denominated in Euro. Claims originally under a different currency need to be converted into Euro at the exchange rate prevailing at the date of the opening of the insolvency proceedings.[103] The respective insolvency creditor has to equally calculate and convert the claims into eEuro. The final distribution to the insolvency creditor will also be made in Euro.[104]

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

<u>I.1.n): The impact of regulatory status of the insolvent counterparty on insolvency proceedings</u>

The German Insolvency Code itself does not differentiate between various categories of entities. With regard to the provisions being particularly important for close-out netting[105], this principle is equally applicable.

However, outside the Insolvency Code, there are a number of particular legal provisions (*leges speciales*) which take priority over the provisions of the InsO. This holds especially true for insurance companies where claims cannot be set-off against claims belonging to the *Sicherungsvermögen* of the insurance companies, or the partial limitation of set-off within the Capital Investment Code[106] as well as the segregated assets of investment management companies thereunder.[107] However, generally speaking, these special provisions do usually not limit the application of Section 104 InsO within the ordinary course of electricity trading under an EFET General Agreement, irrespective of the nature of the counterparty.

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[103] Section 45 sentence 2 InsO; BGH NJW 1989, 3155 (on the KO).
[104] E.g. BGH decision IX ZR 164/88 dated 22 June 1989; *Bruder* in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 2, recital 518.
[105] Sections 104, 103 and 119 InsO.
[106] German Investment Code (*Kapitalanlagegesetzbuch – KAGB*) dated 4 July 2013 (BGBl. I p. 1981).
[107] Section 103 para. 1 sentence 2 VAG.

2. Non-insolvency related Material Reasons

Please discuss the issues outlined above under d), e) and f), as well as the following question:

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

I.2.a): Enforceability of non-insolvency-related termination events

Non-insolvency-related termination events are not considered to be in conflict with the German Insolvency Code, but they are subject to the general rules and limitations of the German Civil Code (BGB). To that end, a termination notice is a legal act which does not require any statutory format (i.e. can be served in writing, via electronic communication or orally). However, the creditor bears the onus of proving that a termination notice has been served, making it advisable to serve a termination notice in a documented manner and by representatives of the terminating party, where their proxy to act can be easily evidenced. Secondly, a termination notice needs to be clear, thereby leaving no room for doubt whether a termination has been served or – for example – has just been threatened.[108] Thirdly, like any other legal act, termination falls under the requirement of the principle of good faith, thereby excluding untimely notices, as well as such termination notices in clear contradiction[109] to previous legal acts which could have been understood as a waiver of termination rights. However, these restrictions apply irrespective of the nature of the underlying transaction and do hence not represent a particularity of electricity trading under the EFET General Agreement.

II. Multibranch Parties

We would like you to distinguish between (1) a Multibranch Party incorporated, organized or having its centre of main interest in Germany and (2) a Multibranch Party incorporated, organized or having its centre of main interest <u>outside</u> Germany, but operating through one or more branches in Germany.

II.: General principles for multibranch parties / main and secondary insolvency proceedings

Multinational or cross-border insolvency scenarios with a German angle could occur under the following legal frameworks:

- Under the EU Insolvency Regulation[110],
- under the Winding-Up Directive for CRR credit institutions, insurance companies and investment firms which are excluded from the Insolvency Regulation[111],
- under general German international insolvency law with respect to entities where neither the EU Insolvency Regulation nor the Winding-Up Directive applies[112].

According to the EU Insolvency Regulation, insolvency proceedings against an insolvent entity may be initiated in the jurisdiction where the **centre of main interest** of the insolvent entity is situated.[113] In general, and in the absence of any evidence to the contrary, this would be the legal seat of the entity. Indications to the contrary could be, inter alia, a permanent location of the entity's management in a

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[108] Higher Regional Court of Düsseldorf decision I-24 U 157/11 dated 19 June 2012; Weidenkaff in Palandt, *Bürgerliches Gesetzbuch* 78th edition 2019, Section 542, recital 12.
[109] Higher Regional Court Hamm decision 31 U 134/03 dated 21 July 2004.
[110] Regulation 2015/848/EC.
[111] Directive 2001/24/EC.
[112] Section 335 et seqq. InsO.
[113] Art. 3 para. 1, recital 23 Regulation 2015/848/EC.

different jurisdiction. Under the applicability of the EU Insolvency Regulation, the insolvency proceedings in the jurisdiction at the centre of main interest would be considered the only **main insolvency proceeding**.[114]

In addition to such main proceedings, courts of other EU member states could – under the applicability of the EU insolvency regulation – open up so-called territorial or **secondary insolvency proceedings**. Said additional proceedings would be limited in scope to the assets within such other EU member state and require an establishment of the insolvent company in that state.[115]

With respect to legal entities falling under the Winding-Up Directive, such territorial or secondary insolvency proceedings are excluded.

Payment claims could become subject to main insolvency proceedings as well as territorial or secondary insolvency proceedings. The decisive factor is where the payment claims are situated. In that regard, payment claims are assets situated in the jurisdiction out of which they have to be paid by the debtor. Absent any indication to the contrary, this would usually be the centre of main interest of that entity. As a consequence, if the centre of main interest of the debtor is located in Germany, payment obligations of that entity to be settled from Germany would become subject to German insolvency law under the main proceeding.

If the centre of main interest of the debtor is in a member state other than Germany, payment obligations to be settled by a German branch of that entity could become subject to territorial or secondary insolvency proceedings under German law.

Payment obligations of an entity having its centre of main interest in Germany, but to be settled from an establishment in another member state, could become subject to territorial or secondary insolvency proceedings under the law and jurisdiction of that other member state.

As a consequence and under the applicability of the EU Insolvency Regulation, close-out netting of payment obligations arising under an EFET general agreement with

- the legal entity having its centre of main interest in Germany are subject to German law;
- a branch of a legal entity with centre of main interest in Germany but the branch being situated in a different member state may become subject to the law and jurisdiction of that second member state under secondary proceedings;
- a German branch of a legal entity having its centre of main interest in another member state is subject to German law, however, only as it concerns territorial or secondary insolvency proceedings in Germany.

In case the EU Insolvency Regulation does not apply, the general German international insolvency law fills the gap[116].

Insolvency proceedings are, as a rule, governed by the law of the jurisdiction where the insolvency proceedings have been opened.[117] If such insolvency proceedings under a different insolvency law as German law extend to assets situated within Germany, the rules of conflict on international law apply. However, any right to declare a set-off will remain unaffected by the opening of insolvency

[114] Recital 23 Regulation 2015/848/EC.
[115] Art. 3 para. 2, recital 23 Regulation 2015/848/EC.
[116] Section 335 - 358 InsO.
[117] Section 335 InsO.

proceedings, provided that such right did exist in accordance with the law governing the relevant claim of the insolvent party at the time the insolvency proceedings were instituted.[118]

In addition, the German Insolvency Code explicitly provides that close-out netting arrangements agreed between the parties under a general agreement would be evaluated in accordance with the law of that agreement.[119] Therefore, if under said scenario payment claims situated in Germany would become subject to insolvency proceedings of a jurisdiction other than Germany (because the legal seat or the centre of main interest of that insolvent entity was situated in a different jurisdiction), the close-out netting provisions would be either upheld or rejected in accordance with the laws of the jurisdiction governing the underlying agreement or the laws of the jurisdiction where the insolvency proceedings have been initiated.

Opposed to that, if the insolvency proceedings have been opened under German law (main proceedings, secondary or territorial proceedings) payment claims to be settled from within Germany (as obligation of the insolvent legal entity or as obligation of the insolvent German branch of that legal entity) would be assessed according to substantive German insolvency law.

1. German Multibranch Party

Please base your opinion on the assumptions outlined under Part C.I and the following additional assumptions:

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

Please discuss the following issues:

a) ***Would there be any change in your conclusions reached under I.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?***

<u>II.1.a): Conclusions for German multibranch parties</u>

No, such fact would not alter or amend our conclusions.

The legal framework applies irrespective of whether or not Party A entered into and conducted business under the EFET General Agreement on a multibranch basis or has entered into transactions under the agreement through one or more branches. Insolvency proceedings against Party A can be opened in Germany irrespective of the relevant contractual framework. Under the EU insolvency regulation, insolvency proceedings are opened in Germany as Party A has its centre of main interest in Germany[120]. The Winding-up Directive only excludes territorial or secondary insolvency proceedings. Thus, if Party A is a CRR credit institution, German insurance company or German investment firm, the main insolvency proceedings are again opened in Germany. Under German international insolvency rules, the main insolvency proceedings are opened in Germany as Party A has its general place of jurisdiction in Germany[121].

[118] Section 338 InsO.
[119] Section 340 para. 2, third alternative InsO.
[120] Art. 3 para. 1, recital 23 Regulation 2015/848/EC.
[121] Sections 335 et seqq., 3 InsO.

b) Would the EFET General Agreement be treated as a single unified agreement by the German receiver under the laws of Germany, 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?

II.1.b): Single agreement concept with regard to German multibranch parties

In general the German administrator under the laws of Germany treats the EFET General Agreement as a single unified agreement if the main insolvency proceedings are opened in Germany. If insolvency proceedings are opened in Germany, such insolvency proceedings include, in general, not only the Individual Contracts concluded by Party A in Germany but also the Individual Contracts concluded by foreign branches of Party A.

However, in addition to the main insolvency proceeding in Germany, territorial or secondary insolvency proceedings could be opened in other jurisdictions which are generally recognized in Germany. The recognition is only subject to a few limitations[122] (e.g. the foreign court needs to have jurisdiction). If the close-out netting of payment obligations is unenforceable in the foreign jurisdiction, the relevant payments claims in that foreign jurisdiction cannot be enforced by or against the German insolvency administrator. As a consequence, the net payment claim of the insolvent Party A under the General Agreement would be reduced accordingly (and the payment claim of the solvent Party increased).

2. Foreign Multibranch Party

Please base your opinion on the following additional assumptions:

- ***A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country ("Country H") other than Germany has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Germany (the "German Branch").***
- ***After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.***

Please discuss the following issues:

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

[122] See e.g. Section 343 para. 1 sentence 2 InsO, Art. 19 Regulation 2015/848/EC.

b) *Could local creditors of the German Branch initiate separate proceedings in Germany even if the relevant authorities in Germany did not do so?*

II.2.a)+b): Separate proceedings for foreign multibranch parties

(i) Under the EU insolvency regulation, a German court might open territorial or secondary insolvency proceedings after the start of the main insolvency proceedings in Country H. Said additional proceedings would be limited in scope to the assets situated in Germany and require an establishment of Party F in Germany[123]. Any territorial or secondary insolvency proceedings by a German court in relation to assets situated in Germany take precedence over the foreign insolvency proceedings in relation to the assets situated in Germany[124]. With respect to legal entities falling under the Winding-Up Directive, territorial or secondary insolvency proceedings are excluded. Under the German conflicts of law rules of the German Insolvency Regulation, territorial or secondary insolvency proceedings might be opened in Germany also if none of the previous is applicable[125]. Said additional proceedings would be limited in scope to the assets situated in Germany and in general require a branch of Party F in Germany or special interest if there is no branch of Party F[126]. Payment claims can be settled from within Germany if Party F has a branch in Germany.

(ii) Any territorial or secondary insolvency proceedings in Germany, provided they are permissible, require that they are opened by a German court. Creditors can file their request for the opening of insolvency proceedings with the competent German court. Under the German Insolvency Regulation,[127] a creditor's application is admissible if the creditor shows evidence that he/she has a legal interest in the opening of insolvency proceedings and substantiates his claim and the reason for the opening. In addition, special interest needs to be substantiated if Party F only has assets but no branch in Germany[128].

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

II.2.c): Single or multiple termination amounts in case of multibranch parties

If a German court opens separate insolvency proceedings in Germany, they relate to all assets situated in Germany.[129] With regard to payment claims, please refer to the introductory section on multibranch parties. Therefore, separate insolvency estates might be created even though they relate to the same General Agreement. If not already terminated and closed out, Section 104 InsO would apply with respect to privileged transactions. Therefore potentially the problem could arise that a German insolvency administrator considering a single EFET General Agreement would require a

[123] Art. 3 para. 2, recital 23 Regulation 2015/848/EC.
[124] Art. 3 para. 2 Regulation 2015/848/EC.
[125] Sections 354 et seqq. InsO.
[126] Section 354 InsO.
[127] Section 14 InsO.
[128] Section 354 para. 2 InsO.
[129] Section 354InsO.

counterparty of the German Branch of Party F to pay the termination amount of Individual Contracts entered into under the General Agreement with the German Branch to the administrator of the German Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement. However, this problem does not arise when the EFET General Agreement has already been closed out prior to the opening of the insolvency proceeding and there are no longer any open claims under the EFET General Agreement and the Individual Contracts. Please see in this respect in particular the introductory section regarding multibranch parties regarding close-out netting of payment obligations and any rights to declare set-off[130].

d) Please consider your answer to your question assuming instead that Party F has no branch located in Germany, but has assets in Germany.

II.2.d): Single or multiple termination amounts in case of assets in Germany instead of a branch

The EU Insolvency Regulation does not provide for jurisdiction when there are only assets but not an establishment in a member country[131]. However, a German court may still open territorial insolvency proceedings under the German Insolvency Regulation.[132] If Party F does not have an establishment but assets situated in Germany, a German court requires (in addition to the general requirements) that the creditor substantiates its special interest in the opening of insolvency proceedings in Germany. The German Insolvency Regulation states that there is such special interest if in particular the creditor is likely to be considerably disadvantaged in a foreign proceeding compared to a domestic proceeding[133]. The details relating to said special interest have been widely discussed in German legal literature.[134] The above does not apply to entities falling under the Winding-Up-Directive, as for entities within its scope territorial or secondary insolvency proceedings are excluded.

III. Collateral

Please base your opinion on the following additional assumptions:

- ***Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.***
- ***The counterparties agree that Eligible Credit Support will include cash and letters of credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.***

Please discuss the following issues:

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

III.a): Transfer of ownership of eligible credit support

According to Section 3 no. 3 of the Credit Support Annex, Eligible Credit Support can be provided by either (i) transferring cash to the account of Party B or (ii) providing a letter of credit. A letter of credit is defined as a standby letter of credit, bank guarantee or similar document which is issued irrevocably

[130] See e.g. Section 335 InsO.
[131] Art. 3 paras. 1, 2, recital 23 Regulation 2015/848/EC.
[132] Section 354 InsO.
[133] Section 354 para. 2 InsO.
[134] Reinhart in *Münchener Kommentar zur InsO*, Volume 3, 3rd edition 2014, Section 354, recital 9 et seqq. InsO.

by a commercial bank, thereby obliging it to release the amount guaranteed upon first demand to Party B.

Against this background, the following explanations will distinguish between both kinds of an Eligible Credit Support i.e. a transfer of cash and a transfer of a letter of credit.

We base our conclusions on the following additional assumptions:

(i) Party A, providing the collateral, as well as the Party's respective bank (Bank A) are both incorporated and/ or have their centre of main interest in Germany

(ii) Party B, receiving the collateral, and its respective bank (Bank B) are both incorporated and/ or have their centre of main interest in a third country.

In an international context, due to the fact that the payer's bank usually involves a second bank based in the beneficiary's home jurisdiction, it is common practice that the number of the parties involved in the cash transfer or the settlement of a letter of credit expands to four. Conclusively, this situation demands to break down legal relationships between Party A and Bank A as well as Party B and Bank B.[135]

a) Cash transfer

In order to successfully transfer the money to the beneficiary, Party B, a payment **services agreement** between Party A and Bank A will have to be concluded.[136] Cross-border transfers are usually considered to be a "chain of bank transfers". Party A concludes a contract with Bank A for the execution of a corresponding payment transaction. Generally, the parties involved in the transactions may freely agree on the applicable law; however, in light of this Opinion, we assume that the relationship between Party A and Bank A will be governed by German law as this is commonly stipulated according to statutory law.[137] Secondly, for the sake of simplicity, Bank A and Bank B are commonly connected by means of a clearing system. Thirdly, Bank B is connected to Party B by means of a payment contract and finally releases the transfer amount to Party B; such payment contract will be governed by the law of the jurisdiction the third country Bank B and Party B are situated in, provided that Bank B and Party B have not agreed otherwise.[138] If the transfer amount is credited to the bank account of Party B, Party A has fulfilled its obligation to provide an Eligible Credit Support under the Credit Support Annex.[139]

b) Letter of credit

The letter of credit encompasses a contractual obligation, entered into by Party A and Bank A, to grant a specified cash payment in a specified currency to Party B on behalf and under the instructions of Party A, in order to secure the payment obligations of Party A towards Party B, provided the latter meets precisely defined conditions and submits the prescribed documents within a fixed timeframe. All conditions and documents Party B has to provide to Bank A are expressly outlined within the letter of credit. A letter of credit is of an abstract nature, i.e. it is independent from the validity as well as all rights and obligations stemming from the underlying agreement between Party A and Party B, unless any act conducted by a party to the letter of

[135] Please note that we will not illuminate the legal relationship between Bank A and Bank B, which in view of a letter of credit is commonly governed by the Uniform Customs and Practice for Documentary Credits (UCP 600).
[136] Sections 675c et seqq. BGB.
[137] Section 6 para. 1 *AGB-Banken*.
[138] See also Haug in Schimansky/Bunte/Lwowski, *Bankrechts-Handbuch*, 5th edition 2017, Section 51a, recital 1.
[139] Please note that there is a legal debate on whether the obligation to transfer cash via a bank transfer is a fulfilment of the obligation pursuant to Section 362 BGB or Section 364 BGB, which, however, is of a subordinated importance on the question of Party A's fulfillment of its obligation under the Credit Support Annex; see BGH decision VIII ZR 157/97 dated 28 October 1998, decision XI ZR 236/07 dated 20 July 2010 or decision VIII ZR 161/03 dated 17 March 2004.

credit conflicts gravely with the fundamental understanding of a fair and honest behavior in a legal relationship.[140]

The legal relationship between Party A and Bank A is generally governed by the statutory laws of the jurisdiction both parties are duly established in, which we assume for this Opinion to be German law. However, the parties may opt for different applicable law regimes. The governing law, in view of the ultimate execution of a letter of credit depends on the provisions within the letter of credit itself. Therefore, Bank A may choose to involve Bank B in the execution (i.e. the payment of the guaranteed cash payment) of the letter of credit, in which case the execution will be governed by the laws of Bank B; if Bank A does not involve Bank B in the execution, the governing law will be German law.[141]

b) Would the laws of Germany 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?

III.b): Unconditional transfer of ownership

(i) For Eligible Credit Support in the form of cash, such transfer would be an unconditional transfer of ownership. Pursuant to Section 7 no. 3 of the Credit Support Annex, each Party agrees that all rights, titles and interests in and in relation to any Eligible Credit Support or interest amount which it transfers to the other party will vest in the transferee, thereby being exempted from any liens, claims, charges or encumbrances or any other interest of the transferor or of any third person. Nothing in the Credit Support Annex is intended to create, or does in fact create, favorable positions to either party in respect of any mortgage, charge, lien, pledge, encumbrance or other security interest in any cash or other property transferred by one party to the other. Therefore, the transfer of cash into the bank account of Party B does neither qualify as a pledge nor a transfer for security purposes, but as an unconditional transfer of ownership of the cash.

(ii) In view of a letter of credit no ownership (i.e. assets) is being transferred.

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?

III.c): No additional actions required to continue title

Under the laws of Germany, no further actions are necessary. Please note, however, that Party B may be obliged to take certain actions under its own governing law.

d) Are there any requirements in Germany 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?

III.d): No further administrative requirements

Under German law, no further requirements have to be met. Please note, however, that Party B may be obliged to fulfill certain requirements under its own governing law.

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[140] *Nielsen*, Internationale Bankgarantie, Akkreditiv und anglo-amerikanische Standby nach Inkrafttreten der ISP 98, WM 1999, 2005 (2011 et seqq.).
[141] See *Nielsen*, Internationale Bankgarantie, Akkreditiv und anglo-amerikanische Standby nach Inkrafttreten der ISP 98, WM 1999, 2005 (2018 et seqq.).

e) 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?

III.e): No further regulatory requirements

Under German law, no other procedures must be followed, except for usual procedures according to the anti-money laundering law[142], which is, however, generally applicable to all kinds of transfers of cash, irrespective of whether made under the Credit Support Annex or not.

f) What is the effect, if any, under the laws of Germany of the right to substitute collateral pursuant to Section 6 of the EFET Credit Support Annex?

III.f): Effects of substituting collateral

Pursuant to Section 6 EFET Credit Support Annex, and subject to the approval of the transferee, the transferor may replace, in whole or in part, any Eligible Credit Support provided under the Credit Support Annex by Eligible Credit Support of the same or higher value. The transferee shall have no obligation to transfer the Eligible Credit Support which it holds until it has received the replacement Eligible Credit Support.

Provided that the Transferee approved the replacement of any Eligible Credit Support, the transferor may provide further Eligible Credit Support under the Credit Support Annex. If the transferor effects such further Eligible Credit Support, the transferee is contractually obliged to re-transfer the Eligible Credit Support to be substituted. However, such contractual obligation to re-transfer needs to be performed by transferring the actual possession of the collateral in order to render the transfer of title effective. If the transferor does not provide the transferee with the substitute Eligible Credit Support, the transferee is not obliged to a re-transfer of the Eligible Credit Support.

In the absence of legal privileges for financial collateral, the replacement of credit support with credit support of the higher value in an insolvency scenario might become subject to challenge rights of the insolvency receiver if the creditor obtains a higher securitization of its claim compared to other creditors.

g) Does the presence or absence of consent to substitution by Party B have any bearing on this question?

III.g): Substituting with or without consent

If Party B does not consent to a substitution, the provision of further Eligible Credit Support does not create the obligation upon Party B to a re-transfer of the Eligible Credit Support to be substituted. Provided that the letter of credit also stipulates the necessity of Party B consenting to a substitution, such letter of credit may not be substituted or waived without Party B's consent.

h) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 11 of the EFET General Agreement together with Section 11 of the EFET Credit Support Annex. Assuming that Section 11 of the EFET General Agreement is valid and enforceable in Germany insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is Section 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 Section 11 of the EFET General Agreement as "other amounts payable"?

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[142] German Money Laundering Act (*Geldwäschegesetz*, GWG).

III.h): Inclusion of collateral into termination amount

Art. 11 of the EFET Credit Support Annex is valid insofar as it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the termination amount. This holds true, however, under the prerequisite that the termination of the General Agreement occurred rightfully and – in the event of an insolvency-related termination – observed the legal restrictions of Section 104 InsO with regard to privileged and non-privileged transactions.

With regard to the related collateral, it has to be noted that financial collateral qualifies as privileged financial transaction according to Section 104 para. 1 sentence 3 no. 6 InsO. Therefore, financial collateral follows, in general, the same legal route as the individual transactions of the Master Agreement where this collateral has been provided for.

Secondly, it can be argued that the costs of collateral forms part of the value of the terminated transactions and any such collateral would also be part of a potential replacement transaction and could therefore be included in the calculation of the termination amount, irrespective of whether an actual replacement transaction has been concluded or not. Calculating fictitious instead of actual replacement costs is a permitted deviation from Section 104 InsO.

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

III.i): Enforceability of rights with regard to collateral

The transfer of cash as collateral under the Credit Support Annex usually involves a full transfer of title from Party B to Party A. If so, Party B, being the owner, is entitled to claim the cash collateral back from the bank holding the account for such cash.

The legal act of providing cash collateral is, however, in principle subject to the claw back rights of the insolvency administrator and can be challenged if both the material and timing preconditions of such challenge are met. In that regard, an exemption applies for **margin collateral** which is privileged under Section 130 para. 1 sentence 2 InsO if the collateral was provided according to an obligation to provide variation margin in order to restore the relation between collateral provided and the value of the secured obligations.

Any transfer of assets which form part of the insolvency estate (as opposed to be under the full ownership of Party B) which takes place after the opening of the insolvency proceedings, is legally invalid according to Section 81 para. 1 sentence 1 InsO.

Transfers which take place at the day of the opening of the proceedings are deemed to have occurred after its opening and are as a rule legally invalid. As an exemption, if at least Party B is privileged as a credit institution or an investment firm including an institution according to Section 1 para. 2 lit. d) of the Financial Collateral Directive[143], such transfer could legally occur even on the day of the opening of the insolvency proceeding as long as the other party has not been aware thereof (Section 81 para. 3 InsO).

[143] Directive 2002/47/EC on Financial Collateral Agreements (*Finanzsicherheitenrichtlinie).*

j) 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?

III.j): Challenge rights with respect to collateral transfer

The transfer of Eligible Credit Support provided as collateral under the Credit Support Annex is – with an exemption for variation margin – subject to the general challenge and avoidance rights of the InsO. As explained under 6. I. 1b), depending on the circumstances such "suspect period" can go back until ten years of the legal act to be challenged. Any transfer of collateral relating to the Credit Support Annex constitutes a number of legal acts each of which could theoretically be challenged under said rules, provided, however, the material preconditions are fulfilled.

On the other end, any transfer which occurs after the opening of the insolvency proceedings (i.e. upon the same day) is per se legally invalid.[144]

k) 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?

III.k): Challenge rights with respect to the substitution of collateral

Such substitution of collateral constitutes separate legal acts which are consequently subject to challenge rights if the material preconditions of such rights are fulfilled. Any such legal act related to a substitution of collateral therefore triggers new suspect periods. However, the substitution of collateral with no greater value than the collateral it has been replacing is as such not detrimental to the interest of other creditors as a transaction replacing collateral with collateral of higher value would have been.

l) 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?

III.l): Transfer of additional collateral

In general, the transfer of additional collateral pursuant to mark-to-market provisions represents legal acts which are subject to challenge or avoidance rights under its own suspect period, triggered upon the performance of such transfer. However, the provision of variation margin is legally privileged according to Section 130 para. 1 sentence 2 InsO and not subject to such contestation.

m) Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B?

III.m): EFET Credit Support Annex as appropriate form of collateral transfer

Amongst the two options of Eligible Credit Support, cash or letter of credit, the transfer of ownership is only relevant for cash collateral. With regard to cash collateral, the EFET Credit Support Annex is in an appropriate form to provide a legal basis for the receiver of the collateral to have full title on the transferred cash. See 2. III. a) for details.

[144] If no exception upon the status of Party B as credit institution or investment firm applies, see above.

n) Are there any other requirements to be observed in Germany 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 o) above?

III.n): Additional requirements

According to German law, no further requirements have to be met. Please note, however, that Party B may be obliged to fulfill certain requirements under its governing law.

o) Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of? If yes, please provide detailed answer.

III.o): Other recommendations

At present, we do not have other specific recommendations on the subject of collateral that EFET and its members need to be aware of. From a practical standpoint and with a view on German counterparties, the provision of credit support by a holding entity of the counterparty via the existence of profit and loss transfer agreements pursuant to the German Stock Corporation Act is a commonly used method to strengthen the creditworthiness of counterparties incorporated in Germany.

IV. General Enforceability

Please discuss the following issues:

a) Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) enforceable under the laws of Germany in accordance with its own terms?

We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (Section 7 of the EFET General Agreement), (ii) remedies for non- performance (Section 8 of the EFET General Agreement) and (iii) limitation of liability (Section 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of Germany, including whether these provisions could and/or need to be further 'expanded' and/or 'strengthened' under the laws of your jurisdiction. We are especially interested in provisions that you may believe, for example infringe upon the ordre public in Germany and that may be challenged by the courts in Germany irrespective of the laws that governs the EFET General Agreement.

IV.a): General enforceability of the General Agreement and possible reasons for invalidity

The EFET General Agreement could – as any other mutual framework agreement – be challenged as non-enforceable. This holds especially true in respect of the following:

(i) Prohibition by law[145]

The EFET General Agreement is, pursuant to Section 134 BGB, not enforceable if it violates a prohibition stipulated by law. In that respect, in particular the transfer of rights, any payment, or other performance of obligations to the benefit of corporations, individuals or countries sanctioned by the EU or the UN may be illegal and render the contract void if those sanctions have been implemented in Germany. An overview on applicable sanctions may be found on

[145] See also below under VIII a) of this Legal Opinion.

the homepage of the Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle,* BAFA)[146].

Violations of license requirements (including non-compliance with obligations to notify authorities) do generally not render the entire agreement unenforceable.[147]

(ii) Hardship

If at least one of the parties to the agreement experiences hardship, the agreement may be terminated prior to an ordinary termination date on the basis of statutory termination or withdrawal rights. Section 314 BGB provides a statutory termination right for cause, without necessitating a notice period, with regard to agreements which entail continuous obligations. A material cause exists if, considering all circumstances of the specific case and weighing the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed termination date or until the end of a contractual notice period.

In addition, Section 313 BGB codifies previous German Federal Court decisions relating to the frustration of the underlying basis of the agreement (*Wegfall der Geschäftsgrundlage*)[148]. It applies whenever circumstances which have become the basis of the agreement have changed in a way making it unbearable for one party to perform its obligations under the unadjusted terms of the agreement, provided that the circumstances were not within the control of the parties and furthermore not foreseeable by the parties at the time they entered into the agreement. Section 313 BGB provides the affected party with the right to claim an amendment of the contract or to withdraw from or terminate the contract if the agreement cannot be adjusted or it would be unreasonable to do so.

Both mandatory provisions are, however, not specifically designed to apply to standard trading transactions based on market prices, they are rather important for transactions including bespoke elements, in particular long term non-market price based transactions[149]. We have not encountered German court practice that would under these provisions award a termination or alteration of standard electricity trading transactions based on market prices in a liquid market environment.

(iii) Non-performance due to force majeure (Section 7 of the EFET General Agreement)

The EFET General Agreement can be terminated according to its terms for non-performance due to a force majeure event.[150] Such contractual termination right applies in parallel to the additional statutory termination rights and is not limited by potential additional statutory termination rights under Sections 313 and 314 BGB.

(iv) General risks regarding the validity of standard business terms

There is a risk that the provisions of the EFET General Agreement may be considered as standard business terms, and that provisions deviating from the statutory requirements for standard business terms might be void. This is a general risk faced by all industries when using general business terms in standard contracts. If the EFET General Agreement terms are

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[146] Accessible under http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_embargo_uebersicht_laenderbezogene_embargos.pdf;jsessionid=89D34E1BAA00068FAE65A8214E04B86A.1_cid362?__blob=publicationFile&v=3 (last access: 21 January 2019).

[147] *Armbrüster* in *Münchener Kommentar zum BGB*, 8th edition 2018, Section 134 BGB, recital 66 (e.g. in relation to concession decisions or electricity concession agreements).

[148] Peter Krebs/Stefanie Jung in Dauner-Lieb/Langen, *BGB – Schuldrecht*, 3rd edition 2016, recital 6.

[149] Which may be documented under an EFET General Agreement as well but would typically be rather concluded as bilateral power purchase agreement

[150] Section 7 EFET General Agreement.

in fact considered as standard business conditions (*Allgemeine Geschäftsbedingungen*) as defined in Sections 305 et seqq. BGB, any deviations from statutory law must comply with permissible limitations and restrictions applicable to standard business conditions.[151] Where such limits are not met, the relevant standard business conditions will be considered void and statutory provisions would apply.

Standard business conditions are defined as contractual terms and conditions pre-formulated for multiple contracts which one party unilaterally provides for (without negotiation between the parties) when concluding an agreement. This is not the case if both parties to the contract have requested the use thereof[152]. In that case, the terms are no longer *unilaterally* provided as there had been two parties providing the same standard contract. It is not entirely clear whether this also applies where one party, e.g. a new market participant, is significantly less experienced while the other is a frequent user of the EFET General Agreement[153].

In addition, Sections 305 et seqq. BGB only apply to a limited extent to all agreements concluded with legal persons (as defined in Section 14 BGB) or public law legal entities. However, in this respect, Sections 308 and 309 BGB are still considered indirectly, even though they are not generally applicable.[154] Therefore, it has to be reiterated that the standard business terms cannot contravene substantial principles under German law, or result in surprising consequences, unclear clauses, or undue disadvantages for one party.[155]

With regard to the absence of surprising consequences, the German Federal Court held several years ago that a provision in standard business terms, specifying that a transaction was a fixed date transaction (even though the legal requirements were not per se fulfilled), was surprising. As such, constituting an undue disadvantage, it was declared void. The court did not decide whether or not the decision might be different if the terms were used and jointly agreed upon in a business type constituting a fixed date transaction[156].

The general risks relating to non-enforceability of certain terms in relation to standard business terms are reflected particularly in the following provisions:

(v) Non-enforceability of remedies for non-performance provision (Section 8 EFET General Agreement)?

If the EFET General Agreement qualifies as an absolute or relative fixed date transaction[157], we consider Section 8 EFET General Agreement generally enforceable.

Section 8 of the EFET General Agreement stipulates damages without granting notice periods for the subsequent fulfilment of obligations in the event of failure to deliver by the counterparty if such failure is not excused by an event of force majeure or the other Party's non-performance. Such grace period is as a rule foreseen according to Section 281 para. 1 BGB. Exemption applies to fixed term contracts. Under statutory law it is therefore possible to request damages without a notice period under these circumstances. As a consequence, there is no deviation from statutory provisions in that regard.

Section 8 of the EFET General Agreement further stipulates – in line with statutory provisions – that damages are calculated based on the difference between the market price or the replacement transaction value and the price agreed with the non-performing party, assuming a

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[151] Sections 305 to 310 BGB.
[152] Grüneberg in Palandt, *Bürgerliches Gesetzbuch*, 78th edition 2019, Section 305, recital 13.
[153] Similar considerations are rejected in the context of potential undue disadvantages under Section 307 BGB, see *Wurmnest* in *Münchener Kommentar*, 8th edition 2019, Section 307 BGB, recital 82.
[154] Section 310 para. 1 sentence 1 BGB.
[155] Sections 305c and 307 BGB; *Leuschner* in NJW 2016, 1222 et seqq.
[156] BGHZ 110, 88, 97 = NJW 1990, 2065, 2067.
[157] See Annex III Transaction Types for further information about the differentiation between absolute and relative fixe date transactions.

relative fixed date transaction[158]. In the event of an actual replacement transaction, the difference between the agreed price and the replacement transaction can under statutory law only be claimed relating to relative fixed date transactions (Section 376 HGB) and if the replacement transaction is made immediately after the event of default. Thus, if this replacement transaction is made under these prerequisites, we do consider Section 8 EFET General Agreement as enforceable.

However, if the Individual Transactions entered into pursuant to the EFET General Agreement were considered, by a court, not to be a fixed date transaction and there was no other exemption due to the circumstances of the case at hand[159] with respect to the notice period requirement, Section 309 para. 4 BGB (requiring a grace period in the event of non-performance) would be violated. Conclusively, in this scenario, Section 309 para. 4 BGB (indirectly applicable, see above) would render contractual provisions to the contrary void. This means that Section 8 EFET General Agreement would not be considered enforceable in the absence of an absolute or fixed date transaction, however, only to the extent that the purchaser has a right to request compensatory damages without the need of granting a grace period for subsequent delivery.

(vi) Non-enforceability of the limitation of liability provision (Section 12 of the EFET General Agreement)?

Limitations of liability in standard business terms, thereby deviating from German statutory law regarding liability, are generally considered overly disadvantageous[160] and thus void as follows: Any limitation which relates to fundamental contractual obligations of rights is void. The German Federal Court also requires that limitations of liability do not limit the liability for damages which are **typical** and **foreseeable** under the specific type of contract[161].

The limitation of liability contained in Section 12.2 EFET General Agreement referring to “gross negligence, intentional default or fraud of a Party or its employees, officers, contractors and/or agents (…)” deviates from German statutory law as Sections 276 and 278 BGB stipulate liability for any type of negligence or willful act of a party, its agents and persons she/he uses to fulfill its contractual obligations. However, this limitation of liability is generally enforceable, as this limitation does not apply to fundamental contractual obligations pursuant to Section 12.4 EFET General Agreement.

In contrary, the limitation of liability contained in Section 12.3(a) EFET General Agreement (“liability does not include any indirect and/or consequential damages, including without limitation, loss of profit, goodwill, business opportunity or anticipated saving”) deviates from German statutory law and is generally considered overly disadvantageous and thus void, because such exclusion of liability also covers typical and foreseeable damages. The limitation of liability in Section 12.3(b) EFET General Agreement referring to “an amount equal to the amounts payable for electricity supplied or to be supplied by a Party under Individual Contracts” also deviates from German statutory law and is generally considered overly disadvantageous and thus void, because such consequential damages are typical and foreseeable for the type of business conducted under the EFET General Agreement.

The risk of the invalidity of the liability clause would, however, only materialize if the General Agreement would indeed be viewed as standard business terms and only affect consequential damages not related to the primary delivery, offtake and payment obligations. As these

[158] Section 376 HGB, which applied if at least one party to such contract is a merchant (Section 346 of the Commercial Code).
[159] E.g. Section 281 para. 2 BGB special circumstances justify damages without notice period, considering the interests of both parties. Another exemption applies when the debtor states clearly and without room for doubt that she/he will not deliver.
[160] Section 307 BGB.
[161] E.g. BGH, decision dated 15 September 2005 - I ZR 58/03 (OLG Köln) = NJW RR 2006, 267; BGH, decision dated 19 January 1984 - VII ZR 220/82 (Oldenburg) = NJW 1984, 1350.

obligations constitute the fundamental contractual obligations under Section 12.4 EFET General Agreement to which the liability limitation does not apply; consequential damages relating to their violation have to be compensated irrespectively. Therefore, the associated risk appears to have limited room to apply under normal circumstances.

In cases where non-standard trading business with a transaction specific increased liability risk shall be documented, the liability clause could be either replaced by bespoke wording covering the risk profile and avoiding the risk associated with standard business terms or by introducing a standard liability clause in line with section 307 and 308 BGB including compensation for typical and foreseeable damages upon negligence.[162]

(vii) Mitigation of standard business terms risks by choice of law?

It has been discussed whether the risks relating to non-enforceability could be mitigated if the EFET General Agreement was governed by UK law. If the EFET General Agreement was governed by UK law (in accordance with Rome I), such standard business term risk would not occur as long as the choice of law would not be viewed as a contravention of the German ordre public. This is not likely to be the case for the deviation in question as the deviation of Sections 7, 8 and 12 of the EFET General Agreement from the corresponding German law is not of such material nature that a German court is likely to consider it unbearable to apply foreign law.[163] However, the potential benefits of this would be outweighed by impacts of the UK leaving the EU which might cause several separate issues with respect to the contract and its enforcement.

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

<u>IV.b): Recommendations with regard to the general enforceability of the EFET General Agreement and the Credit Support Annex</u>

Our recommendations relate to obtaining and checking any relevant authorizations and compliance with regulatory requirements. We recommend monitoring and ensuring that all corporate approvals and authorizations are obtained prior to signing the EFET General Agreement and concluding the Individual Contracts. As the Individual Contracts under an EFET General Agreement might constitute derivative contracts under German law and the Articles of Association of German companies could subject derivative contracts to specific approval requirements, for example, at board level, our recommendation is to monitor and ensure that all applicable authorizational and regulatory requirements are complied with. The latter could form part of internal counterparty onboarding procedures which do include Anti-Money Laundering prevention and the screening on trade sanctions.

[162] Such clause which was hold valid by the BGH for electricity supply to end customers had the following wording in the relevant section (English translation): "*For damages to property and financial loss caused by negligence, the parties including auxiliary persons acting on their behalf are only liable for the violation of material contractual obligations and the respective liability is limited to damages foreseeable at the conclusion of the contract and typical to such contracts*." BGH decision dated 18 July 2012, ref. VIII ZR 337/11.
[163] Martiny in *Münchener Kommentar zum BGB*, 7th edition 2018, Art. 21 Rom I-VO, content of the Ordre Public, recital 3.

V. Confirmation Practices

We would like you to distinguish between (1) the formal requirements and procedure in the formation of a legally binding and enforceable Individual Contract and its inclusion in the EFET General Agreement and (2) the formal requirements a Confirmation should comply with under the laws of Germany in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the EFET General Agreement. When doing so, please base your opinion on the following additional assumptions:

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

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

1. Binding Individual Contract

Please discuss in detail the following issues:

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 the laws of your jurisdiction?

<u>V.1.a): Formal requirements for contracts to be binding</u>

According to German law, contracts do not require any specific formal acts unless legal or contractual provisions stipulate such requirements.

Section 3 para. 1 EFET stipulates that Individual Contracts may be concluded in any form of communication. If the parties to the EFET Agreement do not agree otherwise, there is no requirement of a formal act to conclude an Individual Contract.

Pursuant to Section 3 para. 2 EFET the parties can – in the event an Individual Contract is not concluded in written form – merely confirm their understanding of the agreed terms of the Individual Contract in writing. This could be seen as a requirement of a written form[164], however, the parties can agree that the written form shall not be considered a requirement for the conclusion of an agreement, but shall rather only serve the purpose of evidencing the contract's content. In the absence of a clear indication by the parties as to whether the written form shall constitute a requirement for the conclusion of an agreement, such written form shall only serve evidentiary purposes.[165] Therefore in our view, the purpose of such confirmation is solely to confirm and evidence the understanding of the agreed terms and does not constitute a requirement of the written form.

[164] Section 127 para. 1 and Section 126 para. 1 BGB.
[165] Busche in *Münchener Kommentar zum BGB*, Section 127 recital 4; BGH decision VIII ZR 281/62 dated 18 March 1964.

b) At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?

V.1.b): Legal effectiveness of a contract

An Individual Contract orally agreed upon will become legally binding with immediate effect upon receiving the declaration of acceptance[166], provided that the parties do not agree on a specific deviating effective date. A confirmation is not a requirement for a legally valid Individual Contract and therefore no precondition for its legal effectiveness.

The enforceability of the Individual Contract – to be more precise, the enforceability of individual obligations of the Individual Contract – is subject to the agreement of the parties. The parties are generally free to determine the time of performance of any individual obligation.[167] In the event that the parties do not agree on the date of the enforceability of the Individual Contracts, each obligation becomes immediately enforceable.[168]

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

V.1.c): Non-objection to deviating clauses in confirmation

Under the normal operations of the laws of Germany a subsequent Confirmation has no legal capacity to change, alter or amend the Individual Contract previously concluded; such Confirmation serves only as evidence of the agreed terms.

However, in the event the Individual Contract was agreed upon orally, such Confirmation may under certain conditions – known as the doctrine of *kaufmännisches Bestätigungsschreiben* (commercial letter of confirmation) – alter the provisions of the Individual Contract, provided that the recipient of such Confirmation does not object to the alterations.[169] It is commonly accepted among German courts and legal literature that such confirmation may constitute legal binding terms, thereby notwithstanding deviations from the underlying and agreed upon contract. This is, however, only true if the deviations are not material when compared to the terms of the underlying contract.

The doctrine of the "commercial letter of confirmation" states that the recipient of a commercial letter of confirmation must immediately object to the letter if he does not accept the terms and conditions. If he fails to do so, the content apparent from the commercial letter of confirmation will become binding between the parties, unless the recipient can prove a dishonest behaviour on the sender's part in view of the terms and conditions or a deviation from the terms between the previous agreement and the letter of confirmation to such an extent that the sender could not rely on the approval of the recipient.[170] According to common understanding, the doctrine of the commercial letter of confirmation is based on customary practice.[171] However, the exact dogmatic classification is controversial, though usually leading to the same results.

According to the predominant understanding of the doctrine, the term "commercial letter of confirmation" presupposes that contractual negotiations (oral, telephone or telecommunication) have taken place and that the content of the contract concluded, in the sender's opinion, should

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[166] Busche in *Münchener Kommentar zum BGB*, Section 147 recital 35.
[167] Lorenz in *BeckOK, BGB* Section 271 recital 6; Krüger in *Münchener Kommentar zum BGB*, Section 271, recital 7.
[168] Section 271 para. 1 BGB. Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately.
[169] BGHZ, 7, 187, 189; BGH WM 2007, 303, 305.
[170] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section 346, recital 141.
[171] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section 346, recital 144; BGH decision I ZR 111/53 dated 27 October 1953.

subsequently be recorded in the letter.[172] Such letter does not need to be in writing and with regard to Section 126 para. 3 BGB, an electronic transmission (email) is sufficient.[173]

If the recipient does not accept the confirmation, he must object immediately. Immediately means, in accordance with Section 121 para. 1 sentence 1 BGB, without **undue delay**. As such, this is subject to interpretation and therefore depends on the individual situation at hand.[174] In complicated long-term transactions the period may be longer than in transactions which have to be settled swiftly. Simply put, case law assumes a short period of one to two days[175] and, as a rule, an objection is considered to be delayed after one week has lapsed.[176]

If the recipient remains silent in response to the letter of confirmation, the content of the letter will become legally binding upon the parties. In case of doubt, the confirmation shall also be deemed to be the complete agreement between the parties, unless the contrary is proven.[177] If the sender makes reference to his general terms and conditions in the commercial confirmation letter and the recipient can reasonably be expected to take note of the general terms and conditions, these shall become part of the contract as well. The effect of silence on a letter of confirmation can also prevail against a written form clause in General Terms and Conditions.[178]

The dishonesty of the sender eliminates the protection of legitimate expectations.[179] Here, dishonesty means (actual) knowledge of the incorrectness; mere negligent ignorance is not sufficient. Knowledge exists when the sender knows that the content of the letter does not correspond to the explicit or implied content or consensus of the transaction concluded by the parties.[180] Further, serious deviations from the pre-discussed agreement have the effect of ruling out a sender's trust in protection.[181] Serious in this sense does, however, not mean a deviation with which the recipient does currently not agree. A serious deviation depends on whether the sender could not reasonably expect the consent of the recipient when considered in the light of the extent of the deviation.

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

V.1.d): Inclusions of Individual Contracts

Under the condition that the Individual Contract to which the Confirmation refers is sufficiently identifiable under the provided terms (e.g. first date, last date, contract capacity, price, counterparties, etc.), the reference to the relevant EFET General Agreement is sufficient.

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[172] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section 346, recital 147; BGH decision VII ZR 70/68 dated 9 July 1970.
[173] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 151.
[174] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 160; BGH decision VIII ZR 126/60 dated 20 November 1961.
[175] Federal Court of Judgment VIII ZR 126/60 decision dated 20 November 1961.
[176] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 141; 160.
[177] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 165; BGH decision VIII ZR 108/75 dated 8 December 1976.
[178] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 151; BGH decision III ZR 76/94 dated 20 October 1994.
[179] BGH decision I ZR 111/53 dated 27 October 1953.
[180] Karsten Schmidt in *Münchener Kommentar zum HGB*, 4th edition (2018), Section, 346 recital 162.
[181] Karsten Schmidt, as above.

2. Means of Evidence

Please discuss in detail the following issues:

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

V.2.a): General rules for obtaining evidence

The German Civil Procedure Code (*Zivilprozessordnung,* ZPO) establishes an exhaustive catalogue of admissible means of evidence. These are: expert witness (*Sachverständiger*), questioning of the parties (*Parteivernehmung*), visual inspection (*Augenschein*), documentary evidence (*Urkunde*), witness testimonies (*Zeugenbeweis*). All means of evidence are of equal weight and the court is free in assessing each of them individually and to decide to which extent it wants to base its judgement thereon. Means of evidence which could not have been legally obtained are as a rule not permissible in a court proceeding. This is particularly true for means of evidence which violate rights of privacy.

a) Tape recording

A tape recording is admissible evidence if the recording of the overheard conversation was legally permissible in the first place. This depends on whether the parties of the conversation have consented to the recording. In the absence of such consent, the recording could be viewed as criminal offence (Section 201 StPO)[182] and the recording would not be admitted to court.[183] [184] If obtained under consent of both parties and admitted to the proceeding, the recording would be played out loudly in the hearing and assessed according to the rules of visual inspection (*Augenschein)*. Parties of the conversation might as well be put forward as witnesses to be heard about the context of the conversation in question. If the consent of the parties to the General Agreement is obtained according to Section 23 para. 1 EFET[185], such tape recording can be brought forward by any of the two parties as admissible piece of evidence and can be relied upon in court.

b) Witness statements, email, other electronic messages or transaction entry system data and facsimile are in general permitted means of documentary evidence unless they have been obtained under the breach of applicable law, for example, have been stolen or doctored. Again, the court is free in assessing the value of each piece of evidence on an individual basis.

b) Are there any local requirements or other considerations that are relevant to each form of evidence?

V.2.a): Other local requirements for obtaining evidence?

Please note that all facts which the court shall take into account as basis for its judgement have to be brought forward by the party who wants to rely on such facts including the offer of related evidence if such facts are or will be disputed. The court will not establish facts other than presented by the parties and as a rule not obtain evidence on its own initiative.[186] There are no further requirements or other considerations.

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[182] Code of Criminal Procedure (*Strafprozessordnung*, StPO).
[183] BGHZ 27, 284; BGH NJW 1982, 277, 278; OLG Hamm NJW-RR 1996, 735.
[184] Please note, however, that local German labor law may require a prior consent of the employee to such tape recording.
[185] BVerfG, resolution dated 31 July 2001 –1 BvR 304/01.
[186] So-called "*Beibringungsgrundsatz*".

VI. Core Provisions

Please base your opinion on the additional assumptions outlined under Part C.I.1 and C.II and discuss in detail the following:

a) ***Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting) above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.***

<u>VI.a): Contemplated selections in the EFET General Agreement and its Annexes and the related impact on close-out netting</u>

The elections contemplated by the General Agreement or the Annexes thereto would in general not change the substance of our conclusions. The same would apply for any additional provisions to the General Agreement if such provisions or additional changes currently not contemplated in the General Agreement would not affect the legal basis of our conclusions with regard to close-out netting. Such basis consists of:

- Performance of close-out netting requires the termination of Individual Contracts to be netted at the latest upon the **opening** of the insolvency proceedings, either by operation of law or by contractual termination.

- Insolvency-related termination is only possible for privileged contracts under Section 104 InsO which need to represent either fixed term contracts or financial transactions.

- All legal acts between Party A and Party B may become subject to avoidance by the insolvency administrator according to the general rules with the exemption of privileged margin exchange.

To substitute Eligible Credit Support already provided with or without approval of the transferee constitutes a legal act which becomes subsequently subject to challenge and avoidance rights of the insolvency administrator. This holds, however, true, for all legal acts under the applicable claw back period and does not alter or amend our conclusions reached upon the enforceability of close-out netting in general.

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

<u>VI.b): Core EFET provisions</u>

We view all stipulations in the EFET General Agreement that could affect the legal basis for netting as laid out above as core provision for the enforceability of close-out netting. In our view, this is the case for

- Section 1.1 (*subject of the EFET General Agreement)*

- Section 4 (*Primary Obligations for Delivery and Acceptance of Electricity*)

- Section 8 (*Remedies for Failure to Deliver and Accept*)

- Section 10.3 (*Termination for Material Reason*)
- Section 10.5(c) (iv) (*Winding-up/Insolvency/Attachment*)
- Section 11 (*Calculation of the Termination Amount*)

and all the definitions relevant for the interpretation of these provisions. Amendments and alterations to the way these clauses operate might affect either

- the validity of close-out netting in general
- the performance of close-out netting according to the EFET General Agreement as opposed to statutory netting according the provisions of Section 104 InsO.

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

VI.c): Effects of the inclusion of the General Agreement in the EFET CPPNA, the MNA or the CPMA

The EFET General Agreement can be legally and contractually included into the mentioned master agreements

- EFET Cross-Product Payment Netting Agreement
- Master Netting Agreement
- CPMA Cross-Product Master Agreement

and such inclusions would **not alter** our conclusions with regard to the enforceability of close-out netting of individual contracts under the agreement.

VII. Governing Law, Arbitration and Jurisdiction

Please base your opinion on the following additional assumptions:

- ***The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Germany (including English law).***

Please discuss in detail and advise on the following:

a) Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (Section 22 of the EFET General Agreement) be upheld in Germany, and what would be the consequences if it were not?

VII.a): Governing law other than German law and dispute resolution provisions

a) Governing law

The express choice of other law than German law, including English law, governing the General Agreement (Section 22 para. 1 EFET) will be upheld by German courts.

Pursuant to Art. 3 para. 1 no. 1 EGBGB and Art. 3 para. 1 of to the Regulation (EC) No 593/2008 of the European Parliament and of the Council, dated 17 June 2008 on the law applicable to contractual obligations (Rome I), parties are free to choose the applicable law.[187] The material effectiveness of the clause governing the choice of law is subject to Art. 3 para. 5 and Art. 10 Rome I Regulation. If **all aspects** of the case relate to another jurisdiction as the one chosen, mandatory provisions of that jurisdiction would apply **in addition**.

b) Submission to arbitration

According to Section 1030 ZPO, it is permissible under German law that parties submit a commercial dispute to arbitration for its resolution. Section 1051 para. 1 ZPO explicitly reiterates the possibility for the parties to also choose the law governing the arbitration proceeding.[188] Once an express choice for arbitration has been made, it will become legally binding upon the parties and reference to state courts – safe for some statutory exceptions – is no longer possible.

It is not necessary to designate a certain arbitral institution within the arbitration clause as the ZPO contains the necessary provisions to conduct an arbitration proceeding without the need to make reference to a specific forum. This type of arbitral proceedings is commonly referred to as ad-hoc arbitration. However, institutions like the International Chamber of Commerce (*ICC*), the German Arbitration Institute (*DIS*) or the Arbitration Institute of the Stockholm Chamber of Commerce (*SCC*) are widely used and recognized by German civil courts, thereby administering arbitral proceedings according to their own set of rules.

A German court may upon the request of either party pursuant to Section 1059 para. 2 and para. 3 ZPO only repeal an arbitration decision under the exceptional circumstances mentioned in Section 1059 para. 2 ZPO.

Most relevant examples are:

- The formation of the arbitral tribunal or the arbitration proceedings did not correspond to an valid agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award or

- the court determines that the subject matter of the dispute is not eligible for arbitration under German law or

- the recognition or enforcement of the arbitration award will lead to a result contrary to public order.

The petition must be filed with the German courts within a period of three months after the receipt of the arbitration award; the period starts upon the actual receipt of the award.[189]

[187] Please note: There is an ongoing debate amongst legal scholars whether the Rome I Regulation is applicable in case of legal disputes concerning German-Danish relations or the older Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) ought to be followed; however, both treaties will in the case at hand come to the same end result – namely binding choice of law; see also: Brödermann: *Paradigmenwechsel im Internationalen Privatrecht – Zum Beginn einer neuen Ära* since 17 December 2009; Martiny in *Münchener Kommentar zum BGB*, 7th edition, Art. 2 Rom I-VO, recital 2; Spickhoff in Bamberger/Roth/Hau/Poseck, *BeckOK BGB*, 50th edition, Art. 25 Rom I-VO, recital 4.

[188] Voit in Musielak/Voit, *ZPO* Section 1029, recital 28.

[189] Section 1059 para. 3 ZPO.

VIII. Regulatory Regime

Please discuss the following issues:

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 EFET General Agreement or the Individual Contracts?

VIII.a): Regulatory requirements or prerequisites to perform under the EFET General Agreement

a) Exchange control laws

In the area of exchange control laws, the provisions of the Foreign Trade Act (*Außenwirtschaftsgesetz,* AWG[190]) and the Foreign Trade Regulation (*Außenwirtschaftsverordnung,* AWV[191]*)* must be respected. According to these rules, any transfer of more than EUR 12,500 or the equivalent in other currency (if such transfer is made to or from persons from foreign countries) must be notified to the German Central Bank (*Deutsche Bundesbank*) if such transfer is not made (i) for the import or export of goods or (ii) in respect of certain loan agreements[192]. It should be noted that both AWG and AWV primarily cover investments and not the sale and purchase of goods such as electricity.

Furthermore, trade sanctions issued by the EU or the UN have to be considered when transferring rights, making payments or delivering any kind of performance to sanctioned persons, entities or countries (or to its government or any person or entity residing or incorporated in or established under the laws or otherwise affiliated with such country) if those sanctions have been implemented in Germany. An overview on applicable trade sanctions may be found on the homepage of the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* (**BAFA**).[193]

b) License requirements

(i) Energy law

Under sector specific energy law, license, registration or notification obligations are foreseen in REMIT[194] and in the German Energy Industry Act (*Energiewirtschaftsgesetz* (**EnWG**))[195]. In relation to that, certain market participants and companies are obliged to register with and submit information to the Federal Grid Agency (*Bundesnetzagentur* (**BNetzA**))[196].

(aa) Wholesale trading of electricity

Under Art. 9 REMIT any market participant who is obliged to report wholesale energy market transactions to the Agency for the Cooperation of Energy Regulators (**ACER**) according to Art. 8 REMIT and Art. 3 CIR 1348/2014 (list of reportable contracts) is required to register with the respective national regulatory authority (i.e. BNetzA for Germany) in the EU member state in which the respective market participant is established/resident, or – if not established/resident in the EU – in a member state in which they are active.

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[190] *Außenwirtschaftsgesetz* of 6th June 2013 (BGBl. I S. 1482).
[191] *Außenwirtschaftsverordnung* of 2nd. August 2013 (BGBl. I S. 2865).
[192] Section 67 et seqq. AWV.
[193] Accessible under http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_embargo_uebersicht_laenderbezogene_embargos.pdf;jsessionid=89D34E1BAA00068FAE65A8214E04B86A.1_cid362?__blob=publicationFile&v=3 (last access: 21 January 2019).
[194] Art. 8 REMIT.
[195] Energy Industry Act (*Energiewirtschaftsgesetz*, EnWG).
[196] Federal Network Agency (*Bundesnetzagentur*). See: https://www.bundesnetzagentur.de/cln_131/DE/Home/home_node.html.

Market participant is defined as any person, including TSOs, who enters into transactions in one or more wholesale energy markets.[197] Wholesale energy markets are defined as any market within the EU on which **wholesale energy products** are traded[198], with wholesale energy products being defined as

- contracts for the supply of electricity or natural gas delivered in the EU,
- derivatives relating to electricity or natural gas produced, traded or delivered in the EU, and
- contracts and derivatives relating to the transportation of electricity or natural gas in the EU.[199]

irrespective of where and how they are traded.

Contracts for the supply and distribution of electricity or natural gas for the use of final customers are not considered wholesale energy products, unless said final customers' consumption capacity exceeds 600 GWh per year.[200]

Depending on the content of their agreements, parties trading electricity under the EFET General Agreement are likely to be energy wholesale market participants under REMIT.

Further reporting obligations for market participants to the market transparency unit for electricity (*Markttransparenzstelle für Elektrizität*) are laid down in Section 47e para. 2-5 GWB (*Gesetz gegen Wettbewerbsbeschränkungen,* GWB).The market transparency unit for electricity is set up at the BNetzA and its tasks are carried out by the BNetzA and the German Federal Cartel Agency (*Bundeskartellamt*, BKartA) by mutual consent.

(bb) Supply of electricity to residential customers

While contracts for the supply of electricity to residential customers usually drop out of the scope of REMIT, they are governed by national legislation. Section 5 EnWG provides for an obligation of energy supply companies to notify the regulatory authority (i.e. BNetzA[201]) in the event of commencing or terminating the supply of residential customers which are defined as those customers who utilize the energy supplied for their own purposes and within their own households or for commercial use if the overall consumption does not exceed 10,000 kWh p.a.[202] Such notification shall contain a demonstration of the personal, technical and economical capabilities as well as the reliability of the management of the energy supply company.[203]

[197] Art. 2 para. 7 and para. 6 REMIT.
[198] Art. 2 para. 6 REMIT.
[199] Art. 2 para. 4 REMIT.
[200] Art. 2 para. 4 and 5 REMIT.
[201] Section 54 para. 1 EnWG.
[202] Section 3a no. 22 EnWG.
[203] Section 5 sentence 3 EnWG.

(cc) Transportation of electricity

The commencement of operating a supply/distribution network requires a license.[204] In addition to that, TSOs are subject to a particular certification procedure.[205] The certification is issued by the BNetzA.

(dd) Registration and submission of information for the market master data register

Defined market participants to the German energy market (such as grid operators, market participants according to REMIT or electricity suppliers) are required to register with the market master data register (*Marktstammdatenregister*[206]) which is administered by the BNetzA.[207] The information that shall be submitted is listed in different charts annexed to MaStRV and comprises e.g. general information relating to the market participant (name, address, legal for, beginning and end of activity etc.) as well as additional data for specific market participants.

(ee) Registration and submission of the company master data

In order to facilitate the exchange of data between market participants and the BNetzA, said market participants are required to register with and submit their company master data (*Unternehmensstammdaten*) to BNetzA. The obligation is applicable for e.g. grid operators and electricity suppliers. The relevant templates for registration may be found on the homepage of BNetzA.[208]

(ii) Other requirements and permits

Section 4 German Power Taxation Act (StromStG) prescribes a license requirement for

(a) suppliers incorporated in Germany intending to supply electricity,

(b) generators intending to off-take electricity for own consumption, and

(c) end users intending to obtain electricity from outside Germany.

Apart from the notice obligation upon commencement of commercial activities[209], the German Trade Code (*Gewerbeordnung,* GewO) does not provide for specific permit requirements for energy trading companies.

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[204] Section 4 para. 1 EnWG.
[205] Section 4a para. 1 EnWG.
[206] Set up in accordance with Section 111e EnWG and the subsequent "*Verordnung über das zentrale elektronische Verzeichnis energiewirtschaftlicher Daten* (Marktstammdatenregisterverordnung" – **MaStRV).**
[207] Section 3 MaStRV.
[208] Accessible under the following link: https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/DatenaustauschundMonitoring/UnternehmensStammdaten/unternehmensstammdaten-node.html (last access: 23 January 2019).
[209] Section 14 para. 1 GewO.

c) Authorization under the German Banking Act[210]

The entering into Individual Contracts under the General Agreement might – under certain prerequisites – constitute an **investment service** or **activity** according to the General Banking Act. In this respect, the general principles are that any person

- who intends to perform an investment service or activity
- with respect to a financial instrument
- in Germany

needs to be validly authorized[211] or exempt[212] from the applicability of financial market regulation.[213]

(i) Geographical scope

An investment service is deemed to be performed in Germany

- if and when the respective entity is legally incorporated **in Germany** and provides the services to clients in Germany.[214]
- If the entity is based **outside of Germany,** if the client of that service is based in Germany and the service was initiated by the entity.[215]

As a consequence, with regard to services provided to German clients, the only exception that the German financial market regulation does **not** apply is if the service provider is based outside of Germany and the relevant transaction was entered into on the sole and direct initiative of the German counterparty, where the non-German entity did not actively market its service in Germany and the relation to the German market is not otherwise established.[216]

(ii) Activity scope

The German licensing regime differentiates between banking business and financial services.[217] **Banking businesses** are defined in Art. 1 para. 1 KWG and include, inter alia, credit transactions (*Kreditgeschäft*)[218] and the financial commission agency (*Finanzkommissionsgeschäft*)[219].

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[210] KWG as of 1 January 2019.
[211] By granting a German banking or financial service provider license under the KWG or, alternatively, making use of a European passport according to MiFID II, if there is a valid authorization of the home state regulator to be passported.
[212] Falling under the exemptions to MiFID II as incorporated in the German KWG and - if applicable - notifying the respective reliance on it.
[213] Section 32 para. 1 sentence 1 KWG.
[214] Services must be provided in the „*Inland*" according to Section 32 para. 1 sentence 1 KWG.
[215] See BaFin circular note on cross-border performance of financial services (*BaFin Merkblatt zur Erlaubnispflicht von grenzüberschreitend betriebenen Bankgeschäften und Finanzdienstleistungen, 01.04.2005)*, supplemented 13.09.2017.
[216] The practical application of this MiFIR based distinction varies between member states and national authorities and the German BaFin might be reluctant to accept that such services were performed entirely from outside Germany and do not have a German link for other factual reasons such as employees acting in Germany on a frequent basis, marketing material published in Germany and addressing German customers, German language website or similar.
[217] Section 32 KWG.
[218] Section 1 para. 1 sentence 2 no. 2 alternative 1 KWG.
[219] Section 1 para. 1 sentence 2 no. 4 KWG.

Financial services (*Finanzdienstleistungen*) are defined in Art.1 para. 1a KWG and reflect the related definitions of MiFID II.[220] Financial services under MiFID II and their respective expressions under KWG are:

1. Reception and transmission of orders (*Anlagevermittlung*)[221]
2. Execution of orders on behalf of clients (*Abschlussvermittlung*)[222]
3. Dealing on own account[223] (*Eigenhandel und Eigengeschäft*)[224]
4. Portfolio management (*Finanzportfolioverwaltung*)[225]
5. Investment advice (*Anlageberatung*)[226]
6. Underwriting of financial instruments and or placing of financial instruments on a firm commitment basis[227] (*Platzierungsgeschäft*)
7. Placing of financial instruments without a firm commitment basis[228]
8. Operation of an MTF (*Betrieb einer multilateralen Handelsplattform*)[229]
9. Operation of an OTF (*Betrieb einer organisierten Handelsplattform*)[230]

From this service or activity standpoint, depending on the concrete factual circumstances and arrangements between the parties, transactions under an EFET General Agreement could form part of a *financial commission agency* type of banking business or constitute the financial services and activities of *reception and transmission of orders*, *execution of orders on behalf of clients*, *dealing on own account*, *portfolio management* or, if subject to specific advice, *investment advice*.

However, in the absence of additional contractual arrangements and on the basis of a plain EFET-based transactional structure, such buying and selling of electricity would usually amount to **dealing on own account** within the meaning of Annex I Section A (3) MiFID II and translating into *Eigenhandel* as of Section 1 para. 1a (12) KWG or an *Eigengeschäft* according to Section 32 para. 1a KWG.

The licensing obligation is triggered if and when the respective services or activities are performed in relation to a financial instrument and no exemption applies.

(iii) Product scope

The definition of financial instruments has been harmonized by MiFID II in the same way as the service and activities. The respective catalogue of the German KWG thereby reflects the instruments as stipulated by Annex I C MiFID II. As such, the following are considered to be financial instruments:

[220] Annex I A MiFID II.
[221] Annex I A no. 1 MiFID II; Section 1 para. 1a (1) KWG.
[222] Annex I A no. 2 MiFID II; Section 1 para. 1a (2) KWG.
[223] The uniform term “dealing on own account” combines two different activities under German law which has also been treated differently from a historical standpoint under the German financial market regulation: The so-called *Eigenhandel* is considered a financial service including a service element for the benefit of a third party and has also been labelled as *Eigenhandel für andere*. As opposed to that, the so-called *Eigengeschäft* refers to own account dealing in a narrow sense and thereby excludes any third party service element. As a consequence, this *Eigengeschäft* is not listed in the catalogue of financial services in the German KWG but it still requires a BaFin authorisation (under the separate provision of Section 32 para. 1a KWG) or the applicability of a valid exemption.
[224] Annex I A no. 3 MiFID II; Section 1 para. 1a (4) KWG and Section 32 para. 1a KWG.
[225] Annex I A no. 4 MiFID II; Section 1 para. 1a (3) KWG.
[226] Annex I A no. 5 MiFID II, Section 1 para. 1a (1a) KWG.
[227] Annex I A no. 6 MiFID II; Section 1 para. 1a (2) KWG.
[228] Annex I A no. 7 MiFID II; Section 1 para. 1a (1c) KWG.
[229] Annex I A no. 8 MiFID II; Section 1 para. 1a (1b) KWG.
[230] Annex I A no. 9 MiFID II; Section 1 para. 1a (1d) KWG.

1. *Transferable securities;*[231]
2. *money-market instruments;*[232]
3. *units in collective investment undertakings;*[233]
4. *options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;*[234]
5. *options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;*[235]
6. *options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, an MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;*[236]
7. *options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;*[237]
8. *derivative instruments for the transfer of credit risk;*[238]
9. *financial contracts for differences;*[239]
10. *options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;*[240]
11. *emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme)*[241].

(iv) Qualification of individual transactions under an EFET General Agreement

As explained, transactions under an EFET General Agreement could qualify for different categories of financial instruments and therefore also constitute or relate to financial services or activities.

Consequently, any of the above mentioned services and activities including the *Eigengeschäft* pursuant to Art. 32 para. 1a KWG would require a BaFin authorisation or the applicability of a valid exemption if and when such service or activity was performed relating to a financial instrument.

[231] Annex I C no. 1 MiFID II; Section 1 para. 11 (1-4) KWG.
[232] Annex I C no. 2 MiFID II; Section 1 para. 11 (6) KWG.
[233] Annex I C no. 3 MiFID II; Section 1 para. 11 (5) KWG.
[234] Annex I C no. 4 MiFID II; Section 1 para. 11 (8), (1a-d) KWG.
[235] Annex I C no. 5 MiFID II; Section 1 para. 11 (8), (2a) KWG.
[236] Annex I C no. 6 MiFID II; Section 1 para. 11 (8), (2b) KWG.
[237] Annex I C no. 7 MiFID II; Section 1 para. 11 (8), (2c) KWG.
[238] Annex I C no. 8 MiFID II; Section 1 para. 11 (8), (4) KWG.
[239] Annex I C no. 9 MiFID II; Section 1 para. 11 (8), (3) KWG.
[240] Annex I C no. 10 MiFID II; Section 1 para. 11 (8), (5) KWG.
[241] Annex I C no. 11 MiFID II; Section 1 para. 11 (9) KWG.

As **electricity** constitutes a **commodity**, electricity transactions could qualify as financial instrument under those subsections of Annex I Section C which relate to **commodity derivatives**[242]. These are the products under Section C (5), (6) and (7) Whether or not an electricity transaction under an EFET General Agreement constitutes a financial instrument therefore depends on whether

- it is delivered on a spot or forward basis,
- the place of its execution,
- it is cash or physically settled.

(v) The differentiation between **spot and forward** products is determined by the provisions in Art. 7 of Commission Delegated Regulation 2017 565 (*CDR 565*).[243] Consequently, transactions under the EFET General Agreement which are settled within two days after its execution are out of scope of the forward definition and consequently out of scope of financial instruments relating to forward products.

(vi) With a view on the **place of execution,** transactions executed at a regulated market[244] and at an MTF[245] are **in scope,** irrespective of whether they are settled in cash or on a physical basis[246].

Individual agreements made for the physical delivery of electricity might, if not covered under C (6) as being traded on an MTF or RM, be in scope under C (7) if the derivative contract is not entered into for commercial purpose and meets the criteria of other derivative financial instruments. These criteria are further detailed in Art. 7 CDR 2017/565 and include standardized contracts **equivalent to** contracts traded on a regulated market, MTF, OTF or equivalent third country trading venues (Art.7 para. 1 a (iii).

Transactions for **wholesale energy products**[247] traded on an **OTF** and which must be physically settled are, however, **out of scope.** OTF is a MiFID-defined term[248] and applies only to trading venues established in the European Union. As a consequence, transactions traded at a platform which is validly authorized as an OTF and are made under the EFET General Agreement for the buying and selling of electricity are **out of scope** if and when they must be physically settled[249]. This holds true even in case the electricity transaction is outside of the European Union. The mere fact that the OTF is based in the EU renders the product an EU energy wholesale product. In this respect, Art. 2 para. 4 REMIT explicitly states that REMIT applies to all EU-traded derivatives irrespective of where they are settled[250]. However, according to recent ESMA guidance[251], the mere fact that the OTF is based in the EU should not be sufficient to render the product an EU energy wholesale product. In **addition**, ESMA requires, apart from being traded as a derivative, that the underlying commodity is itself not entirely

[242] See Annex III of this Opinion outlining the transaction types.
[243] Commission Delegated Regulation 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Counsel as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive.
[244] Art. 4 para. 1 no. 21 MiFID II.
[245] Art. 4 para. 1 no. 22 MiFID II.
[246] Annex I C no. 6 MiFID II = Section 1 para. 1 KWG.
[247] See Art. 2 para. 4 REMIT.
[248] Art. 4 para. 1 no. 23 MiFID II.
[249] As defined in Art. 5 CDR 2017/565 for the purposes of C (6), see also below for general considerations.
[250] Art. 2 para. 4 lit. b REMIT.
[251] ESMA public statement dated 7 March 2019, ESMA 70-155-7253 on *Impact of Brexit on MiFID II/MiFIR and the Benchmark Regulation (BMR) – C(6) carve-out, trading obligation for derivatives, ESMA opinions on third-country trading venues for the purpose of post-trade transparency and position limits, post-trade transparency for OTC transactions, BMR ESMA register of administrators and 3rd country benchmarks.*

traded outside the EU. According to this position, a derivative contract relating to electricity that would be exclusively produced, traded and delivered outside the EU would not qualify as energy wholesale product. Opposed to that, a derivative contract on electricity which is traded in the EU and which relates to electricity which as a physical commodity is – in addition to potential trading outside the EU – **also traded within the EU**, is an energy wholesale product under REMIT, even if the non-EU trading outweighs the EU trading.

(vii) With a view on **settlement**, **all cash-settled forward transactions** are in scope[252], irrespective of their place of execution. A transaction is deemed to be cash settled if it is the settlement method provided for in the contract and such settlement is usually performed in practice and does not deviate from the economic interest of the parties. Opposed to that, a contract which provides for **physical settlement** such as the EFET General Agreement is generally viewed as made for physical settlement if such settlement can be practically performed[253] and if such physical settlement is – in the absence of particular trade life cycle events such as events of default and termination – indeed performed in the usual course of business.[254] The existence of close-out provisions in the event of termination does not impact the general rule that said contract is made for physical settlement.[255]

(viii) Scope of applicable exemptions

If the execution or performance of an individual transaction under an EFET General Agreement amounts to the provision of an investment service or activity relating to a financial instrument in Germany, this activity needs to be either authorised by BaFin[256] or validly **exempted** therefrom. Exemptions from the license requirements apply to entities rather than activities. The available exemptions under German law reflect the exemptions provided for by MiFID II basically on a one-to-one basis. Exempted are, i.a.:

- persons providing investment services exclusively for the parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings[257];

- persons

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

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

  – *for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis,*

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[252] Under Annex I C no. 5 MiFID II = Section 1 para. 1 KWG.
[253] Main set of contractual and factual prerequisites of physical delivery are in place or envisaged to be in place such as grid access and scheduling possibilities, see also Art. 5 CDR 2017/565.
[254] Practical details on how to assess bespoke commodity contracts, take-or-pay clauses and other embedded options in the settlement of a contract for physical delivery can be found in the generally agreed audit standards of the German Association of Independent Auditors, published in IDW PS 920, p. 56 et seqq.
[255] See Art. 5 para. 1 CDR 565 on the interpretation of "*must be physically settled*" and the above quoted audit standard IDW PS 920 of the German Association of Independent Auditors which lays out – in alignment with BaFin – the interpretation of particular contractual provisions.
[256] Either by BaFin financial service provider license or making use of a European passport under MiFID II and a valid home state authorisation.
[257] *Intra-group exemption,* Art. 2 para. 1 lit. b) MiFID II = Section 2 para. 1(7) para. 6 (5) KWG.

and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives,

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

– *those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business.* [258]

Due to the differentiation between *Eigenhandel für andere*[259] as service and *Eigengeschäft*[260] as activity, this ancillary activity exemption is incorporated under **two different sections** in the German Banking Act. As regards financial services, it can be found under Section 2 para. 1(9) and para. 6 (11) KWG, relating to the activity of *Eigengeschäft* it is laid out under Section 32 para. 1a KWG. In line with European law, the reliance on this exemption has to be notified on an annual basis to either BaFin as the home state regulator for entities incorporated in Germany or – for other EU-based entities – to their respective home state regulator.

The determination of whether an activity can be considered being ancillary to the main business has to be done in accordance with the methodology set out in the regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business (RTS 20[261]) and respective European Securities and Markets Authority (ESMA) publications[262] of market sizes.

IX. Other Provisions

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

<u>IX.a): Other recommendations</u>

- In order to avoid the German Act on General Terms and Conditions (*AGB-Gesetz*), parties should be aware of the importance of documented negotiations if and when entering into a general agreement including election sheet and confirmation.

- Under the applicability of the AGB, the limitation of liability under the General Agreement could be considered invalid and it could be advisable to use a narrower version of liability limitation if and when the general agreement is used by one party in a pre-defined manner without any further negotiations of its content.[263]

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[258] *Ancillary activity exemption*, Art 2 para. 1 lit. j MiFID II = Section 2 para. 1 (9) for banking business and para. 6 (11) KWG for financial services.
[259] Section 1 para. 1a (4) lit. a-d KWG, including own account dealing when executing client orders under (4) lit. c.
[260] Section 32 para. 1a KWG.
[261] Commission Delegated Regulation (EU) 2017/592= Regulatory Technical Standards 20.
[262] See https://www.esma.europa.eu/document/opinion-draft-rts-20-ancillary-activity, ESMA 70-154-884 Opinion on the Ancillary Activity Calculation as of 2 October 2018.
[263] In particular if and when the General Agreement serves as legal basis for the distribution of electricity towards small and medium-sized customers or municipal retailers.

- The dispute resolution clause under Section 22.2 of the General Agreement does not specify a place of arbitration. Such place of arbitration is important to determine the competent civil law court in case of potential subsequent challenging of an arbitration award.

- Secondly, reference could – but does not have to – be made to an established arbitration institution such as DIS, ICC or SCC.

Annex I.1
Overview over the relevant insolvency proceedings

Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Annex III.

1. Insolvency opening proceeding

Any insolvency procedure requires the **filing of an application** for such procedure and the existence of material **insolvency reasons**. To that end, the debtor as well as any of its creditors are legally entitled to file such application.[264] Limited liability corporations are **obliged** to file for the opening of an insolvency proceeding against themselves if and to the extent that Material Reasons for such proceedings exist.[265]

The opening of insolvency proceedings require underlying **material insolvency reasons** acknowledged by the pertinent legislation.[266] German law stipulates three such reasons:

- Illiquidity (*Zahlungsunfähigkeit*)[267]
- Imminent Illiquidity (*Drohende Zahlungsunfähigkeit*)[268]
- Overindebtedness (Überschuldung)[269]

The competent insolvency court will scrutinize the application upon its admissibility and justification. If the application is admissible, the debtor will be subsequently heard by the court.[270] The application is materially justified if one of the three aforementioned material insolvency reasons exists and the potential insolvency estate is sufficient to cover the costs of the pending procedure. In order to assess the validity of the material insolvency reasons, the court might obtain evidence by instructing an external expert.

The court might release **interim orders** to protect the potential insolvency estate from adverse transactions[271] and may additionally appoint an **interim insolvency administrator**[272].[273] Furthermore, the court might individually limit the legal capabilities of the debtor to enter into transactions up to prohibiting any such transactions at all[274]. The court might insofar install a (strong) preliminary insolvency administrator who substitutes the debtor legally already at this stage of the proceeding.[275]

[264] Section 13 para. 1 InsO; in case such filing is based upon the insolvency reason of imminent illiquidity only the debtor himself has the right to file for such a request.
[265] Section 15a InsO. The only two valid grounds in respect of the opening of insolvency proceedings of limited liability corporations are illiquidity and overindebtedness.
[266] Section 16 InsO.
[267] Section 17 InsO; Illiquidity occurs whenever the company is unable to pay more than 90 % of its aggregated debt and this dire situation does not improve over a period of three weeks following said date.
[268] Section 18 InsO; the insolvency reason of imminent illiquidity is only used in approx. 1 % of the overall amount of filings for the opening of insolvency proceedings, see Karsten Schmidt: *§ 18*, margin no. 6. contained in: Karsten Schmidt (Publisher): *Insolvenzordnung: InsO mit EuInsVO*. 19th Edn. C.H. Beck, Munich 2015.
[269] Section 19 InsO. The criterion of overindebtedness is not assessed on a pure balance sheet perspective but primarily depends on the question of whether the company is likely to be prosperous in the future – see Andreas Dimmling/'*The Insolvency Review'* Edn. 5, p. 88.
[270] Section 20 para. 1 InsO.
[271] Section 21 para. 1 InsO.
[272] Generally speaking, a distinction has to be made between a "weak preliminary insolvency administrator" and a "strong preliminary insolvency administrator"; the former's competence is merely to approve or deny orders for transfer of assets as issued by the debtor, while the latter is actually entitled to act on behalf of the debtor.
[273] Section 21 para. 2 InsO.
[274] Section 21 para. 2 (2) InsO.
[275] Sections 21 para. 2 as well as 22 para. 1 InsO.

2. Basic principles and milestones of the main insolvency proceeding

Up until this stage, the main insolvency proceeding (*Insolvenzhauptverfahren*) has not yet been opened. After the court has checked the facts at hand and verified whether the material insolvency reasons are well founded, it renders the **decision to formally open the insolvency proceedings**.[276] Such order will be published.[277] With the opening of the proceeding, the insolvency administrator is formally appointed and assumes the full legal capability to act on behalf of the insolvency estate under the exclusion of the debtor who is not entitled to further dispose in any way with regard to the insolvency estate.[278]

It is worth noting that between the application for the opening of insolvency proceedings and the order to actually open such proceedings, there may be a time period of several weeks up to a couple of months.[279] Also important to note is that insolvency proceedings relate to specific **individual legal entities.**[280] As a rule, for example, a holding company remains unaffected by the insolvency of a subsidiary and vice versa. However, as of 21 April 2018[281], the newly enacted provisions now permit a uniform settlement of **group insolvencies,** as they allow insolvency proceedings concerning the assets of undertakings belonging to the same group of companies to be brought before one and the same insolvency court.[282]. To that end, the definition of the term 'group company' was included within InsO, covering all legally independent undertakings which have their centre of business in Germany and which are directly or indirectly linked to each other by (i) the possibility of exercising a dominant influence, or (ii) a grouping under one uniform and centrally located management[283]. The opening of insolvency proceedings for any of such group companies requires the existence of Material Reasons for insolvency and will be assessed on a separate basis. Under certain preconditions, it is permissible to appoint one and the same administrator for multiple insolvency proceedings of group companies, unless conflict of interest within said group structures jeopardizes the independence of the administrator.[284]

In the course of the main insolvency proceeding, the insolvency administrator will at his **discretion** decide which of the not yet fully settled bilateral agreements should be performed or – alternatively – will convert into an insolvency claim of the creditor.

All creditors are requested to **notify** their claims or any rights of segregation within the time limits set by the insolvency court in written form to the insolvency administrator.

In the absence of objections of the insolvency administrator or other creditors, the insolvency court will formally establish the respective claims and note them in the list of creditors (*Insolvenztabelle*).

Thereafter, the insolvency administrator will **monetize** the remaining assets of the debtor and, after deduction of the costs of the proceedings, the settlement of priority claims against the insolvency estate **distribute** the balance among the creditors on a pro-rata basis.

Under certain prerequisites and upon mutual agreement with the creditors' assembly, the insolvency proceeding could also be conducted in the form of an **insolvency plan proceeding** in order to maintain, restructure, transfer or liquidate the insolvent company in its **entirety**.

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[276] Section 27 InsO.
[277] Section 30 para. 1 InsO.
[278] Section 80 para. 1 InsO.
[279] As a rule, said preliminary proceedings cover a time period of a maximum of three months, as the Federal Agency for Employment will pay employee's salaries (or parts thereof) for the last three months before the opening of the main insolvency proceedings. See Andreas Dimmling '*The Insolvency Review'* Edn. 5, p. 83.
[280] Section 11 para. 1 InsO.
[281] Act to facilitate the administration of Group Insolvencies (BGBI. I p. 866), entered into force on 21 April 2018.
[282] Sections 3a-3e InsO.
[283] Section 3e InsO.
[284] Section 56b para. 1 as well as 3d para. 3 InsO.

Annex I.2
Proceedings – Graphical presentation

<table>
<tr><td rowspan="2"></td><td colspan="2">Regular insolvency proceeding (Regelinsolvenzverfahren)</td></tr>
<tr><td>Normal procedure</td><td>Self-Administration / Debtor-in-Possession Management (Eigenverwaltung)</td></tr>
<tr><td>Application</td><td colspan="2">Request to open insolvency proceedings (Eröffnungsantrag):</td></tr>
<tr><td rowspan="2"></td><td colspan="2">Interim insolvency proceedings (Insolvenzeröffnungsverfahren)</td></tr>
<tr><td></td><td>Optional: Protective shield proceeding (Schutzschirmverfahren)</td></tr>
<tr><td></td><td colspan="2">Order opening the insolvency proceedings (Eröffnungsbeschluss)</td></tr>
<tr><td rowspan="2">Main proceedings</td><td colspan="2">Main procedure (Hauptverfahren)</td></tr>
<tr><td colspan="2">Optional: Insolvency plan procedure (Insolvenzplanverfahren)</td></tr>
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Annex II
Terminology

Procedural law related terminology:

- **Corporate group insolvency proceedings (*Konzerninsolvenzverfahren*)**: the Corporate group insolvency procedure (*Konzerninsolvenzverfahren*), in its extensive understanding, includes both the corporate group members' procedural coordination – i.e. the conduct and administration of multiple insolvency proceedings – as well as substantive consolidation – i.e. the treatment of the entire corporate group assets and liability for the general benefit of all creditors of the consolidated corporate group members[285];

- **Insolvency plan procedure (*Insolvenzplanverfahren*)**: Insolvency plan procedure (*Insolvenzplanverfahren*) is a procedure within the regular insolvency proceedings, in which the debtor, creditor etc. agrees on a different procedure compared to the procedure of a normal regular insolvency proceeding (i.e. different disbursements of the profits).

- **Insolvency proceedings (*Insolvenzverfahren*)**: Insolvency proceedings (*Insolvenzverfahren*) are proceedings that shall serve the purpose of collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan (derived from Section 1 InsO).

- **Interim insolvency proceedings (*Insolvenzeröffnungsverfahren*)**: Interim insolvency proceedings (*Insolvenzeröffnungsverfahren*) are proceedings that are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis or an order on the discontinuation of the proceedings.[286]

- **Main procedure (*Hauptverfahren*)**: Main procedure (*Hauptverfahren*) is the insolvency procedure following the order to open the insolvency proceedings in which the insolvency assets are distributed among the creditor either through the operations of law or through an insolvency plan procedure (*Insolvenzplanverfahren*) (Please do not confuse the term "main procedure (*Hauptverfahren*)" with "main insolvency procedure (*Hauptinsolvenzverfahren*)").

- **Order opening the insolvency proceedings (*Eröffnungsbeschluss*)**: Decision of the insolvency court to open the insolvency proceedings after consideration that a reason to open insolvency proceedings exists and that no insufficiency of assets is present (*Massearmut;*

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[285] See also: UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency para. 22 and 105
[286] Definition derived from recital (15) of regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

Masselosigkeit). The order comprises itself at least of (i) the business name, registered court and registration number under which the debtor has been entered in the Commercial Register, (ii) the name and address of the insolvency administrator and (iii) the point in time when the insolvency proceedings were ultimately opened.

- **Protective shield proceeding (*Schutzschirmverfahren*)**: Protective shield proceeding (*Schutzschirmverfahren*) is a preliminary insolvency proceeding when the debtor opted for a self-administration proceeding in its request opening of insolvency proceedings.

- **Provisional measures (*vorläufige Maßnahmen*)**: Provisional measures (*vorläufige Maßnahmen*) are measures taken by the insolvency court which are, in the view of the insolvency court, necessary to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request and may comprise of e.g. (i) designating a provisional insolvency administrator, (ii) imposing a general prohibition on making dispositions (*allgemeines Verfügungsverbot*) on the debtor.

- **Regular insolvency proceedings (*Regelinsolvenzverfahren*)**: Regular insolvency proceedings (*Regelinsolvenzverfahren*) are insolvency proceedings in which the debtor is not a consumer (*Verbraucher*; Section 13 BGB); i.e. any insolvency proceeding opened for a legal entity is a regular insolvency proceeding.

- **Request to open insolvency proceedings (*Eröffnungsantrag*)**: Written request filed by the creditors (except in case of an imminent illiquidity or overindebtness) or by the debtor using a predefined form to open the insolvency proceedings over the assets of a natural or legal person.

- **Self-Administration / Debtor-in-Possession Management (*Eigenverwaltung*)**: Self-administration / debtor-in-possession management (*Eigenverwaltung*) is a way of the insolvency proceedings in which the debtor may manage and dispose of the assets involved in insolvency proceedings under the supervision of an insolvency monitor if the insolvency court orders such debtor-in-possession management while deciding on the opening of the insolvency proceedings.

Procedural law terminology regarding international insolvency law

- **Main insolvency proceedings (*Hauptinsolvenzverfahren*)**: Main insolvency proceedings (*Hauptinsolvenzverfahren*) are insolvency proceedings opened within the territory in which the centre of a debtor's main interests is situated[287].

- **Secondary insolvency proceedings (*Sekundärinsolvenzverfahren*)**: Secondary insolvency proceedings (*Sekundärinsolvenzverfahren*) are territorial insolvency proceedings which are opened after the opening of main insolvency proceedings regarding the same debtor.

- **Territorial insolvency proceeding (*Partikularverfahren)***: Territorial insolvency proceedings (*Partikularverfahren)* are insolvency proceedings over assets of a debtor which only cover the assets situated in that territory but in contrast to the main insolvency proceedings not the entire debtor's assets.

Participant-related terminology:

- **Creditors' assembly (*Gläubigerversammlung*)**: In the course of German insolvency proceedings, the creditors' assembly (*Gläubigerversammlung)* is the body which exercises the rights of the creditors vis-à-vis the insolvency court, the insolvency administrator and the ultimate insolvency debtor. It thus serves to safeguard the common interests of the creditors. The creditors' assembly is convened and chaired by the court and does not meet in public.[288]

- **Creditors' committee (*Gläubigerausschuss*)**: The creditor's committee (*Gläubigerausschuss*) is an optional creditors' body established during insolvency proceedings with the task of supporting and supervising the insolvency administrator; the provisional creditors' committee may be appointed by the insolvency court before the first creditors' meeting.[289] Afterwards, the appointment and election of the members shall be decided jointly by the creditors' assembly (*Gläubigerversammlung*).[290]

- **Insolvency administrator (*Insolvenzverwalter*)**: An insolvency administrator (*Insolvenzverwalter*) is an independent, natural person who suits the individual case at hand, who is particularly experienced in handling the respective business affairs and is independent of the creditors and the debtor, who is elected by the insolvency court – after consideration of the

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[287] The Court of Justice of the European Union C-444/07 decision dated 21 January 2010.
[288] Section 74 InsO.
[289] Section 67 para. 1 InsO.
[290] Section 68 InsO.

provisional creditors' committee (*vorläufiger Gläubigerausschuss*) – to carry out the insolvency proceedings.

- **Insolvency court (*Insolvenzgericht*)**: Local court (*Amtsgericht*) with exclusive jurisdiction for insolvency proceedings open in the district a regional court (*Landgericht*) in the district of which the debtor (*Schuldner*) has its place of general jurisdiction (*allgemeiner Gerichtsstand*).

- **Insolvency creditors (*Insolvenzgläubiger*)**: Insolvency creditors (*Insolvenzgläubiger*) are personal creditors of the debtor holding well-founded claims against the debtor on the date when the insolvency proceedings were opened.

- **Preferential creditors (*Massegläubiger*)**: Preferential creditors (*Massegläubiger*) are creditors holding debts incumbent on the estate (*Masseverbindlichkeit*).

- **Provisional insolvency administrator (*vorläufiger Insolvenzverwalter*)**: A provisional insolvency administrator is an independent person designated by the insolvency court within the preliminary insolvency proceedings who shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request and who may – in the discretion of the insolvency court – be vested with the same legal authority as the insolvency administrator to a large extent.

Material law related terminology:

- **Claim to separate satisfaction (*Absonderungsrecht*)**: The claim to separate satisfaction (*Absonderungsrecht*) is a right to claim a separate satisfaction in respect of the main claim, interest and costs from the pledged object under Sections 166 through 173 InsO.

- **Debts incumbent on the estate (*Masseverbindlichkeit*)**: Debts incumbent on the estate (*Masseverbindlichkeit*) are the following debts: 1. the court fees in respect of the insolvency proceedings; 2. the remuneration earned and the expenses incurred by the provisional insolvency administrator, by the insolvency administrator and by the members of the creditors' committee; 3. debts created by activities of the insolvency administrator or in another way by the administration, disposition and distribution of the insolvency estate without belonging to the costs of the insolvency proceedings; 4. obligations under mutual contracts claimed to be performed to the credit of the insolvency estate or to be settled after the opening of the insolvency proceedings; 5. obligations due to restitution for unjust enrichment of the insolvency estate; 6. obligations created by a provisional insolvency administrator in whom the right to transfer the debtor's property was vested.

- **Illiquidity (*Zahlungsunfähigkeit*)**: The debtor is illiquid if he is unable to meet his due (*fällige*) obligations[291] to pay (Please note: The term "insolvency" is often confused to describe the illiquidity of an entity).[292]

- **Imminent illiquidity (*drohende Zahlungsunfähigkeit)***: The debtor is faced with imminent insolvency if he is likely to be unable to meet his existing obligations to pay on the date of their maturity.[293]

- **Insolvency estate (*Insolvenzmasse*)**: Insolvency estate (*Insolvenzmasse*) are all assets owned by the debtor on the date when the insolvency proceedings were opened and those acquired by him during the insolvency proceeding.

- **Insufficiency of assets to cover the costs of insolvency proceedings (*Massearmut; Masselosigkeit*)**: Insufficiency of assets to cover the costs of insolvency proceedings (*Massearmut*; *Masselosigkeit*) is a reason for the insolvency court to either refuse the order opening the insolvency proceedings or to discontinue the insolvency proceedings if the assets do not cover the costs of the insolvency proceedings, which in any case will be covered prior to any other costs.[294]

- **Insufficiency of assets to cover the debts incumbent on the estate (*Masseunzulänglichkeit*)**: Insufficiency of assets to cover the debts incumbent on the estate (*Masseunzulänglichkeit*) is given whenever the costs of the insolvency proceedings are covered as such, but the insolvency estate is insufficient to settle the other mature obligations incumbent on the estate (*sonstige Masseverbindlichkeiten*), thereby leading to an order by the insolvency court to discontinue the insolvency proceedings after the insolvency administrator has distributed the insolvency estate and settled the obligations incumbent on the insolvency estate in the order pursuant to Section 209 InsO, and equal-ranking obligations in proportion to the amounts.

- **Marginal liquidity gap (*geringfügige Liquiditätslücke*)**: Marginal liquidity gap (*geringfügige Liquiditätslücke*) is the ability of the creditor to pay at least 90 % of his due obligations; such a marginal liquidity gap (*geringfügige Liquiditätslücke*) does not satisfy the conditions of illiquidity of the entity.[295]

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[291] Section 271 BGB.
[292] Section 17 InsO.
[293] Section 18 InsO.
[294] Section 207 para. 1 InsO.
[295] BGH decision IX ZR 123/04 dated 24 May 2005.

- **Overindebtedness (*Überschuldung*)**: Overindebtedness exists whenever the debtor's assets no longer cover his existing obligations, unless it is predominantly likely that the enterprise will continue to exist, considering the circumstances.

- **Reason to open insolvency proceedings (*Eröffnungsgründe*)**: Reasons to open insolvency proceedings – in case of a legal person – are only illiquidity, imminent illiquidity or overindebtedness.

- **Right to separation (*Aussonderungsrecht*)**: Right to separation (*Aussonderungsrecht*) is a right to claim the separation of an object from the insolvency estate under a right *in rem* or *in personam*; the holder of such right to separation is not an insolvency creditor with regard to such claim and may enforce his right to separation irrespective of the insolvency proceedings.

- **Suspension of payments (*Zahlungseinstellung*)**: Suspension of payments (*Zahlungseinstellung*) is the perceptible behavior of the debtor, typically expressing its inability to fulfil a significant part of his due obligations due to a lack of cash resources.

- **Temporary delay in payment (*Zahlungsstockung*)**: Temporary delay in payment (*Zahlungsstockung*) is the ability of the debtor to fulfill his due obligations – however not on time – but a short period after the obligations is payable, provided, however, such period does not exceed three weeks after the obligation is payable; such temporary delay in payment (*Zahlungsstockung*) does not satisfy the conditions of a illiquidity of the entity.[296]

[296] BGH decision IX ZR 123/04 dated 24 May 2005.

Annex III
Transaction types

	Transaction Type	Legal Background
1.	Physically settled fixed date transactions relating to electricity	**Privileged <u>fixed date transaction</u> (Section 104 para. 1 sentence 1 InsO).** Constitutes a fixed date commodity transaction.
2.	Physically settled transactions relating to electricity (other than fixed-date transactions)	**In general <u>no privileged transaction</u>.** Legal privilege of Section 104 InsO only applies if <u>transaction constitutes a financial transaction.</u> Transaction needs to qualify as financial instrument according to Annex I C of MiFID II. Section C (6) would be met if transaction was executed on a regulated market or an MTF. In addition, C (7) could be met if transaction had the characteristics of other derivative financial instruments within the meaning of CDR 207/565 Art. 7.[297]
3.	Physical options on transactions relating to electricity	**Could be privileged as <u>fixed date transaction</u> if the underlying electricity transaction constitutes a fixed date transaction.** Could, **alternatively**, be privileged as **<u>financial transaction</u>** if the criteria of MiFID II Annex I C (6) or C (7) are met. C (6) could be fulfilled if the transactions had been executed at a regulated market or MTF, C (7) would be fulfilled if the characteristics of other derivative financial instruments within the meaning of CDR 565 Art. 7 are fulfilled. If none of the above is met, transactions are not privileged.
4.	Cash-settled transactions relating to electricity	**Privileged as <u>financial transaction.</u>** Irrespective of whether privileged as financial forward under Annex I C(6) or C(7), transaction constitutes a financial transaction within the meaning of Section 104 para. 1 sentence 2 no. 3 lit. b) InsO. As a consequence, cash-settled spot transactions qualify as privileged transactions.
5.	Options on cash-settled transactions relating to electricity	**Transactions qualify as <u>privileged financial transaction</u>.** See above, qualifies as financial transaction within the meaning of Section 104 InsO irrespective of whether the underlying constitutes a forward or a spot transaction.
6.	Physically settled transactions on emissions allowances	**Transactions qualify as <u>privileged financial transaction</u>.** Transactions on emission allowances are per se financial instruments according to Annex I C (4) or C (11) MiFID II.

[297] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Counsel as regards organizational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive.

	Transaction Type	Legal Background
7.	Options on physically settled transactions on emission allowances	**Transactions qualify as <u>privileged financial transactions</u>.** Options on emission allowances constitute financial instruments according to Annex I C (4) or C (11) MiFID II.
8.	Cash-settled transactions on emission allowances	**Transactions qualify as <u>privileged financial transactions</u>.** Transactions constitute financial instruments according to Annex I C (4) MiFID II.
9.	Options on cash-settled transactions on emission allowances	**Transactions qualify as <u>privileged financial transaction</u>.** Transaction constitutes financial instruments according to Annex I C (4) MiFID II.

Annex IV
Definition and explanation of relevant legal terms

Fixed date transactions (*Fixgeschäfte*)

Fixed date transactions (*Fixgeschäft*)

A fixed date transaction[298] requires an agreed determination of the exact time or time period of delivery and the mutual agreement of the parties that the validity of the contract hinges on the compliance with these time requirements; any doubts speak against a fixed date transaction.[299] If the parties agree on the possibility of a subsequent delivery, such contract is not considered a fixed date transaction.[300]

German legal practice differentiates between an absolute and a relative fixed date transaction.

In the event of an **absolute fixed date transaction** the compliance with time requirements is of such material importance that the obligation to deliver cannot be fulfilled anymore by law after the exact time or time period of delivery has passed (see Section 275 para. 1 BGB). Delayed delivery can no longer be considered as fulfilling the contractual delivery obligation as this has become impossible after non-compliance with the time requirements[301]. As mentioned above, any doubts speak against a fixed date transaction.

In the event of a **relative fixed date transaction**, compliance with the time requirements is also of material importance. The fulfillment of the delivery obligation does not become impossible after the exact time or time period of delivery has passed and the purpose of the agreement can still be satisfied[302]. The obligor continues to have a right to request delivery and a right to request damages for the delayed delivery (Section 286 BGB); however, if Party A and Party B are both business people, this right only applies by way of exception if the obligor of the delivery obligation notifies the debtor of the delivery obligation immediately after the passing of the exact time or time or time period that she/he still insists on the delivery obligation[303]. Alternatively, the obligor may be no longer interested in the delivery after non-compliance with the time requirements and may request damages for the non-fulfillment of the delivery obligation or withdraw from the agreement. This is possible without any notice period as the exact time or time period of the delivery had already been determined and agreed between the parties (Section 323 para. 2 no. 2 BGB and 376 para. 1 HGB). Indications for a relative fixed date transaction are that the parties use terms such as e.g. “fix”, “prompt”, “exactly” or “at the latest” in the agreement[304]. Other indicators in agreements are that in the event of non-compliance with the time requirements, delivery by a

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[298] See Section 323 para. 2 no. 2 BGB and Section 376 para. 1 HGB.
[299] BGH decision VIII ZR 292/88 dated 17 January 1990; Wagner in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 6, recital 65.
[300] Wagner in Wimmer / Dauernheim / Wagner / Gietl, *Handbuch des Fachanwalts Insolvenzrecht*, 8th edition 2018, Chapter 6, recital 65.
[301] Ernst in *Münchener Kommentar zum BGB*, 8th edition 2019, Section 286 BGB no. 42.
[302] Ernst in *Münchener Kommentar zum BGB*, 8th edition 2019, Section 286 BGB no. 43.
[303] Ernst in *Münchener Kommentar zum BGB*, 8th edition 2019, Section 286 BGB no. 43.
[304] Grunewald in *Münchener Kommentar zum HGB*, 4th edition 2018, Section 376 HGB no. 7.

third party can be accepted without allowing for any grace period and notice obligation. Termination for Material Reasons pursuant to Section 10.3 of the General Agreement requires a notice. However, more relevantly, Section 8 (Remedies for Failure to Deliver and Accept) of the General Agreement does not require any grace period or notice period. Therefore, we are of the opinion that the Individual Contracts can be considered relative fixed date transactions, subject to any provisions to the contrary in the Individual Contracts.

In order to qualify for the legal privilege of Section 104 InsO, the underlying individual contracts need to constitute either (i) fixed date transactions under Section 104 para. 1 sentence 1 InsO or (ii) financial transactions in accordance with Section 104 para. 1 sentence 2 InsO. In the absence of court decisions, Section 104 (i) InsO can in our view be construed as relating to both absolute and fixed date transactions. Therefore, a relative fixed date transaction is already sufficient to satisfy Section 104 InsO. Section 104 (i) InsO relates to fixed date transactions (*Fixgeschäft*) without differentiating between absolute and relative fixed date transactions[305].

[305] Jahn/Fried in *Münchener Kommentar zur Insolvenzordnung*, volume 2, 3rd edition 2013, no. 37.

1. Electricity as a good or commodity

Electricity as a "good" under Section 104 InsO

Generally, goods are movable and corporeal objects.[306] However, it is explicitly acknowledged that immaterial things such as electricity are also covered by the definition of a good[307]. In order to be considered a good, two prerequisites must be fulfilled: Firstly, a good must have a pecuniary value[308] and secondly, a good needs to be able to be subject to a commercial transaction (i.e. it must be fungible in the sense of Section 91 BGB).[309] The definition of goods does in particular not require that goods (such as electricity) have any fixed physical state[310].

This view is supported by judgments of the European Court of Justice relating to the classification of electricity as goods in the context of free movement of goods under Art. 30 et seqq. of the EC Treaty. The European Court of Justice[311] classified electricity as "goods" within the meaning of the EC Treaty in the Gemeente Almelo and Others and Energiebedrijf Ijsellmij NV[312] case. The case concerned the applicability of the rules governing free movements of goods to the electricity industry (in particular Art 37 of the EC Treaty (respective competition rule)). The underlying question was referred by a Dutch court to the European Court of Justice. The European Court of Justice reasoned that in European law and national laws, it is accepted that electricity constitutes a good within Art. 30 of the EC Treaty. The European Court of Justice refers to the following two examples: Under the EU tariff nomenclature electricity is considered as a good; further in a previous decision by the European Court of Justice in the Costa v ENEL case[313], the court accepted that electricity may fall within the scope of Art. 37 of the EC Treaty.

[306] Section 91 BGB.
[307] ECJ, Judgment of 27 April 1994, Case C-393/92, Gemeente Almelo and Others and Energiebedrijf Ijsellmij NV, recital 28.
[308] Breutigam/Blersch/Goetsch, *Berliner Kommentar zum Insolvenzrecht,* Section 104 margin no. 11 InsO.
[309] Uhlenbruck in Hirte / Vallender (eds.), *Insolvenzordnung Kommentar*, first book, 15th edition 2019, Section 104, recital 33.
[310] Jahn/Fried in *Münchener Kommentar zur Insolvenzordnung*, Volume 2, 3rd edition 2013, Section 104 no. 38, footnote 46 InsO.
[311] ECJ, Judgment of 27 April 1994, Case C-393/92, Gemeente Almelo and Others and Energiebedrijf Ijsellmij NV, recital 28.
[312] ECJ, Judgment of 27 April 1994, Case C-393/92, Gemeente Almelo and Others and Energiebedrijf Ijsellmij NV, recital 28.
[313] ECJ, Judgment of 15 July 1964 in Case 6/64 Costa v ENEL [1964] ECR 1141.

2. Electricity as commodity derivative

Electricity Derivative

A contract or transaction constitutes and electricity derivative, if the contract relates to electricity and means a financial instrument as set out in points (5) to (7) of Section C of Annex I to MiFID II. This includes options, futures, swaps and forwards

- which are settled in cash at least at the option of one party

or

- which can be physically settled provided that they are traded on a regulated market or an MTF

or

- which can be physically settled, not being for commercial purposes, which have the characteristics of other derivative financial instruments

A spot contract for electricity, i.e. a contract settled within two trading days or any deviating period generally accepted in the market for electricity as the standard delivery period is not a derivative contract.

Annex V
Section 104 German Insolvency Statute (InsO)

Legal wording and convenience translation

Fixed Date Transactions, Financial Transactions, contractual close-out netting

§ 104 InsO (Insolvenzordnung)

Section 104 German Insolvency Statue

§ 104 **Fixgeschäfte, Finanzleistungen, vertragliches Liquidationsnetting**	**§ 104** **Fixed Date Transactions, Financial Transactions, contractual close-out netting**
(1) War die Lieferung von Waren, die einen Markt- oder Börsenpreis haben, genau zu einer festbestimmten Zeit oder innerhalb einer festbestimmten Frist vereinbart und tritt die Zeit oder der Ablauf der Frist erst nach der Eröffnung des Insolvenzverfahrens ein, so kann nicht die Erfüllung verlangt, sondern nur eine Forderung wegen Nichterfüllung geltend gemacht werden. Dies gilt auch für Geschäfte über Finanzleistungen, die einen Markt- oder Börsenpreis haben und für die eine bestimmte Zeit oder eine bestimmte Frist vereinbart war, die nach der Eröffnung des Verfahrens eintritt oder abläuft. Als Finanzleistungen gelten insbesondere	(1) In the event that a particular time or period was agreed upon for delivery of goods with a market or exchange price, and such time occurs or such period lapses after the opening of insolvency proceedings, specific performance may not be demanded, but rather only a claim for non-performance may be asserted. This also applies to financial transactions which have a market or exchange price, and for which a particular time or period was agreed which only occurs or expires after the opening of insolvency proceedings. Financial transactions shall include in particular
1. die Lieferung von Edelmetallen,	1. delivery of precious metals,
2. die Lieferung von Finanzinstrumenten oder vergleichbaren Rechten, soweit nicht der Erwerb einer Beteiligung an einem Unternehmen zur Herstellung einer dauernden Verbindung beabsichtigt ist,	2. delivery of financial instruments or comparable rights, except where there is an intention to acquire an interest in another enterprise with the aim of establishing a long-term association with that enterprise,
3. Geldleistungen	3. payments of money
a) die in ausländischer Währung oder in einer Rechnungseinheit zu erbringen sind oder	a) which are to be made in a foreign currency or in a mathematical unit, or
b) deren Höhe unmittelbar oder mittelbar durch den Kurs einer ausländischen Währung oder einer Rechnungseinheit, durch den Zinssatz von Forderungen oder durch den Preis anderer Güter oder Leistungen bestimmt wird,	b) the amounts of which are calculated, directly or indirectly by referencing to the exchange rate of a foreign currency or a unit of account, to the interest rate for borrowings or to the price of other goods or services,
4. von Nummer 2 nicht ausgeschlossene Lieferungen und Geldleistungen aus derivativen Finanzinstrumenten,	4. deliveries and payments from derivative financial instruments not excluded pursuant to number 2 above,

5. Optionen und andere Rechte auf Lieferungen nach Satz 1 oder auf Lieferungen, Geldleistungen, Optionen und Rechte im Sinne der Nummern 1 bis 5,	5. options and other rights to demand delivery pursuant to sentence 1 or for delivery, payment or options and rights within the meaning of numbers 1 to 5 above,
6. Finanzsicherheiten im Sinne des § 1 Absatz 17 des Kreditwesengesetzes.	6. financial collateral within the meaning of section 1 para 17 KWG.
Finanzinstrumente im Sinne von Satz 3 Nummer 2 und 4 sind die in Anhang I Abschnitt C der Richtlinie 2014/65/EU des Europäischen Parlaments und des Rates vom 15. Mai 2014 über Märkte für Finanzinstrumente sowie zur Änderung der Richtlinien 2002/92/EG und 2011/61/EU (ABl. L 173 vom 12.6.2014, S. 349; L 74 vom 18.3.2015, S. 38; L 188 vom 13.7.2016, S. 28), die zuletzt durch die Richtlinie (EU) 2016/1034 (ABl. L 175 vom 30.6.2016, S. 8) geändert worden ist, genannten Instrumente.	Financial instruments within the meaning of sentence 3 numbers 2 and 4 are those instruments listed in Annex I Section C of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ. L 173 of 12.6.2014, p. 349; L 74 of 18.3.2015, p. 38; L 188 of 13.7.2016, p. 28), as last amended by Directive (EU) 2016/1034 (OJ. L 175 of 30.6.2016, p. 8).
(2) Die Forderung wegen Nichterfüllung bestimmt sich nach dem Markt- oder Börsenwert des Geschäfts. Als Markt- oder Börsenwert gilt	(2) The amount of any claim for non-performance shall be determined on the basis of the market or exchange value of the transaction. The market or exchange value is deemed to be
1. der Markt- oder Börsenpreis für ein Ersatzgeschäft, das unverzüglich, spätestens jedoch am fünften Werktag nach der Eröffnung des Verfahrens abgeschlossen wird, oder	1. market or exchange price for a replacement transaction which is concluded without undue delay, but no later than on the fifth business day after the opening of insolvency proceedings, or
2. falls kein Ersatzgeschäft nach Nummer 1 abgeschlossen wird, der Markt- oder Börsenpreis für ein Ersatzgeschäft, das am zweiten Werktag nach der Verfahrenseröffnung hätte abgeschlossen werden können.	2. if no replacement transaction is entered into in accordance with number 1, the market or exchange price for a replacement transaction, that could have been concluded on the second business day after the opening insolvency proceedings.
Sofern das Marktgeschehen den Abschluss eines Ersatzgeschäfts nach Satz 2 Nummer 1 oder 2 nicht zulässt, ist der Markt- und Börsenwert nach Methoden und Verfahren zu bestimmen, die Gewähr für eine angemessene Bewertung des Geschäfts bieten.	To the extent that the market conditions do not allow for the conclusion of a replacement transaction pursuant to sentence 2 numbers 1 or 2, the market or exchange value is to be determined by way of methods and procedures allowing for an adequate assessment of the value of the transaction.
(3) Werden Geschäfte nach Absatz 1 durch einen Rahmenvertrag oder das Regelwerk einer zentralen Gegenpartei im Sinne von § 1 Absatz 31 des Kreditwesengesetzes zu einem einheitlichen Vertrag zusammengefasst, der vorsieht, dass die einbezogenen Geschäfte bei Vorliegen bestimmter Gründe nur einheitlich beendet werden können, gilt die Gesamtheit der einbezogenen Geschäfte als ein Geschäft im Sinne des Absatzes 1. Dies gilt auch dann, wenn zugleich andere Geschäfte einbezogen werden; für letztere gelten die allgemeinen Bestimmungen.	(3) Where transactions pursuant to paragraph 1 are combined in a master agreement or the rules of a contractual counterparty within the meaning of Section 1 paragraph 31 of the German Banking Act, which provides that the covered transactions may, upon the occurrence of certain events, only be terminated in their entirety, then the whole of such covered transactions shall be deemed to be a single transaction within the meaning of paragraph 1. This shall also apply, if other transactions are covered by such agreement or rules; such transactions shall be subject to the general provisions.

(4) Die Vertragsparteien können abweichende Bestimmungen treffen, sofern diese mit den wesentlichen Grundgedanken der jeweiligen gesetzlichen Regelung vereinbar sind, von der abgewichen wird. Sie können insbesondere vereinbaren,	(4) The parties to the contract may agree deviating provisions as long as these are compatible with the fundamental principles applicable to the relevant statutory provision which is to be amended. They may in particular agree that,
1. dass die Wirkungen nach Absatz 1 auch vor der Verfahrenseröffnung eintreten, insbesondere bei Stellung des Antrags einer Vertragspartei auf Eröffnung eines Insolvenzverfahrens über das eigene Vermögen oder bei Vorliegen eines Eröffnungsgrundes (vertragliche Beendigung),	1. the effects of paragraph 1 may apply prior to the opening of proceedings, in particular upon the application by a party to the contract for the opening of insolvency proceedings over its assets or upon the existence of a reason for the opening for proceedings (contractual termination),
2. dass einer vertraglichen Beendigung auch solche Geschäfte nach Absatz 1 unterliegen, bei denen die Ansprüche auf die Lieferung der Ware oder die Erbringung der Finanzleistung vor der Verfahrenseröffnung, aber nach dem für die vertragliche Beendigung vorgesehenen Zeitpunkt fällig werden,	2. that a contractual termination will encompass also such transactions pursuant to paragraph 1) in respect of which the claim for delivery of the goods or the performance of the financial transaction becomes due prior to the opening of proceedings, but after the point in time agreed for the contractual termination,
3. dass zwecks Bestimmung des Markt- oder Börsenwerts des Geschäfts	3. that for the purposes of the determination of the market or exchange value of the transaction
a) der Zeitpunkt der vertraglichen Beendigung an die Stelle der Verfahrenseröffnung tritt,	a) the point in time of the contractual termination applies instead of the point in time of the opening of insolvency proceedings,
b) die Vornahme des Ersatzgeschäfts nach Absatz 2 Satz 2 Nummer 1 bis zum Ablauf des 20. Werktags nach der vertraglichen Beendigung erfolgen kann, soweit dies für eine wertschonende Abwicklung erforderlich ist,	b) the entering into of the replacement transaction pursuant to paragraph 2, sentence 2, number 1 may occur until the 20th business day after the contractual termination, if this is required to ensure that the unwinding of the transaction is performed in a manner that will maximise value,
c) anstelle des in Absatz 2 Satz 2 Nummer 2 genannten Zeitpunkts ein Zeitpunkt oder Zeitraum zwischen der vertraglichen Beendigung und dem Ablauf des fünften darauf folgenden Werktags maßgeblich ist.	c) instead of the point in time specified in paragraph 2 sentence 2, number 2 a point in time or a period between the contractual termination and the expiry of the fifth business day following such termination shall apply.
(5) Der andere Teil kann die Forderung wegen Nichterfüllung nur als Insolvenzgläubiger geltend machen.	(5) The other party may assert the claim for non-performance only as an insolvency creditor.