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MEMORANDUM OF LAW

on the

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

dated
14 November 2022

prepared for

European Federation of Energy Traders

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1 Introduction

1.1 Schönherr Rechtsanwälte GmbH, Vienna, Austria ("**Schönherr**"), has been retained by the European Federation of Energy Traders ("**EFET**") to opine on the questions set out in the letter of EFET dated 11 July 2022 (the "**EFET Letter**") in connection with the EFET General Agreement concerning the Delivery and Acceptance of Electricity[1] (the "**EFET General Agreement Electricity**") and the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas[2] (the "**EFET General Agreement Gas**", and together with the EFET General Agreement Electricity, the "**EFET General Agreements**" and each an "**EFET General Agreement**") as well as the collateral arrangements provided for under the EFET Credit Support Annex to the EFET General Agreement[3] (the "**EFET Credit Support Annex**").

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

1.2.1 For electricity:

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

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

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

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

(v) the EFET French Capacity Certificates Appendix (Version 1.0, published March 2013);

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

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

[1] In the Version 2.1, published on 20 December 2000, and 2.1(a), published on 21 September 2007.
[2] In the Version 2.0, published on 6 January 2003, and 2.0(a), published on 11 May 2007.
[3] In the Version 1.0(a), published in September 2005, 2.0, published in May 2010, and 3.1, published on 4 November 2021.

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

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

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

1.2.2 For Natural Gas:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.3 For electricity and Natural Gas:

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

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

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

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

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

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

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

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

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

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

2 Opinion limited to Austrian law as at date of Opinion

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

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

3 Interpretation and construction

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

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

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

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

4 No opinion of fact

We express no opinion as to matters of fact.

5 Assumptions

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

5.1.1 General assumptions

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

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

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

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

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

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

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

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

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

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

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

5.1.3.2 Party A has entered into Individual Contracts under the EFET General Agreement through offices in Austria 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 Austria.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2.5 No transactions contemplated under the EFET General Agreement or any Individual Contract thereunder are carried out in the context of (i) a regulated market within the meaning of Article 4 (1) no 21 Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") or (ii) a system within the meaning of § 2 (1) of the Austrian Settlement Finality Act (*Finalitätsgesetz*) (implementing Article 2 lit a of Directive 98/26/EC on settlement finality in payment and securities settlement systems).

6 Executive Summary

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

What types of counterparty are covered by this Opinion?	Please see Appendix ./A
What types of transaction are eligible for close-out netting?	Please see Appendix ./B
Does the Opinion require or recommend that Automatic Termination applies to Party A?	We believe that the question, whether Party B should select Automatic Termination to apply upon the occurrence of a Material Reason described in

	§ 10.5(c) of the EFET General Agreement or not, is, ultimately, a commercial one. From a mere legal perspective, Automatic Termination does not constitute a prerequisite for a positive statement on the enforceability of the Close-out Netting Provisions (as defined at 2.3.2 of Appendix ./E; see at 8.1.1.1 below for further details). Automatic Termination could, however, mitigate the risk of avoidance under Austrian insolvency law (see at 8.1.1.1 below for further details).
Is the early termination provision of the agreement enforceable in Austria?	Yes (subject to the limitations and qualifications set out in this Opinion).
Are the Close-out Netting Provisions[4] enforceable in a local insolvency?	Within the scope of the Provisions on Netting Agreements (as defined at 2.3.2 of Appendix ./E), the enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A is, subject to the limitations and qualifications set out in this Opinion, to be determined in accordance with the laws governing the relevant EFET General Agreement (including substantive insolvency law), *i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement. Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law and, hence, Austrian substantive

4 For purposes of this Opinion, we consider the following provisions of the EFET General Agreement as the "close-out netting provisions" (the "**Close-out Netting Provisions**"): § 10.3(a) to (c) and (e), § 10.4, § 10.5 and § 11 of the EFET General Agreement.

	insolvency law will be decisive, we believe that, based on the reasoning and subject to the limitations outlined at 7.1.2 below, the Close-out Netting Provisions will be enforceable in the event of opening of local insolvency proceedings over the assets of Party A.
Would the laws of Austria characterize the transfer of Eligible Credit Support as effecting an unconditional transfer of ownership or is there a risk of recharacterizing such transfer as creating a security interest?	In case Austrian substantive law was determined as the law applicable to the relevant Eligible Credit Support in accordance with Austrian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above), the following applies: Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title (*sachenrechtliches Eigentum*) is substituted by entitlement to a claim (*Forderungszuständigkeit*) against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit (*Akkreditiv*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Based on general Austrian law principles, we believe that an Austrian court should recognize and uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive accordingly, full entitlement to a claim (*Forderungszuständigkeit / Vollrecht an*

	der Forderung) against the relevant third-party (see at 8.3.2.2 below for further details).
Is any action required to ensure that ownership title continues to rest with Party B?	No actions or steps other than those required under the law determined as the law applicable to the Eligible Credit Support in accordance with Austrian conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 below) need to be taken and maintained. In case Austrian substantive law was to apply, once Party B has validly received full entitlement to the claim (*Forderungszuständigkeit / Vollrecht an der Forderung*) against the relevant third-party (see at 8.3.1.2.2 and 8.3.1.3.2 below), no further actions or steps are required to ensure that full entitlement to such claim continues to remain with Party B.
Are there any recommended amendments to the standard documents?	Please see our recommendations at 8.1.1.2, 8.3.9 and 8.9 below.
Does the Opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in Austria?	As far as the (non-)application of Automatic Termination is concerned, please see our considerations at 8.1.1 below. In case Party A is an Insurance Undertaking, please see at 9.4 and 9.6.1.1 below. On the one hand, it should be clear from the documentation used to which class of assets (*i.e.*, Unallocated Assets and Allocated Assets[5] or to which respective reserve fund (*Deckungsstock*) or division thereof, respectively) the EFET General Agreement and the Individual

[5] Each such term as defined at 9.4 below.

	Contracts thereunder are allocated. On the other hand, Parties should consider how to best address any issues arising from § 15 (1) VU-KAV (exclusion of set-off rights). Furthermore, each Party should carefully scrutinize whether the other Party has all the requisite capacity, powers and authorities to enter into and perform the EFET General Agreement and any Individual Contracts thereunder.[6] This holds, in particular, true in case the other Party is a Municipality or State where certain limitations apply (see also at 1.8 of Appendix ./E).

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

7.1 Insolvency-related Material Reasons

7.1.1 Within the scope of the Provisions on Netting Agreements

Within the scope of the Provisions on Netting Agreements (see at 2.3.3 of Appendix ./E for further details) the enforceability of Party B's right to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A is determined by the laws governing the relevant EFET General Agreement, *i.e.*, primarily the governing law agreed upon by the Parties (including substantive insolvency law).

7.1.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, we believe that, based on the reasoning and subject to the limitations outlined below, Party B's right to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable in the event of opening of local insolvency proceedings over the assets of Party A.

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

7.1.2.1 Introductory remarks

Under the provisions of the Austrian Insolvency Code (*Insolvenzordnung – IO*), claims and obligations for payment of an insolvent person are generally recognized in the insolvency proceedings as they existed at the effective date of institution of insolvency proceedings.

Pursuant to § 21 (1) IO, the insolvency administrator (*Insolvenzverwalter*) has the right to rescind a bilateral contract not yet fully performed by either party upon institution of insolvency proceedings over the debtor.

According to § 25b (2) IO, agreements pursuant to which a non-defaulting party would have a right to rescind from a contract or a contract would automatically terminate upon institution of insolvency proceedings over the debtor are not enforceable. As an exemption to that rule, agreements providing for a right of rescission or automatic termination in case insolvency proceedings are opened against the debtor are enforceable if the transactions concerned qualify as transactions under § 20 (4) IO.

7.1.2.1.1 Austrian substantive netting privilege (§ 20 (4) IO)

§ 20 (4) IO expressly provides that claims arising out of contracts involving

(i) the special off-balance sheet financial transactions referred to in Annex II to Regulation (EU) No 575/2013 on prudential requirements for credit institutions ("**CRR**") including derivative instruments for the transfer of credit risks (please refer to Appendix ./D and 7.1.2.1.2 below for further details; the "**Annex II-CRR Transactions**");

(ii) interest rate, currency, precious metal, raw material, stock and other securities options sold and index options;

(iii) trades (*Handelsgeschäfte*) relating to listed goods and commodities pursuant § 1 no 3 of the Austrian Stock Exchange Act 2018 (*Börsegesetz 2018 – BörseG 2018*) as long as they do not serve for own consumption (*Deckung des Eigenbedarfs*) but only serve trading purposes (*Handelsgeschäfte*) ("**Trade Transactions**");

(iv) repurchase transactions (§ 50 (1) of the Austrian Banking Act (*Bankwesengesetz – BWG*) and Article 4 (1) no 83 CRR); and

(v) securities borrowing and securities lending transactions

that have been rescinded because of the opening of insolvency proceedings may be set off if the parties to a contract have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of the opening of insolvency proceedings against the other party and that all mutual claims resulting from such contracts are to be set off (an uncertified translation of § 20 (4) IO is attached as Appendix ./C).

According to the explanatory notes (*Erläuternde Bemerkungen*) of the Austrian legislator[7], § 20 (4) IO intends to avoid the problem of determining whether a claim under a contractual netting agreement has vested prior to, or only upon/after, initiation of insolvency proceedings, by providing that claims resulting from such agreements may be set off in any event.

Contrary to Article 9 (1) of the Regulation and § 223 IO (§ 81c BWG) (see at 2.1.4 and 2.3 of Appendix ./E), § 20 (4) IO does not only deal with mere set-off, but also governs the termination and aggregation of all mutual claims upon the opening of insolvency proceedings (*i.e.*, close-out netting). According to § 20 (4) IO, the underlying contract has to be terminated as a consequence of a contractually stipulated right of the non-defaulting party or a contractually stipulated automatic termination upon the opening of insolvency proceedings over the assets of one party.

Hence, to the extent the Individual Contracts would fall within the scope of § 20 (4) IO (*i.e.*, either as Annex II-CRR Transactions or Trade Transactions)[8], we believe that the Close-out Netting Provisions will be enforceable in the event of local insolvency proceedings against Party A.

[7] 369 BlgNR 20. GP 113.
[8] Please refer to Appendix ./B as well as 7.1.2.1.2 and 7.1.2.1.3.

7.1.2.1.2 Annex II-CRR Transactions

The last paragraph of Annex II to CRR notes that the (financial) instruments specified in points 4 to 7, 9, 10 and 11 of Section C of Annex I to MiFID II (and not otherwise included in point 1 or 2 of this Annex) are also considered "derivatives" for purposes of this Annex. Consequently, the financial instruments referred to in points 4 to 7, 9, 10 and 11 of Section C of Annex I to MiFID II may also be treated as Annex II-CRR Transactions for purposes of § 20 (4) IO.

With a view to the Individual Contracts (as described in Appendix ./B), the following categories of MiFID II-financial instruments appear to be relevant:

(i) "*(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*";

(ii) "*(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products*[9] *traded on an OTF that must be physically settled*";

(iii) "*(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*";

(iv) *"(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*

[9] As defined in Article 2 no 4 of Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency ("**REMIT**").

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"; and

(v) "*(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme)*".

Commission Delegated Regulation (EU) 2017/565[10] provides for a definition of "commodities" (*Waren*). Pursuant to Article 2 no 6 of Delegated Regulation 2017/565, "commodity" (*Ware*) means "*any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity*".

While Natural Gas is not explicitly mentioned in this definition, we have no reason to believe that the term "energy" should not (also) comprise Natural Gas.[11] Hence, we believe that both electricity and Natural Gas qualify as "commodities" for purposes of the categories of MiFID II-financial instruments set out above.

Green Certificates and Capacity Rights, albeit unlikely "commodities" in the strict sense of the word, should still be eligible underlyings for purposes of MiFID II and, hence, benefit from the Austrian substantive netting privilege in § 20 (4) IO. This is because point 10 of Section C of Annex I to MiFID II also covers other derivative contracts relating to "*assets, rights, obligations, indices and measures*" not otherwise mentioned in Section C of Annex I to MiFID II. Point 10 of Section C of Annex I to MiFID II is further specified by Article 8 of Delegated Regulation 2017/565. According to Article 8 of Delegated Regulation 2017/565, derivative contracts relating to any of the following assets also fall under point 10 of Section C of Annex I to MiFID II (to the extent certain criteria are met; see further below):

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

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[10] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ("**Delegated Regulation 2017/565**").

[11] This is in line with Austrian legal writing; see, *e.g.*, *Seggermann* in *Brandl/Saria*, WAG 2018[2] § 1 mn 71 et seq.

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

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

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

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

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

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

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

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

Hence, derivative contracts relating to Green Certificates and Capacity Rights should qualify as Annex II-CRR Transactions and thus be covered by § 20 (4) IO, provided, however, that one of the following conditions is satisfied:

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

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

(c) the relevant contract satisfies the conditions under Article 7 (1) of Delegated Regulation 2017/565[12].

7.1.2.1.3 Trade Transactions

The BörseG 2018 does not provide for a definition of "goods" (*Waren*). According to Austrian legal writing[13], the term is, however, to be interpreted rather broadly so that all fungible (*vertretbare*) and movable (*bewegliche*) assets (*Sachen*) capable of being traded on an exchange qualify as "goods" for purposes of § 1 no 3 BörseG 2018. This includes, for instance, agricultural products, foodstuffs, environmental products and energy. This interpretation is also in line with the definition of "commodities" under Commission Delegated Regulation 2017/565 (for purposes of commodity derivatives under MiFID II; see above). Moreover, when introducing § 20 (4) no 2a IO into the IO in 2010, the Austrian legislator[14] explicitly referred to the EFET opinions noting that this newly introduced provision is, in particular, set to secure competitiveness of Austrian companies in international electricity trading. Hence, we believe that both electricity and Natural Gas qualify as goods for purposes of the BörseG 2018.

By virtue of law, Emission Allowances (as defined in the Emission Certificate Act (*Emissionszertifikategesetz 2011 – EZG 2011*[15])) also qualify as goods for purposes of the BörseG 2018.[16]

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

[13] *Leitner-Baier* in *Gruber*, BörseG 2018/MAR I § 1 mn 25.

[14] 612 BlgNR 24. GP 11.

[15] The "emission allowance" (*Emissionszertifikat*) is defined as a "*certificate that entitles the holder to emit one tonne of carbon dioxide equivalent in a specific trading period*" (§ 3 no 1 EZG 2011).

[16] § 44 EZG 2011.

For Green Certificates and Capacity Rights, the legal situation is not (yet) fully clear. *Prima facie*, the fact that energy qualifies as "good" in the meaning of the BörseG 2018 may speak in favour of an interpretation that other intangible (*unkörperliche*) assets (*Sachen*), such as Green Certificates and Capacity Rights, may also fall within the definition of "goods". However, one may argue to the contrary that (i) some Austrian legal writing[17] considers energy as tangible (*körperliches*) rather than intangible (*unkörperliches*) asset (since energy can be perceived with our human senses) and (ii) Green Certificates and Capacity Rights lack, by contrast to emission allowances, a specific legal provision stipulating their qualification as "goods" for purposes of the BörseG 2018. Hence, there is a risk that trades related to listed Green Certificates or Capacity Rights do not fall within the scope of § 20 (4) no 2a IO. As explained at 7.1.2.1.2 above, derivatives contracts relating to Green Certificates and Capacity Rights that meet certain criteria may, however, qualify as Annex II-CRR Transactions and thus may still benefit from the Austrian substantive netting privilege in § 20 (4) IO.

7.2 Non insolvency-related Material Reasons

7.2.1 Within the scope of the Provisions on Netting Agreements

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

7.2.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, we believe that, based on the reasoning and subject to the limitations outlined below, the Party B's right to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable.

[17] For instance, *F. Bydlinski*, Energielieferung und Kaufrecht, in FS Hämmerle (1972) 34 et seq. This view was, however, disputed in Austrian legal writing; see, *e.g.*, *Holzner* in *Rummel/Lukas*, ABGB^4 § 292 mn 2.

7.2.2.1 Restructuring proceedings

Restructuring proceedings (*Restrukturierungsverfahren*) under the ReO, which by definition are not insolvency proceedings[18] (and do not apply, *inter alios*, to Banks, Insurance Undertakings, Investment Firms and CRR-Investment Firms, Pension Funds and, arguably, Municipalities and States; see at 1.1.3 of Appendix ./E), arguably might fall under § 10.5(c)(iv) of the EFET General Agreement. This is because restructuring proceedings (*Restrukturierungsverfahren*) under the ReO may affect creditors' rights (see at 1.1.3 of Appendix ./E for further details on permissible restructuring measures (*Restrukturierungsmaßnahmen*), including, *inter alia*, the reduction of claims).

As stated at 1.1.3 of Appendix ./E, a contractual stipulation providing for a right to rescind, terminate or accelerate an agreement under which the parties still have obligations in the event restructuring proceedings are opened, or an application for the opening of restructuring proceedings is filed with the competent court, will be unenforceable (if this was the only reason for terminating / accelerating that agreement). However, similar to § 20 (4) IO (see at 7.1.2.1.1 above), § 26 (4) last sentence ReO provides for an exemption to that rule for close-out netting arrangements in relation to transactions covered by § 20 (4) IO (see at 7.1.2.1.1 above for further details on the types of transactions falling under § 20 (4) IO).[19]

Hence, to the extent the Individual Contracts fall within the scope of § 20 (4) IO, we believe that the Close-out Netting Provisions will be enforceable in the event of restructuring proceedings (*Restrukturierungsverfahren*) under the ReO in respect of Party A.

Pursuant to § 26 (4) ReO, the enforcement of a claim resulting from the operation of the relevant (close-out) netting arrangement will, however, be subject to any enforcement stay

[18] This is, however, only true for restructuring proceedings (*Restrukturierungsverfahren*) not being conducted as a European restructuring proceeding (*Europäisches Restrukturierungsverfahren*). European restructuring proceedings (*Europäische Restrukturierungsverfahren*) are included in Annex A to Council Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings (recast) (the "**Regulation**") and, therefore, are considered insolvency proceedings for purposes of the Regulation.

[19] This exemption shall, however, not apply to contracts for the supply of goods, services or energy necessary for the operation of the relevant debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

(*Vollstreckungssperre*) imposed by the competent court (see at 1.1.3 of Appendix ./E for further details).

7.2.2.2 Reorganisation proceedings

Reorganisation proceedings (*Reorganisationsverfahren*) pursuant to the URG, which by definition are not insolvency proceedings (and do not apply, *inter alios*, to Banks, Insurance Undertakings, Investment Firms and CRR-Investment Firms and, arguably, Municipalities and States; see at 1.1.2 of Appendix ./E) arguably might fall under § 10.5(c)(iv) of the EFET General Agreement. This is because reorganisation proceedings (*Reorganisationsverfahren*) pursuant to the URG may affect creditors' rights by extending the "suspect periods" under Austrian insolvency law (§ 18 URG).

Pursuant to § 19 URG, a contractual stipulation providing for automatic termination or a contractual right to terminate an agreement in the event reorganisation proceedings are opened would be unenforceable (if this was the only reason for terminating that agreement). The URG does not contain a provision analogous to § 20 (4) IO (see at 7.1.2.1.1 above).

Hence, the EFET General Agreement could not be terminated in accordance with the Close-out Netting Provisions if the opening of reorganisation proceedings against Party A was the only reason for termination.

7.2.2.3 Special receivership proceedings in respect of Banks

The institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*) against Banks (see at 1.2.3 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) special receivership proceedings may, for the reasons set out below, affect creditors' rights, and (b) upon the institution of special receivership proceedings, a receiver (*Aufsichtsperson*) in respect of the Bank's management is appointed by the competent court.

Beyond the scope of the Provisions on Netting Agreements the BWG contains no special provisions on the effects of the institution of special receivership proceedings pursuant to §§ 83 et seqq. BWG in respect of Banks on contractual netting provisions.

Absent statutory provisions to the contrary, we believe that the principles set forth at 7.1.2 above with respect to insolvency proceedings apply *mutatis mutandis* to special receivership proceedings. This is, however, subject to the following exceptions:

(i) § 86 (1) BWG stipulates that "*upon commencement of special receivership, all prior claims against the bank are granted a respite*". The respite is granted until receivership is ended. Consequently, although the non-defaulting counterparty of an insolvent Bank (*i.e.*, Party B) could enforce the Close-out Netting Provisions, the resulting (net) claim for the Termination Amount, if owed by the Bank, would be granted a respite until receivership is ended.

(ii) All funds (*Mittel*) accruing to a Bank from transactions (*Geschäften*) entered into after the institution of special receivership proceedings (new claims (*neue Forderungen*)), will form a separate fund (*Sondermasse*) aimed to serve the preferential satisfaction of such new claims (§ 87 (3) BWG; see also at 9.5.1 below). It is, therefore, not possible for the Bank's counterparty to set off claims originating prior to the institution of receivership with claims of the Bank under supervision originating after the institution of such proceedings.

7.2.2.4 Regulatory measures in respect of Banks

The institution of regulatory measures (*aufsichtsbehördliche Maßnahmen*) pursuant to § 70 (2) BWG against Banks (see at 1.2.4 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) regulatory measures pursuant to § 70 (2) BWG may, for the reasons set out at 1.2.4 of Appendix ./E, affect creditors' rights, and (b) regulatory measures pursuant to § 70 (2) BWG may include the appointment of a government commissioner (*Regierungskommissär*) by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde*) ("**FMA**") (see at 1.2.4 of Appendix ./E for further details).

Beyond the scope of the Provisions on Netting Agreements the BWG does not contain special provisions on the effects of regulatory measures pursuant to § 70 (2) BWG in respect of Banks on contractual netting provisions.

We believe that the principles set out at 7.2.2.3 above with respect to special receivership proceedings, including the exceptions mentioned there, apply *mutatis mutandis* to regulatory measures pursuant to § 70 (2) BWG. This interpretation is supported by the fact that the Austrian legislator clarifies the applicability of the provisions in respect of special receivership proceedings to regulatory measures against Banks by § 70 (2a) and (2b) BWG.

7.2.2.5 BRRD-measures against a BRRD-Entity

The institution of crisis prevention measures and crisis management measures against a BRRD-Entity (see at 1.2.6.3 and 1.2.6.4 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) crisis prevention measures and crisis management measures may, for the reasons set out at 1.2.6.3 and 1.2.6.4 of Appendix ./E, affect creditors' rights, and (b) crisis prevention measures and crisis management measures may include the appointment of a temporary administrator (*Vorläufiger Verwalter*) / special manager (*Sonderverwalter*) by the competent resolution authority (see at 1.2.6.3 and 1.2.6.4 of Appendix ./E for further details)

Crisis prevention measures and crisis management measures (*i.e.*, measures under the BaSAG[20], including the occurrence of any event directly linked to the application of such a measure) will, *per se*, **not** (i) constitute an enforcement event (*Verwertungs- oder Beendigungsfall*)[21] under the Austrian Financial Collateral Act (*Finanzsicherheiten-Gesetz – FinSG*) or an insolvency proceeding under the Austrian Act on Settlement Finality (*Finalitätsgesetz – FinalitätsG*) and (ii) entitle a counterparty to terminate, modify, accelerate or exercise set-off and netting

[20] The Act on Banking Recovery and Resolution (*Bundesgesetz über die Sanierung und Abwicklung von Banken (Sanierungs- und Abwicklungsgesetz – BaSAG)*.

[21] The FinSG contains an autonomous definition of an "enforcement event"; according to such definition, "enforcement event" is "*an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realize or appropriate financial collateral or a close-out netting provision comes into effect*" (§ 3 (1) no 12 FinSG).

rights, as long as the substantive contractual obligations, including payment obligations and the provision of collateral, are fulfilled by the institution (§ 63 BaSAG).

Only if also other events of default in relation to the BRRD-Entity occur, the counterparty may exercise such rights (§ 63 (5) BaSAG). Also, such measures will not trigger cross-default clauses in agreements of group companies of the BRRD-Entity or a credit support provider event of default.

A suspension or restriction under §§ 47a, 64 through 66 BaSAG (see at 1.2.6.7 of Appendix ./E) shall not constitute non-performance of a contractual obligation for the purposes of § 63 BaSAG (please see above).

Consequently, as long as the BRRD-Entity continues to fulfill its substantive contractual obligations under the relevant EFET General Agreement (or the obligations are suspended under § 47a or § 64 BaSAG), the counterparty will not be entitled to close-out transactions under such EFET General Agreement and Automatic Termination will not apply or be triggered or (if the EFET General Agreement is governed by a third-country law) will, on the basis of § 63 BaSAG constituting mandatory law, likely not be enforceable against a BRRD-Entity in case the resolution authority orders crisis prevention measures or crisis management measures.

7.2.2.6 Regulatory measures in respect of Insurance Undertakings

The institution of regulatory measures (*aufsichtsbehördliche Maßnahmen*) against Insurance Undertakings (see at 1.3.3 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) regulatory measures against Insurance Undertakings may, for the reasons set out below, affect creditors' rights, and (b) regulatory measures against Insurance Undertakings may include the appointment of a government commissioner (*Regierungskommissär*) by the FMA (see below and at 1.3.3 of Appendix ./E for further details).

The Austrian Insurance Supervision Act 2016 (*Versicherungsaufsichtsgesetz – VAG 2016*) does not contain special provisions as regards the effects of regulatory measures in respect of Insurance Undertakings on contractual netting provisions.

The following is to be noted though:

(a) In the circumstances described at 1.3.3 of Appendix ./E relating to § 316 VAG 2016, the FMA may be obliged to prohibit payments by an Insurance Undertaking (other than a Re-Insurance Undertaking) by adopting regulatory measures (*aufsichtsbehördliche Maßnahmen*). We believe that such prohibition may extend to all kinds of payments. Therefore, the FMA may (be obliged to) grant all kinds of payments to be made by Insurance Undertakings (other than Re-Insurance Undertakings) a respite until the financial situation of the Insurance Undertaking permits the revocation of the prohibition.

(b) We believe that pursuant to § 275 (1) VAG 2016 (see at 1.3.3 of Appendix ./E) the FMA may (i) prohibit (the entering into / the performance of) such transactions (the taking of such measures) which either are in violation of the provisions applicable to the insurance contract business or would not be entered into / effected (taken) by Insurance Undertakings conducting proper business operations and (ii) order to enter into such transactions (take such measures) which are required for the insurance contract business or which would be entered into (taken by) by Insurance Undertakings (other than Re-Insurance Undertakings) conducting proper business operations.

(c) Pursuant to § 275 (1) VAG 2016, § 283 (1) VAG 2016 or § 284 (1) VAG 2016, the FMA may be obliged to grant claims against Insurance Undertakings a respite.

(d) In the circumstances described at 1.3.3 of Appendix ./E relating to § 284 VAG 2016, the FMA may order measures limited in time which are not exhaustively specified in § 284 VAG 2016. In case a government commissioner (*Regierungskommissär*) is appointed, such person may veto actions so that the Insurance Undertaking (other than Re-Insurance Undertakings) may be, temporarily, restricted from effecting payments. The FMA may also take more far reaching measures and prohibit the Insurance Undertaking (other than Re-Insurance Undertakings) from conducting its business. Pursuant to Austrian legal writing such prohibitions are designed to restrict the creation of new debts and shall not extend to debts originated prior to the prohibition to conduct the business.

(e) Generally, the measures the FMA may take pursuant to § 275 VAG 2016, § 283 VAG 2016 or § 284VAG 2016 are not exhaustively specified. Therefore, it is uncertain what other measures might be taken and how far reaching such measures could be. Pursuant to Austrian legal writing[22], the measures according to § 284 VAG 2016 may only be measures which (i) influence the organizational structure of insurance undertakings or the organization of their business operations, or (ii) constitute restrictions on the further conduct of business.

(f) In the absence of statutory provisions to the contrary, we believe that the enforceability of contractual close-out netting provisions should not be affected by the adoption of regulatory measures as regards Insurance Undertakings. An Insurance Undertaking might, however, temporarily be restricted from paying the Termination Amount, if owed by it.

7.2.2.7 Special receivership proceedings in respect of Investment Firms and CRR-Investment Firms

The institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*) pursuant to §§ 80 et seqq. of the Austrian Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz 2018 – WAG 2018*) against Investment Firms and CRR-Investment Firms (see at 1.4 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) special receivership proceedings may, for the reasons set out below, affect creditors' rights, and (b) upon the institution of special receivership proceedings, a receiver (*Aufsichtsperson*) in respect of the Investment Firm's / CRR-Investment Firms 's management is appointed by the competent court.

The WAG 2018 contains no special provisions on the effects of the institution of special receivership proceedings pursuant to §§ 80 et seqq. WAG 2018 in respect of Investment Firms and CRR-Investment Firms on contractual netting provisions.

[22] *S. Saria* in *Korinek/G. Saria/S. Saria*, VAG § 284 mn 5.

Absent statutory provisions to the contrary, we believe that the principles set forth at 7.1.2 above with respect to insolvency proceedings apply *mutatis mutandis* to special receivership proceedings, subject to the following exceptions:

(i) § 83 (1) WAG 2018 stipulates that "*upon commencement of special receivership, all prior claims against the investment firm are granted a respite*". The respite is granted until receivership is ended. Consequently, although the non-defaulting counterparty (*i.e.*, Party B) could enforce the Close-out Netting Provisions, the resulting (net) claim for the Termination Amount, if owed by the Investment Firm or CRR-Investment Firm, would be granted a respite until receivership is ended.

(ii) All funds (*Mittel*) accruing to an Investment Firm and CRR-Investment Firm from transactions (*Geschäften*) entered into after the institution of such special receivership proceedings (new claims (*neue Forderungen*)), will form a separate fund (*Sondermasse*) aimed to serve the preferential satisfaction of such new claims (§ 84 (3) WAG 2018; see also at 9.5.1 below). It is, therefore, not possible for the Investment Firm's or CRR-Investment Firm's counterparty to set off claims originating prior to the institution of receivership with claims of the Investment Firm or CRR-Investment Firm under supervision originating after the institution of such proceedings.

7.2.2.8 Regulatory measures in respect of Investment Firms and CRR-Investment Firms

The institution of regulatory measures (*aufsichtsbehördliche Maßnahmen*) pursuant to § 92 WAG 2018 against Investment Firms and CRR-Investment Firms (see at 1.4 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) regulatory measures pursuant to § 92 WAG 2018 may, for the reasons set out at 1.4 of Appendix ./E, affect creditors' rights, and (b) regulatory measures pursuant to § 92 WAG 2018 may include the appointment of a government commissioner (*Regierungskommissär*) by the FMA (see at 1.4 of Appendix ./E for further details).

The WAG 2018 contains no special provisions on the effects of regulatory measures pursuant to § 92 WAG 2018 in respect of Investment Firms and CRR-Investment Firms on contractual netting provisions.

We believe that the principles set out at 7.2.2.7 above with respect to special receivership proceedings, including the exceptions mentioned there, apply *mutatis mutandis* to regulatory measures pursuant to § 92 WAG 2018.

7.2.2.9 Regulatory measures in respect of Pension Funds

The institution of regulatory measures (*aufsichtsbehördliche Maßnahmen*) pursuant to § 33 (4) PKG against Pension Funds (see at 1.5 of Appendix ./E for further details) arguably might be covered by § 10.5(c)(iv) of the EFET General Agreement and/or § 10.5(c)(vi) of the EFET General Agreement. This is because (a) regulatory measures pursuant to § 33 (4) PKG may, for the reasons set out at 1.5 of Appendix ./E, affect creditors' rights, and (b) regulatory measures pursuant to § 33 (4) PKG may include the appointment of a government commissioner (*Regierungskommissär*) by the FMA (see at 1.5 of Appendix ./E for further details).

The PKG does not contain special provisions on the effects of regulatory measures (*aufsichtsbehördliche Maßnahmen*) pursuant to § 33 (4) PKG in respect of Pension Funds on contractual netting provisions.

In the absence of statutory provisions to the contrary, the enforceability of the Close-out Netting Provisions should thus not be affected by regulatory measures pursuant to § 33 (4) PKG against a Pension Fund.

However, a Pension Fund might, temporarily, be restricted from paying the Termination Amount, if owed by it.

8 Specific questions

8.1 Part I: Enforceability of Close-out Netting

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

8.1.1.1 General remarks

We believe that the question, whether Party B should elect Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement or not, is ultimately a commercial decision to take. In arriving at such decision, we believe that potential practical difficulties (e.g. in determining the Termination Amount in an Automatic Termination-scenario because relevant amounts need to be calculated for the (historic) point in time when Automatic Termination became effective) should also be taken into account.

Please see below an analysis of what needs to be considered by the Parties from a legal perspective when determining whether to select Automatic Termination or not:

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

Within the scope of the Provisions on Netting Agreements, it needs to be assessed under the laws governing the relevant EFET General Agreement (*i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement, including substantive insolvency law) whether selection of Automatic Termination is a prerequisite for, or recommended to secure, enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings, special receivership proceedings or restructuring proceedings (*Restrukturierungsverfahren*) over the assets of Party A, or in the event of institution of any regulatory measures against Party A (in each case, as applicable; please see at 2.3.3 of Appendix ./E for further details).

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

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

Under Austrian substantive insolvency law, election of Automatic Termination is no prerequisite for enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over Party A's assets. This is because the Austrian substantive netting privilege in § 20 (4) IO (see at 7.1.2.1.1 above) applies irrespective of whether the parties to a contract have agreed that these contracts are automatically rescinded, <u>or</u> may be rescinded at the option of one party, in case of the institution of insolvency proceedings against the other party.

Moreover, election of Automatic Termination should also be no prerequisite for enforceability of the Close-out Netting Provisions in the event of opening of special receivership proceedings or restructuring proceedings (*Restrukturierungsverfahren*) over the assets of Party A, or in the event of institution of any regulatory measures against Party A (in each case, as applicable; please see at 2.3.3 of Appendix ./E for further details).

Automatic Termination upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement could also mitigate the risk of avoidance under Austrian insolvency law (see at 9.3 below). The reason for this is that, in an Automatic Termination scenario, the non-defaulting party (*i.e.*, Party B) would not take any direct action by which it would document its knowledge of the existence of a Material Reason described in § 10.5(c) of the EFET General Agreement. If, by contrast, Party B terminates the EFET General Agreement because of the occurrence of a Material Reason described in

§ 10.5(c) of the EFET General Agreement in respect of Party A, an Austrian court could come to conclude that Party B had knowledge or should have had knowledge of the insolvency of Party A giving rise to the termination (potentially) becoming subject of an avoidance action (please see at 9.3 below and Appendix ./F for further details).

8.1.1.2 Application of Automatic Termination

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

In our understanding of the Material Reason described in § 10.5(c)(iv) of the EFET General Agreement, Automatic Termination (if elected to apply by the Parties pursuant to § 10.4 of the EFET General Agreement) would already be triggered upon filing (*Antrag*) for the opening of insolvency proceedings by the defaulting Party or any of its creditors (*Gläubiger*) or any competent supervisory authority[23]. This is because § 10.5(c)(iv) of the EFET General Agreement refers to the defaulting Party or any of its creditors (as the case may be) "instituting" proceedings against the defaulting Party with the aim of "seeking" reliefs under insolvency or similar laws. We believe that this clause should not be interpreted as referring to the formal opening (by the competent court) of insolvency proceedings over the assets of the defaulting Party but rather to filing (*Antrag*) for the opening of insolvency proceedings. While the Parties are requested to specify the Early Termination Date in such event in the Election Sheet, Automatic Termination may occur at a point in time when insolvency proceedings have not yet been (formally) opened and, hence, insolvency proceedings have not yet become effective.[24]

In this respect, Parties should consider that, by contrast to the formal opening of insolvency proceedings, filings for the opening of insolvency proceedings are not made public in Austria. In case of filings for the opening of insolvency proceedings by creditors of the defaulting Party, not even the defaulting Party itself may have knowledge of such filings. Furthermore, there

[23] In case of Banks, only the FMA or, during effective special receivership proceedings (*Geschäftsaufsichtsverfahren*), the appointed receiver (*Aufsichtsperson*) may file for the opening of bankruptcy proceedings against the assets of a Bank.

[24] Austrian insolvency proceedings only become effective as of 00:00 hours of the day following the publication of the receiving order by the competent insolvency court in the official insolvency data base (*Ediktsdatei*).

will be a time gap between the filing for, and the actual opening of, insolvency proceedings (if insolvency proceedings were opened at all). While, in case of a motion by the defaulting Party for opening of insolvency proceedings over its assets, formal opening of insolvency proceedings by the competent insolvency court (*Insolvenzgericht*) is only a matter of days, it may take several weeks or even months in case of filings made by creditors of the defaulting Party. Hence, in addition to the practical aspects around historic valuations flagged at 8.1.1.1 above, there is a risk that Parties, not having knowledge of the occurrence of a Material Reason under § 10.5(c)(iv) of the EFET General Agreement (*i.e.*, filing for opening of insolvency proceedings), continue to enter into Individual Contracts irrespective of the relevant EFET General Agreement already having been (automatically) terminated. Parties thus need to carefully scrutinize whether to apply Automatic Termination for such scenarios and, if they elect to do so, which point in time should be specified as Early Termination Date in the Election Sheet.

Moreover, we believe that an Automatic Termination based upon a Material Reason described in § 10.5(c) of the EFET General Agreement that only occurs <u>after</u> opening of insolvency proceedings might not benefit from the Austrian substantive netting privilege in § 20 (4) IO. This is due to § 20 (4) IO specifically referring to an automatic termination <u>upon</u> the opening of insolvency proceedings. In addition to agreeing a (too) late Early Termination Date in the Election Sheet, the foregoing may, in particular, hold true for scenarios where the Parties agreed that § 10.5(c)(iv) of the EFET General Agreement would not trigger Automatic Termination and the following will apply:

- § 10.5(c)(i) of the EFET General Agreement, to the extent such dissolution is the result of insolvency proceedings;

- § 10.5(c)(iii) of the EFET General Agreement, to the extent this (also) includes recovery plans (*Sanierungspläne*) which may only take effect after the opening of respective insolvency proceedings[25]; and

[25] We believe that recovery plans (*Sanierungspläne*) might fall under § 10.5(c)(iii) of the EFET General Agreement given that a recovery plan (*Sanierungsplan*) constitutes an arrangement with and for the benefit of the debtor's creditors; please see at 1.1.1 of Appendix ./E for further details on recovery plans (*Sanierungspläne*).

- § 10.5(c)(vii) of the EFET General Agreement, to the extent such enforcement actions are carried out only after opening of respective insolvency proceedings.

However, to the extent Automatic Termination in case of the institution of insolvency proceedings against Party A (§ 10.5(c)(iv) of the EFET General Agreement) is not disapplied by the Parties, the EFET General Agreement should already (automatically) terminate upon the institution of insolvency proceedings against Party A so that, in any of the scenarios mentioned above, the EFET General Agreement will have already ceased to exist.

To reduce the uncertainties discussed above, we suggest limiting the trigger events for Automatic Termination and to specify the Early Termination Date as follows (if at all Parties agree to opt for Automatic Termination):[26]

"*§ 10.4 shall apply in case the Material Reason described in § 10.5(c)(iv) or – to the extent analogous thereto – § 10.5(c)(viii) is triggered by the institution of a proceeding seeking the opening of insolvency proceedings that subsequently results in the opening of such proceedings in respect of Party A with termination being effective as of 11.59 p.m. on the day of publication of the receiving order in the official insolvency data base".*

We believe that any grace period foreseen in § 10.5(c)(iv) of the EFET General Agreement must expire upon the actual opening of insolvency proceedings over the assets of the other Party. This is because the wording of § 20 (4) IO[27] does not give room for Parties to provide for a grace period in case of the opening of insolvency proceedings.

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

26 The suggested language does not take into account the specifics of any transaction and/or counterparty.
27 *Arg*. "*[…] such contracts are rescinded, or may be rescinded at the option of one party, upon the opening of insolvency proceedings […]*".

8.1.1.3 Non-application of Automatic Termination

For scenarios where the Parties have not selected Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement, it is recommended that Party B exercises its right of Early Termination within due course following the occurrence of such Material Reason.

This holds, in particular, true in the event of opening of local insolvency proceedings over Party A's assets. We believe that Party B should exercise its right of Early Termination as soon as reasonably practicable after the opening of insolvency proceedings over Party A's assets. The right of Early Termination should, in particular, be exercised prior to any recovery plan (*Sanierungsplan*) in respect of Party A being confirmed by the competent insolvency court. This recommendation follows an Austrian Supreme Court (*Oberster Gerichtshof*) judgment of December 2015[28]. According to this case law, a creditor who does not make use of the statutory set-off right pursuant to § 19 (1) IO during the course of an insolvency proceeding may, following acceptance of a recovery plan (*Sanierungsplan*) and completion of the insolvency proceedings, only set off claims in the amount of the insolvency quota (*Insolvenzquote*). Given that set-off is an inherent element of the close-out netting mechanism provided for under the Close-out Netting Provisions, we cannot exclude that an Austrian court would apply this dictum to the Close-out Netting Provisions *mutatis mutandis*.

For the reasons set out above (and at 8.1.1.2 in respect of the opening of insolvency proceedings), we also believe that Parties should refrain from agreeing a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement. If Parties were, nonetheless, to agree upon a grace period, the period should be as short as reasonably possible.

[28] OGH 1.12.2015, 6 Ob 179/14p (vS).

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

8.1.2.1 Within the scope of the Provisions on Netting Agreements

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

Notwithstanding the foregoing, enforceability of § 11 of the EFET General Agreement will also be subject to the limitations set out at 8.1.2.3 below.

8.1.2.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, we believe that § 11 of the EFET General Agreement will be enforceable pursuant to the principle of contractual freedom (*Vertragsfreiheit*), respectively private autonomy (*Parteiautonomie*), recognized under Austrian law and, in the event of opening of local insolvency proceedings over the assets of Party A, pursuant to the principles of Austrian insolvency law (see Appendix ./E) and subject to the limitations set out at 8.1.2.3 and below.

No case law exists on whether the insolvency administrator (*Insolvenzverwalter*) or the debtor can challenge or otherwise dispute the methods of calculating the Settlement Amounts and, on basis thereof, the Termination Amount. However, in connection with the dissolution of other agreements as a result of insolvency proceedings, the Austrian Supreme Court (*Oberster Gerichtshof*)[29] held that any agreement on a penalty made prior to the initiation of insolvency proceedings to the detriment of the estate (*Insolvenzmasse*) is ineffective in as far as the compensation paid by the estate (*Insolvenzmasse*) exceeds the damage actually incurred by the solvent party.

[29] OGH 17.5.1983, 5 Ob 311/81; RIS-Justiz RS0032080.

Should the insolvency administrator of Party A not have the necessary evidence to calculate the actual claims, Party B may be forced to disclose the information and business matters required to determine these claims.

In addition, § 58 IO generally excludes the assertion of interest as of the commencement of insolvency proceedings and costs incurred by the creditors from participating in the proceedings. These claims are not part of the proceedings. The assertion of interest accruing after the initiation of insolvency proceedings by a right to preferential satisfaction (*Absonderungsrecht*) is permitted, but for a period of six months after opening of insolvency proceedings the claim for interest is limited to contractual interest (*Vertragszinsen*) rather than default interest (*Verzugszinsen*) (in case no contractual interest was agreed, the statutory interest (*gesetzliche Zinsen*) would apply). Furthermore, while the assertion of interest accruing after the initiation of insolvency proceedings by set-off should generally be permissible, Austrian law is silent whether the above restrictions will also apply for set-off rights[30].

8.1.2.3 Additional limitations

Austrian law provides for certain overriding mandatory principles as regards damages and the calculation of damages, respectively, which may not be derogated from by the Parties and which, although not directly geared at commodities derivatives business, might be relevant in regard to the Termination Amount calculations and related payments foreseen in the EFET General Agreement. For instance, such mandatory principle would be that any exclusion of liability is only permissible within *bones mores* (*gute Sitten*). Moreover, in cases where a Party is vested with a discretion, may determine a matter in its opinion or is granted the right to unilaterally determine essential terms of a contract, such discretion is to be exercised reasonably, such opinion is to be based on reasonable grounds and such determination needs to be adequate and not arbitrary under the then prevailing circumstances.

In the event that the Termination Amount calculations and relevant payment obligations foreseen in the EFET General Agreement would yield results that would be incompatible with the foregoing, these would be superseded by Austrian substantive

[30] This remains to be clarified by the Austrian courts.

law. Whereas it is difficult to quantify this risk from the language of the EFET General Agreement without reference to the facts of specific Individual Contracts, we understand that generally the relevant clauses have been drafted aiming at commercially balanced results, so that this risk should probably be small.

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

We believe that the agreement of the Parties that all Individual Contracts and the EFET General Agreement shall form a single agreement (see § 1 (1) of the EFET General Agreement) and that the Close-out Netting Provisions shall apply to all Individual Contracts concluded under the relevant EFET General Agreement should be recognized and upheld by an Austrian court. This is backed by Austrian case law according to which, also in the event of opening of insolvency proceedings, the divisibility (*Teilbarkeit*) of performance obligations is, in principle, to be determined according to the parties' intentions.[31]

Furthermore, where the Provisions on Netting Agreements do not apply (otherwise, this would need to be assessed on the basis of the laws governing the relevant EFET General Agreement), we believe that the single agreement concept is strictly necessary in order for the Close-out Netting Provisions to be enforceable under Austrian substantive insolvency law. Provisions allowing or providing for the termination and close-out netting of some but not all Individual Contracts under the EFET General Agreement may thus not be enforceable under Austrian substantive insolvency law. This is because the Austrian substantive netting privilege in § 20 (4) IO requires termination of all Individual Contracts and (subsequent) set-off of all mutual claims resulting from the terminated Individual Contracts.

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[31] OGH 20.4.1995, 8 Ob 22/94.

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

While claims expressed in a foreign currency remain unaffected upon the opening of local insolvency proceedings over the assets of an Austrian counterparty, § 14 (1) IO stipulates that such claims must be converted into Euros, applying the exchange rate valid at the date of the opening of the insolvency proceedings.[32]

Hence, upon the opening of local insolvency proceedings over the assets of Party A, any obligation of Party A to pay the amount of any compensation claim in USD or GBP (as the case may be) will not be enforceable.

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

8.1.5.1 Within the scope of the Provisions on Netting Agreements

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

[32] Previously, the predominant view was that the applicable exchange rate will be the selling rate (*Briefkurs*) published by the Vienna Stock Exchange. Since the Vienna Stock Exchange no longer officially announces (determines) the selling rate, it is somewhat unclear which exchange rate shall be applied. We believe that good arguments could be made to apply the reference rates published by the European Central Bank ("**ECB**") (currently available under http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html). This view is corroborated by case law on the conversion of a payment obligation denominated in a foreign currency contained in a writ of execution (*Exekutionstitel*), according to which in such a case the reference rate published by the ECB is to be applied (see OGH 30.9.2009, 3 Ob 161/09m). However, the more recent case law on § 907b ABGB cannot be ignored either, rejecting the application of the reference rates published by the ECB because these are average rates between buying and selling rates only (see OGH 25.8.2020, 8 Ob 37/20d).

The same applies in the event of opening of restructuring proceedings (*Restrukturierungsverfahren*) over the assets of Party A (where applicable).

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

8.1.5.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A will, subject to the limitations set out at 7.1.2 above and 9.5 below, not be dependent upon, or otherwise affected by, either Party's legal or regulatory status.

The same applies in the event of opening of restructuring proceedings (*Restrukturierungsverfahren*) over the assets of Party A (where applicable).

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

8.1.6.1 Within the scope of the Provisions on Netting Agreements

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

8.1.6.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, we believe that the conclusions reached under this 8.1 would not change to the extent <u>all</u> Individual Contracts under the relevant EFET General Agreement would benefit from the Austrian substantive netting privilege in § 20 (4) IO.

If there were, however, also Individual Contracts not falling within the scope of § 20 (4) IO, there is a risk that this would negatively impact on the enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A. We believe that the question to what extent the close-out netting mechanism provided for under the Close-out Netting Provision remains enforceable in such a scenario, would, however, not only need to be assessed under applicable Austrian substantive insolvency law but also under the laws governing the EFET General Agreement / EFET Credit Support Annex (*e.g.*, English or German law).

We believe that the same should hold true where restructuring proceedings (*Restrukturierungsverfahren*) were opened over the assets of Party A.

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

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

8.1.7.1 Within the scope of the Provisions on Netting Agreements

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

8.1.7.2 Beyond the scope of the Provisions on Netting Agreements

Where the Provisions on Netting Agreements do not apply or the EFET General Agreement is governed by Austrian law, we believe that, based on the reasoning and subject to the limitations outlined at 7.1 above, the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable irrespective of the insolvency of Party A.

8.2 Part II: Multibranch Parties

8.2.1 Austrian Multibranch Party

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

There would not be any change in our conclusions reached under 8.1 above.

From an Austrian law perspective, enforceability of close-out netting of claims arising under or in connection with Individual Contracts will depend on which entity legally "owns" such claims. According to established principles of Austrian corporate law, the head office and all branches of a bank or other corporation form one single legal entity. Consequently, Individual Contracts carried out through branch offices of Party A create rights and obligations of Party A which have to be enforced in the Austrian insolvency proceeding of Party A. Where secondary insolvency proceedings have been opened against the assets of a branch office of Party A located in a Regulation State (other than Austria) (see at 2.1.3 of Appendix ./E for further details), we believe that enforceability of close-out netting of claims arising under or in connection with Individual Contracts entered into by such branch office will, primarily, depend on whether such Regulation State treats Party A and the respective branch office as one single entity (see also at 8.2.1.2 below).

8.2.1.2 *Would the EFET General Agreement be treated as a single unified agreement by the Austrian receiver under the laws of Austria, 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?*

If Austrian bankruptcy proceedings are opened against Party A, the Austrian insolvency administrator will treat the EFET General Agreement and all Individual Contracts thereunder as single, unified agreement with respect to Party A and branches of Party A in countries that treat Party A and the branch as one single entity.

With respect to branches of Party A in countries that treat the branch as separate legal entity, we believe that the Austrian insolvency administrator would not recognize the inclusion of Individual Contracts concluded by such branch into the close-out netting of Party A.

8.2.2 Foreign Multibranch Party

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

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

Local creditors of the Austrian Branch of a Foreign Institution could not initiate separate proceedings in Austria if the relevant authorities in Austria did not do so. Local creditors of a Austrian Branch of a Foreign Corporation or EEA Financial Institution could request for the initiation of separate bankruptcy proceedings in Austria.

8.2.2.1.1 General

According to established principles of Austrian corporate law, the head office and all branches form one single legal entity.[33] An Austrian Branch of a Foreign Corporation / Foreign Institution / EEA Financial Institution does not have its own legal personality. Therefore, as far as "*assets or liabilities of an Austrian*

[33] See OGH 11.10.1995, 3 Ob 64/95; according to § 12 of the Austrian Act on Private International Law (*Internationales Privatrechtsgesetz – IPRG*) in conjunction with § 10 IPRG, the question of whether a branch of a bank is a separate legal entity or not is determined according to the law applicable at the seat of the branch.

Branch" are concerned, according to Austrian law, these assets and liabilities belong to the head office only.

In accordance with recent decisions of Austrian appellate courts, branches of foreign companies in Austria are not capable of insolvency by themselves as they have no separate legal capacity.

8.2.2.1.2 Rules applicable

Austrian courts do not have jurisdiction for the institution of bankruptcy proceedings, special receivership proceedings or regulatory measures against the Austrian Branch of a credit institution / insurance undertaking licensed in another EEA State. The home Member State alone has the right to decide on the implementation of reorganisation measures over a credit institution / insurance undertaking licensed in another EEA State or its branch in Austria (§ 244 (1) IO).

If the FMA deems it necessary that reorganisation measures should be implemented in respect of the Austrian Branch of a credit institution licensed in another EEA State, it shall inform the competent authorities of the home Member State accordingly (§ 83 (6) BWG, implementing Article 5 of Directive 2001/24/EC).

In respect of Foreign Corporations, Foreign Institutions and EEA Financial Institutions, Austrian courts have jurisdiction for the institution of insolvency proceedings against the Foreign Corporation / EEA Financial Institution (provided that there is a branch or there are at least assets located in Austria; § 63 (2) IO and, where the Regulation applies in respect of Foreign Corporations or EEA Financial Institutions (see at 2.1.1 of Appendix ./E), Article 3 (2) of the Regulation, respectively) or Foreign Institution (provided that there is an Austrian Branch; § 244 (2) IO). Where the Regulation applies, such Austrian insolvency proceedings will be treated as secondary insolvency proceedings to the extent main insolvency proceedings have already been opened over the assets of the relevant Foreign Corporation / EEA Financial Institution in the Foreign Corporation's / EEA Financial Institution's home country (see at 2.1.3 of Appendix ./E).

Also, in respect of Foreign Institutions, Austrian courts have jurisdiction for the institution of special receivership proceedings[34] or regulatory measures over the assets of the Austrian Branch of the Foreign Institution. In respect of Foreign Institutions, local creditors could not initiate separate proceedings in Austria, since the institution of bankruptcy proceedings as well as the institution of regulatory measures is reserved to the FMA. The institution of special receivership proceedings[35] against Foreign Institutions is reserved to the FMA and the Foreign Institution itself. In respect of Foreign Corporations and EEA Financial Institutions, the general rules of Austrian insolvency law apply and thus also local creditors having an insolvency claim could request for the initiation of Austrian bankruptcy proceedings.

Insolvency proceedings opened in another State against a Foreign Corporation, Foreign Institution or EEA Financial Institution shall be recognized in Austria (§ 240 (1) and (2) IO; see at 2.2.4 of Appendix ./E) if[36]:

(i) the Foreign Corporation's, Foreign Institution's or EEA Financial Institution's COMI is in that other State;

(ii) these insolvency proceedings are comparable to Austrian proceedings, in particular Austrian creditors are treated equal to creditors from the State in which proceedings were opened;

(iii) insolvency proceedings were not opened and / or preliminary injunctions were not ordered in Austria; and

(iv) the recognition of proceedings would not lead to a result which apparently contradicts the fundamental values of the Austrian legal system.

Decisions in an EEA Member State to open insolvency / liquidation proceedings against credit institutions as defined in CRR or insurance undertakings shall be recognized in Austria irrespective of whether the prerequisites mentioned above are met (§ 250 IO).

[34] Special receivership proceedings may only be instituted against banks, not insurance undertakings.
[35] See footnote above.
[36] Where the Regulation applies in respect of Foreign Corporations or EEA Financial Institutions, insolvency proceedings opened in another Regulation State against any such Foreign Corporation / EEA Financial Institution shall be recognized in Austria in accordance with Article 19 (1) of the Regulation. The insolvency proceedings opened in that other Regulation State take effect in Austria as soon as they become effective in the Regulation State in which the proceedings were opened.

However, insolvency proceedings may be opened and conducted in Austria, notwithstanding foreign insolvency proceedings (§ 240 (3) IO) provided Austrian courts have international jurisdiction. If (i) the debtor's COMI is in another State, (ii) insolvency proceedings were opened in that other State and (iii) these insolvency proceedings also include the assets situated abroad, the (secondary) insolvency proceedings opened in Austria will, however, only cover the assets located in Austria (§ 237 (1) IO; see at 2.2.3.1 of Appendix ./E). In this case, the assets located in Austria form a separate estate (*Sondermasse*) of the insolvent Foreign Corporation, Foreign Institution or EEA Financial Institution which will be subject to territorial Austrian insolvency proceedings.

8.2.2.2 *If there were separate proceedings in Austria with respect to the assets and liabilities of the Austrian Branch, would the receiver or liquidator in Austria and the Austrian 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 Austria and, if so, would the receiver or liquidator and the Austrian courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms? The most significant problem arising would be if an Austrian receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Austrian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Austrian Branch to the liquidator or receiver of the Austrian 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.*

Based on the reasoning and subject to the limitations outlined below an Austrian insolvency administrator and an Austrian court would include Party F's or the EEA Financial Institution's position under an EFET General Agreement as a whole.

As a first step, the Austrian insolvency administrator would analyze whether the Austrian Branch and Party F / the EEA Financial Institution form one single legal entity or two separate legal entities in order to determine whether Individual Contracts carried out through the Austrian Branch create rights and obligations of Party F / the EEA Financial Institution or of the Austrian Branch.

As mentioned at 8.2.2.1.1 above, the Austrian Branch and Party F / the EEA Financial Institution form one single legal entity under Austrian law.

As a second step, the insolvency administrator would inquire whether the law of Country H also considers the Austrian Branch to form one single legal entity with Party F / the EEA Financial Institution.

As a third step, the insolvency administrator (*Insolvenzverwalter*) would inquire whether a bilateral treaty provides that all assets and liabilities are combined and handled as part of the proceedings in Country H.

With respect to Foreign Institutions and, to the extent the Regulation does not apply, with respect to Foreign Corporations and EEA Financial Institutions, the following scenarios are conceivable:

(i) If no bilateral treaty is in place between Austria and Country H and the law of Country H considers the Austrian Branch to form one single legal entity with Party F / the EEA Financial Institution, the Austrian insolvency administrator should recognize the result of the netting as one single claim or obligation of Party F / the EEA Financial Institution to be enforced in the insolvency proceedings against Party F / the EEA Financial Institution in Country H.

(ii) If no bilateral treaty is in place between Austria and Country H and the law of Country H considers the Austrian Branch and Party F / the EEA Financial Institution to form separate legal entities, the Austrian insolvency administrator should recognize the result of the netting as one single claim or obligation of Party F / the EEA Financial Institution to the extent the claims and obligations are attributed to the Austrian Branch.

(iii) If a bilateral treaty was in place that provides that all assets and liabilities are combined and handled as part of the proceedings in Country H, the Austrian insolvency administrator would be required to recognize the result of the netting as one single claim or obligation of Party F / the EEA Financial Institution to be enforced in the insolvency proceedings against Party F / the EEA Financial Institution in Country H.

Where the Regulation applies in respect of Foreign Corporations or EEA Financial Institutions, the following scenarios are conceivable:

(i) If the law of Country H considers the Austrian Branch to form one single legal entity with the Foreign Corporation / EEA Financial Institution, the Austrian insolvency administrator should recognize the result of the netting as one single claim or obligation of the Foreign Corporation / EEA Financial Institution to be enforced in the insolvency proceedings against the Foreign Corporation / EEA Financial Institution in Country H.

(ii) If the law of Country H considers the Austrian Branch and the Foreign Corporation / EEA Financial Institution to form separate legal entities, the Austrian insolvency administrator should recognize the result of the netting as one single claim or obligation of the Foreign Corporation / EEA Financial Institution to the extent the claims and obligations are attributed to the Austrian Branch.

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

8.2.2.3.1 Credit institutions / insurance undertakings licensed in another EEA State

There would not be any change in our conclusions reached under 8.2.2.1.2 above.

8.2.2.3.2 Foreign Institutions

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

8.2.2.3.3 Foreign Corporations / EEA Financial Institutions

Where the Regulation applies (see at 2.1.1 of Appendix ./E), Austrian courts would, in the absence of an Austrian Branch[37], have no jurisdiction for the institution of insolvency proceedings against a Foreign Corporation or EEA Financial Institution even if there were assets of that Foreign Corporation / EEA Financial Institution located in Austria.

Where the Regulation does not apply, Austrian courts have jurisdiction for the institution of insolvency proceedings against a Foreign Corporation or EEA Financial Institution if there are (at least) assets of that Foreign Corporation / EEA Financial Institution located in Austria (§ 63 (2) IO).

8.3 Part III: Collateral

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

8.3.1.1 General remarks

The Austrian Act on Private International Law (*Internationales Privatrechtsgesetz – IPRG*) and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**") recognize a contractual choice of law governing the obligation to transfer title (*titulus*).

While the contractual choice of law is, subject to the limitations on choice of law set out at 9.6.10 below, valid as concerns the Parties' obligations under the Opinion Documents (*i.e.*, questions in regard to determining the Parties' obligations, interpretation and remedies for breach of the agreement), the creation of rights *in rem* in any Eligible Credit Support as well as other issues concerning rights *in rem* (such as the establishment, acquisition, types, contents, effects, protection, transfer and loss of rights *in rem*) will be determined in accordance with Austrian conflict of laws rules.

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

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

8.3.1.2 Eligible Credit Support in the form of Cash

8.3.1.2.1 Relevant conflict of laws rules

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

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

8.3.1.2.2 Austrian substantive law

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

According to case law by the Austrian Supreme Court (*Oberster Gerichtshof*)[38], the transfer of Cash as collateral cannot be determined under strictly *in rem* right aspects. Cash deposited to a bank account would qualify as book money (*Buchgeld* or *Giralgeld*) under Austrian law. When dealing with book money, *in*

[38] See OGH 23.2.1999, 4 Ob 34/99z.

rem ownership title (*sachenrechtliches Eigentum*) is substituted by entitlement to a claim (against the account bank) (*Forderungszuständigkeit*)[39].

Therefore, any contractual obligation to transfer ownership in cash collateral (other than notes and coins) constitutes an obligation of the collateral provider to provide the collateral taker with book money (*Buchgeld*)[40], *i.e.*, a claim of the collateral taker against its account bank.

In case of transfer of book money, the discharging effect (*die schuldbefreiende Wirkung*) of the transfer and the transfer of perils (*Gefahrenübergang*) will occur when the account bank of the collateral taker will receive the credit (*Buchung*) from the account bank of the collateral provider[41].

With respect to transfer orders (*Überweisungsaufträge*), scholars hold that these have to be qualified as orders (*Anweisungen*) under Austrian law[42].

According to Austrian law, the beneficiary of an order (*Anweisungsempfänger*, *i.e.* the collateral taker) will only receive an abstract claim[43] against the drawee (*Angewiesener*, *i.e.* the account bank of the collateral taker) once the drawee has confirmed to him the acceptance (*Annahme*) of the order (*Anweisung*) by the collateral provider or the collateral provider's account bank respectively. In this respect, Austrian legal writing holds that such confirmation of acceptance may be seen in the account bank of the recipient (*i.e.*, the collateral taker) storing (*speichern*) the credit entry (*Gutschrift*) in an electronic system that may be accessed by the collateral taker at any given time[44].

On the basis of the above, the collateral taker will acquire a claim (*Forderung*) against their account bank once the amount in question is credited to their bank account.

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39 See *Rabl*, ÖBA 2006, 579.
40 See *Schulyok* in *Konecny/Schubert,* KO § 44 mn 16, who reiterates that in case of a transfer of book money the account holder (recipient) can never acquire *in rem* ownership in the amounts credited to his bank account.
41 See *Kietaibl/Ladler* in *Kletečka/Schauer*, ABGB-ON$^{1.03}$ § 907a mn 41.
42 See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht Band III² mn 1/32; also the OGH in ÖBA 1998, 566.
43 See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht III² mn 1/83.
44 See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht III² footnote 309.

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

8.3.1.3.1 Relevant conflict of laws rules

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

To the extent that the law applicable to the Letter of Credit / Parent Company Guarantee has not been chosen in accordance with Article 3 of Rome I[45], the law of the country where the issuing bank / guaranteeing bank / parent company has its habitual residence (*gewöhnlicher Aufenthalt*)[46] shall be decisive (Article 4 (1)(b) of Rome I).

8.3.1.3.2 Austrian substantive law

Where, in accordance with 8.3.1.3.1 above, Austrian law was found to be the law applicable in relation to the creation of a right *in rem*, the following applies:

(i) Standby letters of credit

A standby letter of credit (*Akkreditiv*) constitutes an abstract obligation (*abstrakte Verpflichtung*) of a credit institution (the issuing bank (*Akkreditivbank*)) vis-à-vis a third-party (the beneficiary (*Begünstigter*)) (assumed by the issuing bank upon the instruction of the principal (*Akkreditivauftraggeber*)) to pay a certain amount on behalf of the principal to the beneficiary as soon as and to the extent certain (pre-agreed) conditions (*Akkreditivbedingungen*) have been met (typically, timely presentation of a pre-agreed set of documents by the beneficiary to the issuing bank[47]).

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

46 For the purposes of Rome I, the habitual residence (*gewöhnlicher Aufenthalt*) of companies shall be the place of central administration (*Ort der Hauptverwaltung*).

47 As far as standby letters of credit are concerned, these are, typically, documents evidencing that liability arises. However, it may also be that a respective declaration of the beneficiary or a (simple) demand for payment by the beneficiary may be sufficient (*cf*. *Apathy* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht VIII² mn 1/2, footnote 11)

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

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

(ii) Bank guarantees

A bank guarantee typically constitutes an abstract obligation (*abstrakte Verpflichtung*) of a credit institution (the guarantor (*Garant*)) vis-à-vis a third-party (the beneficiary (*Begünstigter*)) (assumed by the guarantor upon the instruction of the principal (*Garantieauftraggeber*)) to guarantee (*einstehen für*) payment by the principal to the beneficiary of any and all amounts due (*fällig*) under a particular (or the entire) legal relationship between the principal and the beneficiary.

In case of such abstract (*abstrakt*) and independent (*unabhängig*) bank guarantee, the guaranteeing bank may, in principle, not raise any defences or objections which may arise from the legal relationship between (i) the principal and the beneficiary (*Valutaverhältnis*) and (ii) the principal and itself (*Deckungsverhältnis*) either.

(iii) Parent Company Guarantees

The explanations provided under (ii) above similarly apply to guarantees provided by a parent company.

Based on the legal nature of Letter of Credits (as described above), any contractual obligation to "provide a Letter of Credit" (see § 3.2(b) of the EFET Credit Support Annex) constitutes an obligation of Party A to provide Party B with a claim of Party B against the relevant issuing bank / guaranteeing bank / parent company.

Therefore, *in rem* ownership title (*sachenrechtliches Eigentum*) is substituted by entitlement to a claim (against the relevant issuing bank / guaranteeing bank / parent company) (*Forderungszuständigkeit*).

The prevailing view in Austrian legal writing is that, as is the case with transfer orders (see at 8.3.1.2.2 above), standby letters of credit are to be qualified as orders (*Anweisungen*) under Austrian law.[48] As mentioned under 8.3.1.2.2 above, the beneficiary of an order (*Anweisungsempfänger*; *i.e.*, Party B) will only receive an abstract claim against the drawee (*Angewiesener*; *i.e.*, the issuing bank) once it has received the declaration of acceptance (*Annahmeerklärung*) of the order (*Anweisung*) by the issuing bank.[49]

On the basis of the above, we believe that Party B will acquire a claim against the relevant issuing bank (at the latest) once Party B has received the document certifying the standby letter of credit.

In terms of guarantees, the abstract payment claim of the beneficiary against the guaranteeing bank / parent company only arises upon conclusion of a contract between the guarantor and the beneficiary.[50] This means that the beneficiary must accept (*annehmen*) the guarantee.

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

[48] See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht V² mn 1/83.
[49] See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht V² mn 1/84 et seq.
[50] See *Koziol* in *Apathy/Iro/Koziol* (Hrsg), Bankvertragsrecht V² mn 3/70.

8.3.2.1 General remarks

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

Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title (*sachenrechtliches Eigentum*) is substituted by entitlement to a claim (*Forderungszuständigkeit*) against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit (*Akkreditiv*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Pursuant to Austrian case law, entitlement to a claim (*Forderungszuständigkeit*) means the exclusive right (*ausschließliches Recht*) vesting in a person to enforce a particular claim (*Forderung*) as a creditor (*Gläubiger*).

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

8.3.2.2 Re-characterization risk

Under Austrian law, contracts must be interpreted primarily following the parties' intentions. After having determined the parties' intentions, a contract needs to be characterized in accordance with the Austrian law concepts available.

The intentions of the Parties are expressed in § 7 (1) and (3) of the EFET Credit Support Annex. § 7 (1) and (3) of the EFET Credit Support Annex stipulate that a transfer of all right, title and interest in and to any Eligible Credit Support shall occur and that nothing in the Eligible Credit Support Annex is intended to create, or shall create, any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support.

Based on the above, we believe that an Austrian court should recognize and uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive accordingly, full entitlement to a claim (*Forderungszuständigkeit / Vollrecht an der Forderung*) against a third-party. Hence, while we cannot exclude that an Austrian court would, nonetheless, take a view different from what is expressed as our opinion above, we consider the re-characterization risk as rather low.

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

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

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

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

Enforcement of the claim acquired by Party B under a Letter of Credit may, however, be subject to satisfaction of further conditions set out in the relevant Letter of Credit (*e.g.*, in respect of standby letters of credit

(*Akkreditive*), timely presentation of a pre-agreed set of documents to the issuing bank).

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

8.3.4.1 Effect of substitution

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

8.3.4.2 Consent of Party B

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

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

8.3.5 *<u>Determination of net amount payable upon termination</u>: Party B's right in relation to the transferred collateral upon termination of the relevant EFET General Agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Austria insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the* *calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?*

8.3.5.1 Within the scope of the FinSG

Within the scope of the FinSG (*i.e.*, where, at least, one of the Parties is an institution pursuant to § 2 (1) FinSG and Eligible Credit Support in the form of Cash is concerned)[51], the following applies:

Since the Close-out Netting Provisions should qualify as close-out netting provision within the meaning of the FinSG, we believe that § 11 of the EFET Credit Support Annex should be valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "*other amounts payable*". We base such belief on the following reasons:

Close-out netting is expressly recognized by the FinSG. Pursuant to § 9 (1) FinSG, contractual close-out netting provisions are effective:

(i) notwithstanding the commencement or continuation of insolvency or winding-up proceedings, or reorganisation proceedings or measures in respect of the collateral provider and / or the collateral taker; and

(ii) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

Unless otherwise agreed by the parties, the close-out netting provisions operate without the need for prior notice, approval or consent by a court, auction or any waiting period (§ 9 (2) FinSG).

§ 9 FinSG thus supplements the Austrian substantive netting privilege in § 20 (4) IO (see at 7.1.2.1.1 above) for financial collateral arrangements.

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

However, in order for a certain close-out netting mechanism to benefit from the protection under the FinSG[52], such mechanism must meet the definition of "close-out netting" under the FinSG. Pursuant to § 3 (1) no 14 FinSG, "close-out netting" means "*a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise (a) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or (b) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party*". Based upon this definition, we come to conclude that the Close-out Netting Provisions should qualify as a close-out netting provision within the meaning of § 3 (1) no 14(a) FinSG (*i.e.*, providing for termination and replacement of the Parties' obligations under the EFET General Agreement by a single net claim; see, in particular, § 10.3(a) and (b) of the EFET General Agreement).

Further, § 8 (2) FinSG stipulates that in case of an enforcement event (*Verwertungs- oder Beendigungsfall*)[53] occurring while the obligation of the collateral taker to retransfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, such obligation may be subject to a close-out netting provision. The FinSG thus also recognizes close-out netting where a title transfer financial collateral arrangement was established.

8.3.5.2 Beyond the scope of the FinSG

Beyond the scope of the FinSG (*i.e.*, where none of the Parties is an institution pursuant to § 2 (1) FinSG and/or Eligible Credit Support in the form of Letters of Credit / Parent Company Guarantees is concerned)[54], the following applies:

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52 By way of background, please also note recital 14 of the Financial Collateral Directive highlighting that "*the enforceability of bilateral close-out netting should be protected, not only as an enforcement mechanism for title transfer financial collateral arrangements including repurchase agreements but more widely, where close-out netting forms part of a financial collateral arrangement*".

53 The FinSG contains an autonomous definition of an "enforcement event"; please refer to 7.2.2.5 above.

54 See at Appendix ./G for a detailed analysis of the scope of application of the FinSG.

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

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

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

Moreover, while a power of attorney granted or an instruction or order given by an Austrian entity will, generally, automatically terminate upon the opening of local insolvency proceedings over the relevant entity's assets (§ 26 (1) IO), this should not be the case for the instruction given by Party A prior to the opening of insolvency proceedings to the relevant third-party (*i.e.*, the issuing bank, guaranteeing bank or parent company, as the case may be) to issue a Letter of Credit / Parent Company Guarantee to the extent the relevant third-party has already complied with such instruction. This means that, to the extent the relevant third-party has already issued the Letter of Credit / Parent Company Guarantee, the instruction given by Party A and, therefore, the respective Letter of Credit / Parent Company Guarantee will remain valid irrespective of the opening of insolvency proceedings over the assets of Party A.

For purposes of this 8.3.5.2, we have assumed that the term "draws" in the second sentence of § 11 of the EFET Credit Support Annex is, under the laws applicable to the EFET Credit Support Annex, to be understood as requesting and actually receiving payment under the relevant Letter of Credit / Parent

Company Guarantee (at which point in time, the Eligible Credit Support will consist of Cash).

8.3.5.3 Additional limitations

Limitations on the above may arise in respect of BRRD-Entities. As noted under 1.2.6.5 of Appendix ./E, if transactions are subject to a close-out netting arrangement, the resolution authority (or the independent valuer appointed by the resolution authority) will, as a basis for application of the bail-in tool, calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (§ 91 (3) BaSAG). However, the value of liabilities arising from the transactions must be determined by the resolution authority in accordance with § 91 (4) BaSAG and, possibly, also the Commission Delegated Regulation (see at 1.2.6.5 of Appendix ./E for further details).

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

8.3.6.1 Within the scope of the FinSG

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

As noted under 8.3.5 above, § 9 (1) FinSG stipulates that contractual close-out netting provisions are effective:

(i) notwithstanding the commencement or continuation of insolvency or winding-up proceedings, or reorganisation proceedings or measures in respect of the collateral provider and / or the collateral taker; and

(ii) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

In the absence of any agreement to the contrary, close-out netting may occur without the need for prior notice, approval or consent by a court, auction or any waiting period (§ 9 (2) FinSG).

Based upon § 9 FinSG, the Close-out Netting Provisions which also extend to the financial collateral arrangements established under the EFET Credit Support Annex should, within the scope of the FinSG, thus not be affected by the opening of insolvency proceedings over the assets of Party A.

8.3.6.2 Beyond the scope of the FinSG

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

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

8.3.7.1 Recovery of Eligible Credit Support provided

Under §§ 27 et seqq. IO certain actions taken by debtors that are held to be detrimental to their creditors may be set aside by the courts if a voidance action (*Anfechtungsklage*) is filed in insolvency proceedings by the insolvency administrator (*Insolvenzverwalter*). The avoidance rules of §§ 27 et seq. IO constitute mandatory rules of law (*Eingriffsnormen*) and thus §§ 27 et seqq. IO will apply to the extent insolvency proceedings are commenced in Austria (*lex fori concursus*) (see Article 7 (2) lit m of the Regulation / § 221 (2) no 13 IO).

Also, the provisions of the FinSG do not affect other statutory provisions relating to avoidance (*Anfechtung*), such as §§ 27 et seqq. IO, or nullity (*Nichtigkeit*) of agreements (§ 11 (2) FinSG[55]).

Please refer to Appendix ./F concerning a brief summary of Austrian avoidance rules. For the purposes of this Opinion, all cases of voidance due to "unduly favouring a certain creditor" (*Anfechtung wegen Begünstigung*) pursuant to § 30 IO and "knowledge of insolvency" (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*) pursuant to § 31 IO appear important.

Party B would be unduly favoured pursuant to § 30 IO, if a discharge of obligations (*Befriedigung*) or granting of security (*Sicherstellung*) was made (A) after Party A becoming insolvent within the meaning of the IO (see 1.1.1 of Appendix ./E), (B) after the petition for the commencement of insolvency proceedings or within 60 days prior to the commencement of insolvency proceedings provided that (C) Party B acquired a security or satisfaction to which, to which kind or at which time it was not entitled to such security or satisfaction (objective preference (*objektive Begünstigung*); § 30 (1) no 1 IO)[56], or Party B acquired a security or satisfaction it was indeed entitled to but knew or was deemed to know of Party A's intent to prefer Party B over other creditors (subjective preference (*subjektive Begünstigung*); § 30 (1) no 3 IO).

Any challenge pursuant to § 30 IO would be excluded if the transfers of Eligible Credit Support took place more than one year preceding the initiation of insolvency proceedings over the assets of Party A.

A transfer of Eligible Credit Support to Party B could in particular be challenged pursuant to § 31 (2) IO, if the transfer (A) took place after Party A's illiquidity / overindebtedness (in terms of Austrian insolvency law) or after the filing of the petition on the commencement of insolvency proceedings, and (B) the transfer constitutes satisfaction (*Befriedigung*) / securing (*Sicherstellung*) of Party B or is a disadvantageous legal

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[55] The legal text of § 11 (2) FinSG refers to the voidance of legal transactions (*Rechtsgeschäfte*) while §§ 27 et seqq. IO (in particular, §§ 30 and 31 IO which may be relevant in the given circumstances; see below) mostly refer to legal acts (*Rechtshandlungen*) as the subject of avoidance actions. Based on general Austrian civil law principles, one might conclude that the reference to legal acts in the IO provides for a broader scope of application of its provisions on avoidance, thereby not only including legal transactions but, e.g., also real acts (*Realakte*) or communications of will (*Willensmitteilungen*). On the other hand, the legislative materials to the FinSG (251 BlgNR 22. GP 9) stipulate that the provisions on the voidance of legal acts (pursuant to §§ 27 et seqq. IO) shall not be deviated from by § 11 (2) FinSG. We therefore believe that the better interpretation of § 11 (2) FinSG is that it should apply to legal transactions and legal acts alike.

[56] Unless Party B was not preferred over other creditors by such legal act.

transaction to Party A's creditors and (C) Party B had knowledge or should have had knowledge of the insolvency or the petition for commencement of insolvency proceedings in relation to Party A (for further details please refer to Appendix ./E).

Any challenge pursuant to § 31 IO would be excluded if the transfer of Eligible Credit Support took place more than six months prior to the initiation of insolvency proceedings over the assets of Party A.

8.3.7.2 Substitution of Eligible Credit Support

Any substitution of Eligible Credit Support by Party A (see § 6 of the EFET Credit Support Annex) is a separate (and potentially voidable) transaction. A substitution of collateral could be challenged, if the substitution was disadvantageous to Party A's other creditors (as to the general prerequisites see at 8.3.7.1 above). This will be determined by comparing the value of the substitute assets with the value of the assets they were replacing. The relevant point in time for such evaluation / comparison could be either the time of substitution (in case the value of the substitute assets is higher than the value of the replaced assets at that time) or even the end of the trial at the court of first instance[57]; in the latter case, it would be required that such disadvantage for Party A's other creditors was objectively foreseeable for Party B.[58] In such case, e.g. an increase of the value of the substitute Eligible Credit Support or a decrease in the value of the initial Eligible Credit Support subsequent to the substitution might cause an (indirect) disadvantage of the creditors, which could – in case this would have been objectively foreseeable for Party B – trigger a risk that the substitution may successfully be challenged.

8.3.7.3 Provision of additional Eligible Credit Support

According to established case law, a transfer of additional collateral to the collateral taker during the suspect period set forth by § 30 IO (see at 8.3.7.1 above) may not be challenged by the collateral provider's insolvency administrator pursuant to § 30 (1) no 1 IO if (i) the collateral taker is, based upon a contractual or statutory claim vested in him prior to the beginning of the relevant suspect period, entitled to receive such

[57] OGH 25.6.1986, 1 Ob 555/86.
[58] *Rebernig* in *Konecny/Schubert*, Insolvenzgesetze § 31 KO mn 32 et seqq.

collateral or (ii) the claim to be secured arose during the relevant suspect period but at the same time the transfer of (additional) collateral was agreed (so-called congruent cover (*kongruente Deckung*)).

Following Austrian courts[59], the agreement on which the relevant claim of the collateral taker is based must (i) sufficiently specify the additional collateral to be provided and (ii) take into account the purpose of § 30 IO and, more generally, Austrian voidance laws. The relevant agreement must thus ensure that the collateral to be provided in addition is (at least) determined to an extent that the collateral taker has no discretion as to choose the collateral to be provided as such exercise of discretion could be disadvantageous to the creditors of the collateral provider.[60] In line with Austrian case law[61], an agreement will be considered sufficiently specified in terms of the additional collateral to be provided if, at least, the types (*Gattungen*) of collateral that may be provided as additional collateral are determined.

Further, Austrian legal writing argues that in scenarios where the claim for provision of additional collateral is based upon a change in the ratio between the value of the collateral already provided to the collateral taker and the amount of the secured obligations (*i.e.*, a change that is justified by objective criteria that are beyond the parties' control), such claim should constitute congruent cover (*kongruente Deckung*).[62]

Applying the above to the facts of the case, we believe that the agreement under the EFET Credit Support Annex in respect of the provision of additional Eligible Credit Support by Party A upon calculation of a positive net exposure in favour of Party B should be sufficiently specified and not be deemed to conflict with the purpose of § 30 IO and, more generally, Austrian avoidance laws. Thus, we believe that additional Eligible Credit Support transferred by Party A to Party B based upon the provisions of the EFET Credit Support Annex during the suspect period foreseen by § 30 IO may likely not be challenged according to § 30 (1) no 1 IO. However, voidance claims

[59] OGH 23.8.2001, 6 Ob 157/01h relating to the assignment of future receivables based upon a framework assignment agreement (*Mantelzessionsvertrag*); OGH 20.5.1999, 2 Ob 128/99h, in each case with further references.
[60] See *Schumacher*, Nachträgliche Kreditbesicherung: Insolvenz- und anfechtungsrechtliche Risken, ÖBA 2006, 118.
[61] OGH 23.8.2001, 6 Ob 157/01h (see also above).
[62] See *Mätzler/Hebein*, Neue Möglichkeiten für Verpfändungen, ÖBA 2011, 633.

according to § 30 (1) no 3 IO – which would require subjective preference – or § 31 IO – which would require that Party B had knowledge or should have had knowledge of the insolvency or the petition for commencement of insolvency proceedings in relation to Party A – would still be possible (see at 8.3.7.1 above).

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

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

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

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

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

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

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

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

8.4 Part IV: General Enforceability

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

8.4.1.1 General remarks

Given that the Parties have chosen the law to govern the EFET General Agreement (see § 22 of the EFET General Agreement), the terms of the EFET General Agreement only need to stand the following (twofold) test:

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

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

Prima facie, we have no reason to believe that any provisions of the EFET General Agreement (other than the provisions specifically discussed in this Opinion) might be challenged by an Austrian court as being manifestly incompatible with overriding mandatory provisions of Austrian law, which are applicable irrespective of the choice of law, or Austrian public policy (*ordre public*).

Please find below an analysis of the provisions of the EFET General Agreement we were asked to specifically comment on:

8.4.1.2 Non-performance due to Force Majeure

We have no reason to believe that § 7 of the EFET General Agreement might be challenged by an Austrian court as being manifestly incompatible with overriding mandatory provisions of Austrian law, which are applicable irrespective of the choice of law, or Austrian public policy (*ordre public*). The reasons for this are as follows:

While not specifically referring to the term "Force Majeure" (*höhere Gewalt*), Austrian law recognizes the concept of *force majeure*. The Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) provides for rules in case of damages or other detriments occurring due to coincidence (*Zufall*). According to Austrian case law, coincidence also includes force majeure.[63] Such rules are, however, not mandatory and parties may thus agree otherwise.

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

[63] According to the Austrian Supreme Court, "force majeure" is an incidental and extraordinary event from outside, showing no operational coherence, the occurrence of which cannot be expected and prevented, even with reasonable diligence (OGH 8.5.1984, 2 Ob 208/83).

8.4.1.3 Remedies for non-performance

We have no reason to believe that § 8 of the EFET General Agreement might be challenged by an Austrian court as being manifestly incompatible with overriding mandatory provisions of Austrian law, which are applicable irrespective of the choice of law, or Austrian public policy (*ordre public*).

8.4.1.4 Limitation of liability

We have no reason to believe that § 12 of the EFET General Agreement might be challenged by an Austrian court as being manifestly incompatible with overriding mandatory provisions of Austrian law, which are applicable irrespective of the choice of law, or Austrian public policy (*ordre public*).

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

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

In terms of Austrian law, the following would apply:

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

With respect to questions of burden of proof, the law governing a contract shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law (*gesetzliche Vermutungen*) or determine the burden of proof (*Beweislast*) (Article 18 (1) of Rome I).

As a general principle under Austrian law, each party must provide evidence for the facts that form the factual basis for / corroborate its legal claim against the relevant counterparty. The counterparty must, in turn, present evidence for the facts supporting a dismissal of the claim of the other party.

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

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

8.5 Part V: Confirmation Practices

8.5.1 Binding Individual Contract

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

According to Article 10 (1) of Rome I, the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under Rome I if the contract or term were valid.[64] Hence, this question would need to be assessed on the basis of the laws governing the relevant EFET General Agreement (*i.e.*, primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement).

In terms of Austrian law, the following would apply:

Austrian law does not provide for any (general) formal requirements for the conclusion of contracts. This means that, under Austrian law, contracts may be concluded both in writing and orally (§ 883 ABGB), provided that statutory law does not stipulate specific form requirements for contracts of a certain type.

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

This is the case for, *e.g.*, guarantees (*Garantien*) which require the handwritten signature or, alternatively, a qualified electronic signature of the guarantor to be effective.

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

§ 257 (2) no 1 of the FMA Ordinance on the Solvability of Credit Institutions (*Solvabilitätsverordnung – SolvaV*), which ceased to be in force upon 1 January 2014, stipulated that "netting agreements" must be concluded in writing. The successor provision in Article 296 CRR does not contain any such form requirement for "netting agreements". For transactions subject to Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"), recital 26 of Commission Delegated Regulation (EU) No 149/2013 ("**Delegated Regulation No 149**") may be relevant. It specifies that "confirmations" must either be "electronically executed" or signed by both counterparties. ESMA provides some further guidance on this in its Q&A-tool[65]. Question 5 of the ESMA Q&A deals with the issue of "electronic execution" of confirmations. ESMA states that confirmations sent by fax, on paper, or by manually sent e-mails do not meet the requirement of "electronic execution". ESMA apparently assumes that electronic confirmations are executed via an electronic platform or system. Following recital 26 of Delegated Regulation No 149 and respective ESMA guidance, non-electronic confirmations must thus be signed by both counterparties. However, according to the ESMA Q&A, an agreement providing for a negative affirmation mechanism would, arguably, be permissible in ESMA's view. This is also in line with the view expressed by the International Swaps and Derivative Association, Inc. ("**ISDA**").[66] ISDA also allows a negative affirmation mechanism as permissible form of confirmation. Both ESMA and ISDA thus apparently do not view the form requirement set forth in recital 26 of Delegated Regulation No 149 as being so strict that it would require any confirmation to be signed by both counterparties. In any case, given that EMIR, respectively Delegated Regulation No 149, provide a regulatory framework only, we believe that any violation of the form requirement set forth in recital 26

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

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

However, from a civil law perspective, it appears advisable for evidence purposes to record Individual Contracts in writing.

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

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

As outlined at 8.5.1.1 above, under Austrian law, Individual Contracts may also be concluded orally. This means that an Individual Contract becomes legally binding and enforceable under Austrian law upon exchange of corresponding declarations of intent (*übereinstimmende Willenserklärungen*) by both parties. Such declarations of intent must, however, (at least) provide for consensus on the main elements of the relevant contract (*essentialia negotii*).

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

No. We understand that a Confirmation is, typically, not more than a summary of an Individual Contract that has previously been agreed upon between the Parties – either via telephone, fax or e-mail. Usually, one of the parties will sum-up the commercial terms of the Individual Contract in form of the Confirmation that is forwarded to the other Party without need for the other Party to take any further action. Hence, "incorrect" terms (*i.e.*, terms contrary to what has previously been agreed upon between the Parties) will, under Austrian law, not be binding upon the other Party, irrespective of whether such Party objects to the Confirmation or not. The Confirmation containing terms contrary to what has been previously agreed upon between the Parties might, rather, be seen as an offer (*Anbot*) of the Party delivering such Confirmation to amend the terms and conditions of the relevant Individual Contract.

Under Austrian law, Parties are, however, free to provide for legal consequences if one Party fails to object to incorrect terms stated in a Confirmation without delay / within a given period of time (as is the case in § 3.3 of the EFET General Agreement).[67]

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

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

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

8.5.2 Means of Evidence

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

The Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) provides for the following categories of means of evidence:

[67] Provided that both Parties are entrepreneurs (*Unternehmer*) and are acting in that capacity.

(i) Documentary evidence (*Urkundenbeweis*);

(ii) Visual evidence (*Augenscheinsbeweis*);

(iii) Witness evidence (*Zeugenbeweis*); and

(iv) Expert evidence (*Sachverständigenbeweis*).

In addition, the Parties may also be heard by the court in respect of disputed facts (*Parteieneinvernahme*).

E-mails and other electronic massages as well as transaction entry systems and facsimiles will be recognized as documentary evidence by an Austrian court.

As far as tape recordings are concerned, generally, only tape recordings obtained in compliance with applicable laws will be admissible in court; unlawfully obtained tape recordings will be admissible in court under certain specified circumstances only. However, the transcript of a tape recording will always be admissible in court (as documentary evidence (*Urkundenbeweis*)).

Under the ZPO, no formal order of different forms of evidence applies. The judge (in case of a senate of judges: the judges) decide(s) by applying the principle of free evaluation of the evidence (*Grundsatz der freien Beweiswürdigung*) (§ 272 ZPO); only limited exceptions from this principle apply, *e.g.*, with respect to public documents (*öffentliche Urkunden*).

8.6 Part VI: Core Provisions

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

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

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

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

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

8.6.3 *<u>Cross-Product Netting</u>: Would the inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement, the EFET Master Netting Agreement or in the 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 8.1 and 8.2 above?*

8.6.3.1 EFET Cross Product Payment Netting Agreement

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

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

8.6.3.2 EFET Master Netting Agreement

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

We do not express an opinion whether (i) the EFET Master Netting Agreement is a netting agreement (*Saldierungsvereinbarung*) for purposes of § 233 IO (see at 2.3.2 of Appendix ./E for further details) or (ii) any and all of the transactions covered by an EFET Master Netting Agreement may benefit from the Austrian substantive netting privilege in § 20 (4) IO (see at 7.1.2.1.1 above for further details). Furthermore, we do not express an opinion on the validity or enforceability of the EFET Master Netting Agreement under the laws of Austria.

8.6.3.3 Cross-Product Master Agreement

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

We do not express an opinion whether (i) the Cross-Product Master Agreement is a netting agreement (*Saldierungsvereinbarung*) for purposes of § 233 IO (see at 2.3.2 of Appendix ./E for further details) or (ii) any and all of the transactions covered by a Cross-Product Master Agreement may benefit from the Austrian substantive netting privilege in § 20 (4) IO (see at 7.1.2.1.1 above for further details). Furthermore, we do not express an opinion on the validity or enforceability of the Cross-Product Master Agreement under the laws of Austria.

8.7 Part VII: Governing Law, Arbitration and Jurisdiction

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

8.7.1.1 Choice of law

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

The Parties' agreement on the governing law will – subject to the limitations set out below at 9.6.10 – thus be recognized under Austrian law and the courts of Austria would have to uphold such choice of law.

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

8.7.1.2 Submission to jurisdiction

8.7.1.2.1 Arbitration

The agreement to arbitrate contained in the EFET General Agreement (see § 22 thereof) is a valid and binding reference to arbitration of disputes under the EFET General Agreement, to the extent the dispute involves a proprietary claim or a matter which under Austrian law can be resolved by settlement. Since Austria is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (the "**New York Convention**") with no reservation of reciprocity, a foreign arbitral award (a "**Foreign Award**") rendered in a contracting state to the New York Convention in respect of the EFET General Agreement should be recognized and enforced by Austrian courts in accordance with the New York Convention and Austrian civil procedure and enforcement rules.

8.7.1.2.2 Submission to jurisdiction

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

If, however, the Parties submitted to the non-exclusive jurisdiction of a court not having its seat in a state that is bound by the Brussels Regulation Recast, the question whether a judgment obtained in such court would be enforced in the Republic of Austria would need to be assessed on the basis of § 406 of the Austrian Enforcement Code (*Exekutionsordnung – EO*).

§ 406 EO sets forth the conditions for declaring non-Austrian judgments enforceable in the Republic of Austria. The conditions are as follows:

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

(ii) reciprocity in terms of recognition and enforcement must be established by a treaty or regulations (*Verordnungen*).

8.8 Part VIII: Regulatory Regime

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

8.8.1 Exchange control laws

Subject to the relevant provisions of the Treaty on the Functioning of the European Union and national implementing measures (if any) adopted by the OeNB thereunder, there are no restrictions as regards payments in foreign currency or to foreign residents according to Austrian law. The Foreign Exchange Act 2004 (*Devisengesetz 2004*) and the related regulations (*Verordnungen*) of the OeNB impose some notification duties (for statistical purposes).

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

8.8.2 Financial regulatory licensing requirements

8.8.2.1 Legal Background

The sale or purchase of financial instruments (including all types of derivatives) for own account or the account of a client constitutes the banking business of trading pursuant to § 1 (1) no 7 BWG. The provision of such services would require an Austrian banking license or a respective EU passport if carried out (i) on a commercial basis and (ii) in Austria (*i.e.*, sufficient territorial nexus to Austria is deemed to exist).

(i) **Commercial basis**: An activity is considered to be carried out on a commercial basis (*gewerblich*) in particular if it (a) occurs repeatedly (*wiederholt*) or with the intention to be repeated (*mit Wiederholungsabsicht*) and (b) is aimed at the realisation of proceeds (*Einnahmenerzielungsabsicht*). Such requirements are generally construed rather strictly and are therefore fulfilled in almost all cases.[68]

(ii) **Territorial nexus**: Regulated activities will trigger Austrian licensing requirements if such activities are deemed carried out in Austria. Pursuant to the landmark decision of the Austrian Supreme Court (*Oberster Gerichtshof – OGH*) of 2006 it needs to be determined on a case by case basis weather dealings are deemed to be carried out in Austria or not.[69]

Legal writing and case law set out **criteria** to be considered such as the following (non-exhaustive):

- the place at which a contract was initiated and/or concluded;
- the place where an offer concerning a regulated activity is made or accepted[70];
- the place of incorporation of the client;
- the place of incorporation of the service provider;
- where the result (*Erfolg*) of the regulated activity is or where the performance of the contract would take place; or

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68 Higher Administration Court (*Verwaltungsgerichtshof*) ("**VwGH**") ruling no. 0225/79 of 10 September 1979; VwGH 2118/50 of 7 November 1952; *Gapp/Gfall*, ecolex 2003, 247.
69 OGH 31.8.2006, 6 Ob 110/06d.
70 *Gapp/Gfall*, ecolex 2003, 246-247; KUVS-K1-696/8/2002; UVS Wien 06/FMV/47/3362/2011.

- whether marketing activities or solicitation of business are targeted to the Austrian market (regardless of whether the entity soliciting business is based outside or inside Austria).

An **overall assessment** would be decisive. Generally, while there is only very limited case law or regulatory guidance on when a specific activity/transaction is deemed carried out in Austria, it should be noted that the FMA / Austrian courts tend to apply a strict approach to licensing requirements and are likely to consider both contractual and factual aspects.

8.8.2.2 Legal analysis

Whether or not a counterparty requires a license very much depends on the actual scope of activities and type of counterparty.

Not every sale or purchase of financial instruments (including derivatives) is considered as licensable banking business of trading. Activities such as the following are considered not to be in scope of Austrian banking license requirements[71]:

- entering into derivatives transactions for mere hedging purposes;
- entering into derivatives transactions of the purpose of general debt management of a company;
- entering into derivatives transactions under an investment strategy rather aimed at long-term holding of positions than short-term trading to generate income from price fluctuations; and/or
- mere trading for the purpose of private investments/wealth management.

However, if counterparties attempt to generate profits through (possibly short-term) trading in financial instruments and maintain a bank-like presence on the market, a licensing requirement could be triggered.

[71] *Waldherr/Ressnik/Schneckenleitner* in *Dellinger*, BWG § 1 mn 63a.

8.8.2.3 Exemptions under MiFID II

The WAG 2018 provides for certain exemptions from licensing requirements which may be relevant with a view to the EFET General Agreement.

According to § 2 (1) no 13 WAG 2018 (implementing Article 2 (1) lit j MiFID II), persons:

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

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

are exempt from licensing requirements, provided that:

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

- those persons are not part of a group the main business of which is the provision of investment services within the meaning of the WAG 2018, the performance of any activity listed in § 1 (1) BWG, or acting as a market maker for commodity derivatives;

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

- those persons report upon request to the competent authority the basis on which they have assessed that their activity under points (i) and (ii) is ancillary to their main business.

8.8.2.4 Consequences

Potential legal consequence of carrying out banking business in Austria on a commercial basis without the required license include:

- administrative fines of up to EUR 100.000,- in case of the banking business of trading pursuant to § 1 (1) no 7 BWG;

- the invalidity of agreements on remuneration (e.g. fees, commissions or interest) associated with those transactions; and/or

- the invalidity of suretyships (*Bürgschaften*) (and probably also other accessory security interests such as pledges) and guarantees associated with banking transactions conducted without the required license (§ 100 BWG) – according to the predominant view in legal writing invalidity affects securities/guarantees in their entirety (and not only as far as remuneration is concerned).

8.8.3 Other licensing requirements

Carrying out activities as a gas trader (*Erdgashändler*)[72] requires (i) prior notification to the competent regulatory authority (§ 121 (1) of the Austrian Natural Gas Business Act 2011 (*Gaswirtschaftsgesetz 2011 – GWG 2011*)) and (ii) a license under the Austrian Trade Act 1994 (*Gewerbeordnung 1994 – GewO 1994*)[73]. Moreover, under certain trading arrangements, a gas trader needs to register with the competent regulatory authority as a balancing group representative (*Bilanzgruppenverantwortlicher*).

Carrying out activities as an electricity company (*Elektrizitätsunternehmen*)[74] does not require a license under the GewO 1994. Such activities are, however, subject to the Austrian Electricity Business and Organisation Act 2010 (*Elektrizitätswirtschafts- und -organisationsgesetz 2010 – ElWOG 2010*).

Furthermore, all such companies may need to register with the competent national regulatory authority if they are entering into wholesale energy market transactions, including orders to trade[75] (*i.e.*, transactions subject to the reporting obligations under Article 8 (1) of REMIT).

[72] "Gas trader" (*Erdgashändler*) means a natural or legal person or a registered partnership buying and selling gas without carrying out the functions of transmission or distribution, neither within nor outside the system in which such gas trader is established (§ 7 (1) no 14 GWG 2011).

[73] § 2 (1) no 20 GewO 1994 *e contrario*.

[74] "Electricity company" (*Elektrizitätsunternehmen*) means any natural or legal person or registered partnership which carries out, with a view to profit, at least one of the functions of generation, transmission, distribution, supply or purchase of electricity, and which is responsible for commercial, technical or maintenance tasks related to such functions; final customers are not deemed electricity companies (§ 7 no 11 ElWOG 2010).

[75] See Article 9 (1) of REMIT.

8.9 Part IX: Other Provisions

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

In order to mitigate the risk of Physical Commodity Transactions not falling within the scope of the Austrian substantive netting privilege in § 20 (4) IO (see at 7.1.2.1.1 above), Parties may want to consider including the following additional representation in § 21 of the EFET General Agreement (where factually accurate):

"*Each Party represents and warrants that […] it does not use, and does not intend to use, any of the Natural Gas / electricity delivered to it under this Agreement to cover own consumption (Deckung des Eigenbedarfs) and any Individual Contract entered into by it constitutes a pure trading transaction (reines Handelsgeschäft) within the meaning of § 20 (4) no 2a of the Austrian Insolvency Code (Insolvenzordnung – IO).*"

9 Limitations and qualifications

9.1 Limitations and qualifications concerning certain Individual Contracts

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

9.1.1 In respect of Individual Contracts not having elements of optionality or other derivative-like characteristics, e.g. Individual Contracts entered into on a "spot" basis[76], there is, subject to the last sentence of this 9.1.1, a risk that they are not included in Annex II to CRR (please refer to Appendix ./D) and thus do not benefit from the Austrian substantive netting privilege. The same is true for wholesale energy products[77] that must be physically settled. Such do not qualify as MiFID II-financial instruments (to the extent traded on an OTF) and, hence, may likely not fall within the scope of Annex II to CRR. Trades (including on a spot basis, such as spot "Physical Commodity Transactions") relating to listed (*börsenotiert*) goods and commodities pursuant to § 1 no 3 BörseG 2018 (including wholesale energy products that must be physically settled) are, however, covered by § 20 (4)

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

[77] As defined in Article 2 no 4 of REMIT.

IO, as long as they do not serve for own consumption (*Deckung des Eigenbedarfs*) but only serve trading purposes.

9.1.2 This Opinion only applies to "Commodity Forwards", "Commodity Options", "Commodity Swaps" and "Physical Commodity Transactions"[78], if they (i) must be settled in cash, (ii) may at least be settled in cash at the option of one Party (even if effectively physically settled) other than by reason of default or other termination event, or (iii) can be physically settled, provided that they are traded on a regulated market and/or an MTF or OTF. Where the underlying is a Green Certificate or Capacity Right, this Opinion also applies to "Commodity Forwards", "Commodity Options", "Commodity Swaps" and "Physical Commodity Transactions" to the extent the conditions under Article 7 (1) of Delegated Regulation 2017/565[79] are satisfied.

9.2 Speculation for differences (*Differenzeinwand*)

Pursuant to § 1270 ABGB, amounts due as a result of games and bets (speculative transactions) are unenforceable.

§ 1 (5) BWG stipulates that, with respect to the resolution of disputes resulting from banking transactions (as defined in § 1 (1) BWG), the defense that a claim is based on a speculation for differences (*Differenzeinwand*) qualifying as game or bet may not be relied upon if at least one party to the contract is authorized (*i.e.*, licensed or "passported") to carry on such activity on a commercial basis.

For Individual Contracts which do not qualify as banking transactions, § 1 (5) BWG does not apply. In connection with the implementation of Directive 2004/39/EC on markets in financial instruments ("**MiFID**") and MiFID II, respectively, the number of Individual Contracts that constitute banking transactions and, thus, benefit from § 1 (5) BWG if at least one of the parties to the transaction holds the requisite license / passport has increased significantly. However, Parties should still carefully analyse whether a particular Individual Contract constitutes a banking transaction and whether either of the parties holds the requisite license / passport so as to determine whether an exposure in respect of gaming laws for speculative transactions exists.

In addition, the BörseG 2018 stipulates that (i) in decisions concerning legal disputes arising from exchange transactions, the objection or defence of gambling or

[78] If the Individual Contract was not entered into on a "spot" basis (see footnote above); if the Individual Contract was entered into on a "spot" basis, please refer to 9.1.1 above.

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

wager shall be inadmissible (§ 51 (1) BörseG 2018) or if options and financial futures contracts are traded on recognized exchanges, in Austria or outside the country, and prices are published for these, the objection of gambling and wager in legal disputes arising from these transactions shall not be admissible, irrespective of who presents the claim (§ 51 (2) BörseG 2018).

In respect of non-banking transactions and Individual Contracts that do not qualify for purposes of § 51 BörseG 2018, the prevailing view in Austria is that contracts for differences (*Differenzgeschäfte*) which serve the needs of sound business (hedging transactions, for example) do not qualify as gambling contracts. This view has also been confirmed by the Austrian Supreme Court (*Oberster Gerichtshof – OGH*).[80] The enforceability of these Individual Contracts, therefore, depends on whether such Individual Contracts are entered into for speculative or gambling reasons or for hedging purposes, whereby only the latter will be enforceable. The Austrian Supreme Court has also held that because of the close link between hedging and speculative transactions, transactions entered into by traders[81] are also economically justified and, therefore, not subject to the defense of speculation for differences (*Differenzeinwand*).

9.3 Avoidance rules

Under §§ 27 et seqq. IO certain actions taken by debtors that are held to be detrimental to their creditors may be set aside by the courts if a voidance action (*Anfechtungsklage*) is filed in insolvency proceedings by the insolvency administrator (*Insolvenzverwalter*). Please refer to Appendix ./F for a brief summary of Austrian avoidance rules.

For the purposes of this Opinion, we consider all cases of voidance due to "unduly favouring a certain creditor" (*Anfechtung wegen Begünstigung*) pursuant to § 30 IO and "knowledge of insolvency" (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*) pursuant to § 31 IO to be of importance.

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

Further to §§ 27 et seqq. IO, Austrian law (i.e. the Austrian Act on Avoidance (*Anfechtungsordnung – AO*)) also provides for rights of avoidance irrespective of an insolvency scenario. Such rights of avoidance are, however, limited to (i) avoidance due to intent to discriminate (*Anfechtung wegen Benachteiligungsabsicht*) or

[80] See, *e.g.*, OGH 25.5.1998, 1 Ob 81/98p.
[81] *I.e.* those market participants who take on risk from parties seeking to hedge an exposure for a premium and, thus, enable the hedging party to separate the risk from the underlying transaction and pass it on to other market participants.

(ii) avoidance due to squandering of assets (*Anfechtung wegen Vermögensverschleuderung*). Therefore, in practice the rights provided for under the AO are of minor importance only.

Article 16 of the Regulation and § 229 IO (where applicable) impose a restriction on the ability of an Austrian insolvency administrator to set aside set-off. Article 16 of the Regulation and § 229 IO limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors, if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

According to § 119 (3) BaSAG, the application of resolution tools (see at 1.2.6.4 of Appendix ./E) and the exercise of resolution powers (see at 1.2.6.7 of Appendix ./E) will not be subject to avoidance actions/proceedings in case of the subsequent opening of insolvency proceedings over the assets of the BRRD-Entity under resolution.

9.4 Reserve funds (*Deckungsstöcke*) of an Insurance Undertaking (other than Re-Insurance Undertakings)

By way of background information to what is said at 9.5.2 of this Opinion, we note that under the VAG 2016 an Insurance Undertaking (other than a Re-Insurance Undertaking) must keep specific assets or pools of assets as cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*) according to § 300 VAG 2016 ("**Allocated Assets**") with respect to certain classes of insurance (*Versicherungszweige*). For this purpose, an Insurance Undertaking (other than a Re-Insurance Undertaking) must maintain reserve funds (*Deckungsstöcke*) and in certain cases even particular divisions to such reserve fund (*Abteilungen eines Deckungsstocks*).

Allocated Assets need to be registered with the reserve fund register (*Deckungsstockverzeichnis*) to be maintained by the Insurance Undertaking (other than a Re-Insurance Undertaking) (§ 249 (1) VAG 2016), otherwise such assets will not be Allocated Assets of the intended reserve fund (*Deckungsstock*).

We believe that the assets of an Insurance Undertaking (other than a Re-Insurance Undertaking) which are not allocated to a specific reserve fund (*Deckungsstock*) and which do not serve as cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*) may, subject to the requirements laid down in (i) the VAG 2016 and (ii) the FMA Ordinance on Qualitative Requirements for the Investments of Insurance and Reinsurance Undertakings (*Versicherungsunternehmen Kapitalanlageverordnung* – "***VU-KAV***"), be used for other purposes by an Insurance Undertaking ("**Unallocated Assets**").

Whereas not set out by law, it should be clear from the documentation used to which class of assets (i.e. Unallocated Assets and Allocated Assets or to which respective reserve fund or division thereof respectively) the EFET General Agreement and the Individual Contracts thereunder are allocated. This is because the Allocated Assets relating to a particular reserve fund (*Deckungsstock*) or division thereof are ring-fenced, i.e. the counterparty of an Insurance Undertaking (other than a Re-Insurance Undertaking) will have no access to the assets of other reserve funds (*Deckungsstöcke*) or divisions thereof maintained by the respective counterparty (see also at 9.5.2 below).

9.5 Limitations and qualifications from separate funds (*Sondermassen*)

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

9.5.1 Banks / Investment Firms

Upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*) with respect to Banks, Investment Firms and CRR-Investment Firms (please see at 1.2.3 and 1.4 of Appendix ./E) all funds (*Mittel*) accruing to the Bank, Investment Firm or CRR-Investment Firm from transactions (*Geschäften*) entered into after the institution of such special receivership proceedings (new claims (*neue Forderungen*)), will form a separate fund (*Sondermasse*). Such separate fund would, even after the end of such receivership, be used to preferentially satisfy new claims of creditors of a Bank, Investment Firm or CRR-Investment Firm which arose after the institution of special receivership proceedings.

Under Austrian (insolvency) law, separate funds (such as the funds of a Bank, Investment Firm or CRR-Investment Firm which arose after the institution of special receivership proceedings) are ring-fenced (as long as the separate fund is not dissolved by court; see last paragraph of this 9.5.1).

It follows from this that (i) claims resulting out of Individual Contracts entered into prior to the institution of special receivership proceedings with / against (ii) claims resulting out of Individual Contracts entered into after the institution of special receivership proceedings cannot be netted.

Any counterparty of a Bank, Investment Firm or CRR-Investment Firm should therefore consider carefully terminating an EFET General Agreement upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*).

A Bank, Investment Firm or CRR-Investment Firm may apply to the competent court in order to have such separate fund (*Sondermasse*) dissolved only if (i) the special receivership proceedings ended without the Bank, Investment Firm or CRR-Investment Firm becoming subsequently subject to formal insolvency proceedings (*Nachfolgeinsolvenz*) and (ii) two years have lapsed since the special receivership proceedings ended. If not dissolved by court order, such separate funds would also sustain (and thus adversely affect close-out netting of claims under "old" and "new" Individual Contracts) in case of subsequent formal insolvency proceedings (*Nachfolgeinsolvenz*).

9.5.2 Reserve funds (*Deckungsstöcke*) of Insurance Undertakings (other than Re-Insurance Undertakings)

9.5.2.1 With respect to Individual Contracts relating to Unallocated Assets (as defined above at 9.4 above) we refer to the general conclusions reached in this Opinion.

9.5.2.2 In addition, we note the following with respect to close-out netting across reserve funds (Deckungsstöcke) of an Insurance Undertaking (other than Re-Insurance Undertaking):

With respect to Individual Contracts relating to Allocated Assets (as defined above at 9.4 above), the respective reserve funds (*Deckungsstöcke*), and, where applicable, the divisions of a reserve fund (*Abteilung eines Deckungsstocks*) will have to be treated on a segregated basis as separate funds.

Pursuant to § 307 (1) VAG 2016 execution can be levied against assets registered in the reserve fund register (*Deckungsstockverzeichnis*) only for the benefit (*zugunsten*) of an insurance claim (*Versicherungsforderung*) (as defined in the VAG 2016; not including claims under derivative transactions) for which a reserve fund requirement (*Deckungserfordernis*) exists. Subject to certain exemptions, assets that are not subject to execution are also excluded from set-off (§ 293 (3) of the EO).

In relation to claims that are in principle excluded from execution (and, consequently, set-off), § 293 (3) EO sets out that set-off against such claims is permissible *inter alia* for collecting a legally connective counterclaim (*zur Einbringung einer im rechtlichen Zusammenhang stehenden Gegenforderung*). Pursuant to Austrian case law and legal writing, the requirement that counterclaims be legally connective has to be construed narrowly. However, pursuant to Austrian legal writing, a set-off should e.g. be permissible if the claim and the counterclaim to be set off derive from a unitary agreement (*einheitlicher Vertrag*).[82]

We believe that an Austrian court should recognize the Parties' agreement in § 1.1 of the EFET General Agreement that the EFET General Agreement and all Individual Contracts entered into thereunder form a single agreement.

It follows from this that good arguments can be made that the inclusion of an Individual Contract in a reserve fund (*Deckungsstock*) or division thereof and registration of such Individual Contract with the reserve fund register (*Deckungsstockregister*), which is decisive in allocating an asset to a reserve fund, would not *per se* adversely affect the enforceability of the Close-out Netting Provisions.

We believe that it will, however, not be possible to net payment and delivery obligations that relate to a particular reserve fund and are registered in the respective reserve fund (or division thereof) register with / against obligations that do not relate to a reserve fund (i.e. Unallocated Assets) or that relate to another reserve fund (even of the same Insurance Undertaking (other than a Re-Insurance Undertaking)), i.e. (close-out) netting across reserve funds will not be enforceable.

In case of insolvency proceedings Allocated Assets relating to a reserve fund or to a division[83] of a reserve fund (*Abteilung eines Deckungsstocks*) constitute a separate fund (*Sondermasse*) according to § 48 IO (§ 312 (2) VAG 2016). Claims arising out of insurance contracts, including insurance claims (*Ansprüche auf Versicherungsleistung*) will be satisfied preferentially out of the assets allocated to this separate fund (§ 314 VAG 2016). These claims will, thus, have priority over a counterparty's claim to receive the Termination Amount (as defined in § 11.1 of the EFET General Agreement).

9.5.3 Pension Funds

In the event of bankruptcy proceedings against a Pension Fund, the assets allocated to an investment and risk sharing group (*Veranlagungs- und Risikogemeinschaft*) constitute a separate fund (*Sondermasse*) according to § 48 (1) IO (§ 37 (4) PKG). Each member (*Anwartschaftsberechtigter*),

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[82] *Oberhammer* in *Angst/Oberhammer*, EO[3] § 293 mn 7.

[83] *Braumüller*, Versicherungsaufsichtsrecht, 257; *Baran*, VAG, §§ 87 footnote 3 concurs in relation to assets which are subject to execution and belong to a division of a reserve fund.

i.e. a person entitled to retirement benefits, and each beneficiary (*Leistungsberechtigter*), i.e. a person already receiving retirement benefits, are entitled to the assets allocated to his investment and risk sharing group in accordance with the current balance of his pension accounts (§ 39 (1) and (2) PKG). This means that the members and beneficiaries of the investment and risk sharing group will be satisfied preferentially out of the assets allocated to the investment and risk sharing group and the proceeds from their realization.

Derivatives transactions (see § 25 (1) no 6 PKG) form a part of the assets allocated to an investment and risk sharing group. To secure or assert claims, which were effectively established by the Pension Fund for the assets allocated to an investment and risk sharing group, execution may be levied only on the assets of such investment and risk sharing group (§ 13 (1) PKG).

Following the above reasoning, we believe that the Close-out Netting Provisions should be enforceable prior to and after the commencement of bankruptcy proceedings against a Pension Fund insofar as only claims from transactions that were concluded by the Pension Fund for the same investment and risk sharing group are netted, i.e. no "cross" close-out netting between different investment and risk sharing groups.

If the claims from the Pension Fund contract to which the members and beneficiaries are entitled cannot be fully settled from the relevant investment and risk sharing group, they shall have priority over the remaining claims in bankruptcy (§ 39 (3) PKG). Thus, a claim of a counterparty of a Pension Fund for payment of the Termination Amount (as defined in § 11.1 of the EFET General Agreement) will be subordinated to the unsettled claims of members and beneficiaries.

9.6 Other limitations and qualifications

9.6.1 Insurance Undertakings

9.6.1.1 Exclusion of set-off rights

§ 15 (1) VU-KAV stipulates that loans, receivables (such as claims for *pro rata* interest) and credit balances may only be used by an Insurance Undertaking for Allocated Assets if the counterparty waives any right of set-off or retention in written form (including, presumably, set-off rights arising out of the Close-out Netting Provisions of the EFET General Agreement).

Based on the letter of the law and the examples mentioned in terms of receivables covered (i.e. claims for *pro rata* interest), we believe that it is unlikely that § 15 (1) VU-KAV will apply to derivatives transactions. Hence, it should not be necessary for the Insurance Undertaking's counterparty to waive any right of set-off in order for the Insurance Undertaking to use such commodities derivatives transactions for Allocated Assets. This is further backed by the fact that the FMA could have expressly stipulated that § 15 (1) VU-KAV should also apply to derivatives transactions but has, obviously, refrained from doing so.

If a counterparty were to enter into Individual Contracts with an Insurance Undertaking that do not meet the requirements of the VU-KAV, in particular § 15 (1) VU-KAV and the requirements described in more detail at 9.6.1.2 below, these Individual Contracts could not be allocated to the respective reserve fund (*Deckungsstock*) as Allocated Assets for which the relevant Individual Contracts were used.

We believe, however, that from the perspective of Austrian law the provisions of the VU-KAV (and probably also a possible violation of § 15 (1) VU-KAV) should not necessarily impair the validity of the relevant Individual Contracts – albeit of course the implications of a potential illegality would need to be looked into also under the laws governing the EFET General Agreement. There are, however, indirect effects on a counterparty of an Insurance Undertaking since each Individual Contract under an EFET General Agreement (unless such EFET General Agreement was concluded for the Unallocated Assets) should be concluded for a specific (division of) reserve fund (see also below). If a certain Individual Contract did not meet the regulatory requirements, such Individual Contract could not be allocated to any division of the respective reserve fund and would possibly have to be removed from the reserve fund. This would negatively affect the enforceability of close-out netting.

Based on the foregoing, we therefore recommend that any entity envisaging entering into Individual Contracts with an Insurance Undertaking carefully scrutinizes this issue and discusses with its counterparty.

9.6.1.2 Further regulatory requirements under the VU-KAV

The VU-KAV contains detailed regulatory requirements which need to be observed by Insurance Undertakings when entering into derivatives transactions (see § 11 VU-KAV). None of these requirements should, however, affect the conclusions reached in this Opinion.

9.6.1.3 Restrictions on the right of disposal over Allocated Assets

An Insurance Undertaking may only dispose of Allocated Assets – except for the separate groups of the reserve fund pursuant to § 300 (1) no 3 and 6 VAG 2016 – with the written consent of the trustee (*Treuhänder*) of the relevant reserve fund (§ 305(2) VAG 2016). A sale, assignment or encumbrance of Allocated Assets without the trustee's consent will be invalid. We therefore believe that any Individual Contract which involves an Insurance Undertaking acting as seller of Allocated Assets will require the written consent of the respective reserve fund's trustee.

Moreover, Individual Contracts where an Insurance Undertaking acts as borrower or acquirer of Allocated Assets could also be (indirectly) affected by § 305 VAG 2016.

Where there is sufficient surplus cover, the trustee may also consent to specific disposals in the form of a general approval. Such general approval will be valid for a maximum term of one year and may only relate to disposals of Allocated Assets where assets of at least equivalent value are allocated to the reserve fund at the same time (§ 305 (4) VAG 2016).

9.6.2 Pension Funds

Assets combined in an investment group may neither be pledged nor otherwise encumbered nor transferred nor assigned as collateral in a legally effective way by a Pension Fund other than under the circumstances set forth by § 14 (2) PKG. According to § 14 (2) no 3 PKG, assets shall be allowed to be temporarily provided as collateral for derivatives pursuant to § 73 InvFG 2011 contracted in accordance with § 25 (1) no 6 PKG, if the provision of collateral is prescribed by Regulation (EU) No 648/2012 and the resulting risks have been adequately considered in risk management.

9.6.3 Rules applicable to the OeNB

As concerns the enforceability of the Close-out Netting Provisions, § 77 of the Act on the National Bank (*Nationalbankgesetz – NBG*) provides for a rather far-reaching preferential right of OeNB to satisfy its own claims and to take security over assets coming into its possession.

Neither court rulings nor legal writing is available in relation to § 77 NBG. We believe though that § 77 NBG is a mandatory provision of Austrian law, which, as such, could override any contractual stipulations to the contrary, irrespective of the governing law of such contract. § 77 NBG could thus adversely impact on the Close-out Netting Provisions insofar as OeNB could, based on black letter law, realize any assets of its counterparty, and even assets to which a third-party has ownership title or other rights if these rights were not clearly identifiable at the moment the assets came into OeNB's possession, prior to close-out netting under the EFET General Agreement. However, we believe that § 77 should not be seen in isolation and that there are good arguments supporting the view that the OeNB may not rely on § 77 NBG in a close-out netting scenario, in particular when conducting transactions falling within the scope of the Guidelines (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework.

Central Banks, as OeNB, have obviously not been considered by the Regulation. An analysis whether OeNB could, *e.g.*, be subject to the Regulation would, however, be beyond of scope of this Opinion.

9.6.4 Limitations arising from § 65 (4) BaSAG

Limitations may arise with respect to BRRD-Entities, Insurance Undertakings and entities pursuant to § 2 (1) no 4 FinSG[84] from § 65 (4) BaSAG. Pursuant to § 65 (4) BaSAG, the protections conferred by §§ 5 to 9 FinSG shall not apply to any restrictions on the effect of a close-out netting provision, including any set-off, that are imposed (i) by virtue of the application of a resolution tool (see at 1.2.6.4 of Appendix ./E) or the exercise of a resolution power (see at 1.2.6.7 of Appendix ./E) by the resolution authority in respect of a BRRD-Entity, or (ii) by virtue of the application of similar powers provided for under applicable laws in order to facilitate the orderly resolution of an Insurance Undertaking / an entity pursuant to § 2 (1) no 4 FinSG which is subject to safeguards at least equivalent to those set out in §§ 106 et seqq. BaSAG.

9.6.5 Restrictions on the enforcement against States and Municipalities

Pursuant to § 15 EO, debt enforcement against Municipalities and non-profit institutions under public law (*gemeinnützige öffentliche Anstalten*) is limited to those assets which can be used for paying of the Municipalities' or the institutions' creditors without interfering with their duties to serve public

[84] These are central counterparties, settlement agents or clearing houses, as defined respectively in Article 2(c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under the law of an EEA State acting in the futures, options and derivatives markets to the extent not covered by that Directive. Such entities are, however, not covered by this Opinion.

interest (*Erfüllung öffentlicher Interessen*). This limitation of debt enforcement does not apply to the enforcement of contractual pledges (*vertragliche Pfandrechte*).

In a former decision, the Austrian Supreme Court[85] ruled that § 15 EO would also apply to the Republic of Austria. In a more recent decision, the Austrian Supreme Court[86] explicitly refused its former ruling and stated that § 15 EO would not apply to the Republic of Austria and the States. They would, however, be indirectly protected by § 15 EO if they transferred their assets to a non-profit institution.

Since there is no established and consistent case-law on the applicability of § 15 EO to States, we cannot rule out that an Austrian court would come to the conclusion that an enforcement (and thus set-off) against States is limited to those assets (claims) which were contractually pledged or can be used for paying of the creditors of the respective State without interfering with its duties to serve public interest (*Erfüllung öffentlicher Aufgaben*), even if these assets were not transferred to a non-profit institution under public law.

The application of § 15 EO would affect pre-insolvency close-out netting not only against Municipalities but also against States if a court came to the conclusion that certain claims that shall be subject to close-out netting under an EFET General Agreement are excluded from execution / enforcement pursuant to § 15 EO. This is because – subject to certain exemptions – assets that are not subject to execution are also excluded from set-off (§ 293 (3) EO).

Moreover, § 15 EO would affect post-insolvency close-out netting since it limits the scope of the assets that are subject to insolvency proceedings. This is because according to § 2 (2) IO, the bankrupt's estate comprises those assets that are subject to execution / enforcement according to the EO.

9.6.6 Grounds for the opening of insolvency proceedings against States

In contrast to Municipalities, it is disputed in legal literature whether a federal or state government such as a State can become illiquid (*zahlungsunfähig*) or over-indebted in terms of insolvency law (*insolvenzrechtlich überschuldet*) at all. Due to the competence of the States to collect taxes[87],

[85] OGH 28.6.1930, SZ 12/155.
[86] OGH 14.10.1992, 3 Ob 77/92.
[87] Generally, the Republic of Austria is competent to collect taxes. However, legal literature argues that the States have a right to collect taxes (*Steuerfindungsrecht*) where the Republic of Austria is not competent to collect such taxes pursuant to the Austrian Federal Constitution Act (*Bundes-Verfassungsgesetz – B-VG*) or

some argue that they will always be able to make available the necessary funds to uphold their ability to pay. It is further argued that the States may also not become over-indebted in terms of insolvency law since parts of their assets may never be subject to debt enforcement due to § 15 EO (see at 9.6.5 above).

We do not find this argumentation convincing. Considering the financial collapse of several sovereign states in economic history and their decision to cease further payments to their creditors, it is obvious that illiquidity may also occur to states. As to the cited argumentation on over-indebtedness, we note that the potential applicability of § 15 EO probably restricts the assets that are subject to insolvency proceedings, but is not relevant with regards to over-indebtedness in terms of insolvency law.

For the above-mentioned reasons, we believe that insolvency proceedings might in theory be opened against a State if the respective State was illiquid (*zahlungsunfähig*) or over-indebted in terms of insolvency law (*insolvenzrechtlich überschuldet*).

States and public law entites, such as the States and Municipalities, have obviously not been considered by the Regulation. An analysis whether the States or Municipalities could e.g. be subject to the Regulation would, however, be beyond of scope of this Opinion.

9.6.7 Legislative power of the Republic of Austria

The Republic of Austria and its legislative bodies have legislative power as to the insolvency laws applying on the States and Municipalities and the national law on close-out netting. In two court rulings[88] the Austrian Constitutional Court explicitly stated (by reference to a State, but the underlying reasoning should also apply to Municipalities) that it is "*without any doubt in the public interest*" if the Republic of Austria uses its legislative powers to avoid a situation resembling insolvency (*insolvenzähnliche Situation*) of a State. By stating that the exclusive application of (corporate) insolvency laws to a State (or Municipalities) is not reconcilable with basic principles of the Austrian constitution (separation of powers, democracy and rule of law), the Austrian Constitutional Court[89] clearly implied that a special set of rules would need to be implemented in such scenario. Hence, such legislative power may implement special provisions regarding the insolvency of a State / Municipality or may be used to restrict the enforceability of close-out netting under the EFET General Agreement in a pre-

the Fiscal Constitutional Act (*Finanzverfassungsgesetz – F-VG*). See also *Matzinger/Pröll* in *Steger* (Hrsg.), Öffentliche Haushalte in Österreich 71 et seq.)

88 See VfGH G 239/2014-27, G 98/2015-27 of 3 July 2015; VfGH G 248/2017-32, G 2/2018-19, G 55/2018-8, G56/2018-7 of 14 March 2018.

89 See VfGH G 248/2017-32, G 2/2018-19, G 55/2018-8, G56/2018-7 of 14 March 2018.

insolvency and a post-insolvency scenario. The legislative bodies of the Republic of Austria could e.g. decide that insolvency proceedings may not be opened against a State / a Municipality or that specific close-out netting legislation such as § 233 IO (see at 2.3 of Appendix ./E) and § 20 (4) IO (see at 7.1.2.1.1 above) shall not be applicable. In that case and if the relevant piece of legislation stands the tests established by the Austrian Constitutional Court (*Verfassungsgerichtshof*), including that the law must be in public interest (*im öffentlichen Interesse*), ensure equal treatment of creditors and must be proportionate (*verhältnismäßig*) and objectively justifiable (*sachlich gerechtfertigt*), the enforceability of Close-out Netting Provisions against the States or Municipalities could be adversely affected.

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

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

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

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

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

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

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

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

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

(ii) the courts of the Republic of Austria will apply Austrian law insofar as it is mandatory irrespective of foreign law governing the Opinion Documents;

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

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

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

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

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

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

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

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

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

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

9.6.17 On 31 January 2020, the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland (the "**UK**") from the European Union and the European Atomic Energy Community (the "**Withdrawal Agreement**") entered into force and gave effect to the UK leaving the European Union ("**Brexit**"). On 24 December 2020, the European Union and the UK agreed on the EU-UK Trade and Cooperation Agreement (the "**Brexit Deal**"). The Brexit Deal defines the post-Brexit relationship between the European Union and the UK, but, does not provide for any provision on cross-border cooperation on choice of law, courts and enforcement of court judgements in civil cases. As a result of Brexit, the Brussels Regulation Recast and the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (the "**Lugano Convention 2007**") no longer apply to civil and commercial cases commenced in the UK on or after 1 January 2021. The UK has applied to join the Lugano Convention 2007 on 8 April 2020. However, consent is required from all existing member parties, including the European Union. On 28 June 2021, the European Commission, representing the European Union, refused to give its consent to the UK acceding to the Lugano Convention 2007. The UK, having previously been member as part of the European Union, has acceded in its own right to the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**") that, following Brexit, is effective as of 1 January 2021 and applicable to international cases with exclusive choice of court agreements concluded in civil or commercial matters. The Hague Convention requires courts of states which are contracting parties to the Hague Convention (the "**Contracting States**") to recognise and enforce judgments given by courts in other Contracting States that are designated by jurisdiction clauses. These jurisdiction clauses must be exclusive within the meaning of the Hague Convention which consequently limits its scope of application. In this regard (and based on relevant case law of Contracting States) there is considerable uncertainty that the Hague Convention is not applicable to jurisdiction clauses which only provide for one contracting party to submit to an exclusive jurisdiction (asymmetric clauses). Moreover, there is uncertainty about the application of the Hague Convention to clauses predating 1 January 2021, leaving room for potential application of the UK's common law rules. Also, the scope of application of the Hague Convention is narrower than the scope of the Brussels Regulation Recast. If recognition and enforcement of a judgment in civil and commercial matters (as defined in the Convention between the Republic of Austria and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters of 27 July 1962 as amended (the "**Bilateral Convention**")) for the payment of a sum of money (as defined in the Bilateral Convention) and given by a superior court (as defined in the Bilateral Convention) in the territory of England was sought in Austria, this may be subject to the conditions and limitations set out in the Bilateral Convention (including, without limitation, under Articles II, III, IV and VIII thereof) (if the Bilateral Convention is deemed applicable by the Austrian courts). Also, with the Brussels Regulation Recast no longer being applicable in that context, the Austrian exequatur procedure will apply to judgments rendered in accordance with the Bilateral Convention and require parties to obtain an Austrian court order before enforcing an English judgment in Austria in accordance with Austrian law. We understand that according to UK legislation (Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 Part 4, Section 82) any rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Brussels conventions (as defined in Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 Part 4, Section 82), also the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the "**1968 Brussels Convention**") and the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the 1968 Convention and the 1971 Protocol, with the adjustments made to them by the Accession Convention, the 1982 Accession Convention and the 1989 Accession Convention, signed at Brussels on 29 November 1996, as amended (the "**Convention on the Accession of the Republic of Austria**") ceased to be recognised and available in domestic English law (and to be enforced, allowed and followed accordingly) on exit day 31 January 2020. According to Article 55 of the 1968 Brussels Convention (in connection with Article 7 of the Convention on the Accession of the Republic of Austria), the 1968 Brussels Convention supersedes the Bilateral Convention. If the 1968 Brussels Convention were not to apply, it is not absolutely clear from an international law perspective whether the Bilateral Convention would apply instead (due to it having been superseded). We understand that the UK position apparently is that the 1968 Brussels Convention no longer applies. If a UK judgment would be enforced in Austria, we cannot rule out that an Austrian court would conclude that the 1968 Brussels Convention, with a broader scope, is applicable and not the Bilateral Convention (contrary to the UK position), or that neither the 1968 Brussels Convention nor the Bilateral Convention is applicable. This patchwork of potentially applicable legal regimes is a source of uncertainty regarding agreements involving UK based parties or being subject to English law or the jurisdiction of English courts and there is a risk that, as a consequence of Brexit, judgments rendered by an English court will not be enforced (at all, to the same extent or as swiftly as pre-Brexit) in the Republic of Austria.

10 No implied opinion

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

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

11 Purpose of Opinion

11.1 The purpose of this Opinion is to provide guidance to EFET and its members in understanding the issues that may be of relevance as a matter of Austrian law and to satisfy the opinion requirements set forth by Articles 111 (2) and 296 (2)(b) CRR concerning the recognition of close-out netting for capital purposes and the recognition of collateral arrangements for credit risk mitigation purposes.

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

12 Addressees; liability

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

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

13 Disclosure

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

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

Very truly yours,

DocuSigned by:
Bernd Rajal
6F4BBAA3F7E3405...
Schönherr Rechtsanwälte GmbH

Appendix ./A
Entity Types[90]

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

Legend for below table:

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

Description	Legal form(s)	Limitations
Banks / Credit Institutions	"**Banks**" means credit institutions (*Kreditinstitute*)[91], as defined in § 1 (1) BWG which are incorporated in Austria and which are organized as joint stock corporations (*Aktiengesellschaft – AG*), limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*), cooperative associations (*Genossenschaften*) or savings banks (*Sparkassen*)[92]. The term "Bank" when used in certain sections of this Opinion may refer to institutions that are defined separately below as either	Limitations due to certain funds constituting separate estates (*Sondermassen*) and possible application of resolution tools or exercise of resolution powers by the resolution authority; see at 9.5.1 above and 1.2.6 of Appendix ./E.

[90] In these definitions, the term "legal entity" means an entity with legal personality (*Rechtspersönlichkeit*) other than a private individual.

[91] Since the enactment of the BWG in 1993, Austrian law has adopted the terminology of the EU banking directives which use the term "credit institution" instead of "bank". For the sake of terminological consistency with the assumptions and issues presented, however, the term "bank" shall be used throughout this Opinion.

[92] § 1 (1) BWG covers undertakings which are, pursuant to §§ 4 or 103 no 5 BWG or other federal statutory provisions or since effectiveness of the Single Supervisory Mechanism (SSM) by decision of the ECB, entitled to conduct banking business (as specified in the BWG) in Austria. § 4 BWG (setting forth the obligation to obtain a license from the FMA) applies to undertakings having their head office and main place of management in Austria (which have to fulfill certain other requirements as to their legal form and their share capital, for example, in order to be licensed by the FMA). § 4 BWG, in principle, also covers foreign banks (which are defined as undertakings licensed to conduct banking business outside the EEA) which intend to establish a branch in Austria. In this context, however, foreign banks may not be referred to. § 103 no 5 BWG sets forth that banks licensed to conduct banking businesses prior to the entry into force of the BWG need not apply for a license under § 4 (1) BWG. Other federal statutory provisions entitling undertakings to conduct banking businesses in Austria include the NBG and the Postal Savings Bank Act (*Postsparkassengesetz – PSK-G*), for example.

Description	Legal form(s)	Limitations
	CRR-Credit Institutions, CRR-Financial Institutions or Financial Institutions. Where certain provisions only apply to a CRR-Credit Institution or a CRR-Financial Institution respectively, our Opinion makes reference only to such specific term. "**CRR-Credit Institutions**" means Banks that qualify as credit institutions pursuant to CRR. "**CRR-Financial Institutions**" means Banks that qualify as financial institutions pursuant to CRR. "**Financial Institutions**" means Banks which have obtained a license from the FMA pursuant to § 4 BWG to conduct certain banking business not regulated by CRR and / or CRD IV and which hence do not qualify as either CRR-Credit Institutions or CRR-Financial institutions.	
Corporations	"**Corporations**" means corporations (*Kapitalgesellschaften*) (i.e. joint stock corporation (*Aktiengesellschaft – AG*) or limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*)) under Austrian law having their corporate seat and their principal place of management in Austria. This does not include regulated entities (Banks, Insurance Undertakings, Investment Firms and Investment Fund Management Companies, for example), that are operated in the legal form of a Corporation and which are dealt with herein specifically.	

Description	**Legal form(s)**	**Limitations**
Counties	"**States**" means the following federal states (*Bundesländer*): (i) Burgenland; (ii) Carinthia (*Kärnten*); (iii) Lower Austria (*Niederösterreich*); (iv) Salzburg; (v) Styria (*Steiermark*); (vi) Tyrol (*Tirol*); (vii) Upper Austria (*Oberösterreich*); (viii) Vienna (*Wien*); and (ix) Vorarlberg.	Limitations due to legislative power of the Republic of Austria and restrictions on enforcement; see at 9.6.5 and 9.6.7 above.
Insurance Companies	"**Insurance Undertakings**" means insurance undertakings (*Versicherungsunternehmen*), as defined in § 1 (1) of the Austrian Insurance Supervision Act 2016 (*Versicherungsaufsichtsgesetz – VAG 2016*), which are organized as joint stock corporations (*Aktiengesellschaft – AG*) or mutual insurance companies (*Versicherungsverein auf Gegenseitigkeit*)[93]. "**Re-Insurance Undertaking**" means Insurance Undertakings which are solely licensed by the FMA to conduct re-insurance business (*Betrieb der Rückversicherung*).	Limitations due to certain assets constituting separate estates (*Sondermassen*) and, possibly, § 65 (4) BaSAG as well as limitations on disposal over Allocated Assets; see at 9.5.2, 9.6.1.3 and 9.6.3 above.
Investment Services Providers / Investment Firms	"**Investment Firms**" means investment firms (*Wertpapierfirmen*), as defined in § 3 (2) WAG 2018, which are organized as corporations (*Kapitalgesellschaften*) (joint stock corporations (*Aktiengesellschaften – AG*), limited liability companies (*Gesellschaften mit beschränkter Haftung – GmbH*)) or cooperative associations	Limitations due to certain funds constituting separate estates (*Sondermassen*); see at 9.5.1 above.

[93] § 1 (1) VAG 2016 covers undertakings which have their head office in Austria and whose business activity consists of the conduct of the insurance contract business. Pursuant to § 2 (2) VAG 2016, § 1 (1) VAG 2016 does not apply to Insurance Undertakings exclusively licensed to conduct reinsurance business.

Description	Legal form(s)	Limitations
	(*Genossenschaften*) and which are incorporated in Austria and have obtained a license from the FMA for the investment services of (i) investment advice, (ii) portfolio management and/or (iii) reception and transmission of orders in relation to one or more financial instruments. Pursuant to Austrian law, investment firms must not take proprietary positions when providing their services, i.e. must not hold money, securities or other instruments of their clients so that the investment firm at no time becomes the debtor of its client. "**CRR-Investment Firm**" means investment firms (*Wertpapierfirmen*), as defined in § 3 (2) WAG 2018, which are organized as corporations (*Kapitalgesellschaften*) (joint stock corporations (*Aktiengesellschaften – AG*), limited liability companies (*Gesellschaften mit beschränkter Haftung – GmbH*)) or cooperative associations (*Genossenschaften*) and which are incorporated in Austria and have obtained a license from the FMA for (a) the investment services of (i) investment advice, (ii) portfolio management, or (iii) reception and transmission of orders in relation to one or more financial instruments <u>and</u> for the operation of a multilateral trading facility (MTF) and/or an organised trading facility (OTF), or (b) solely the operation of a multilateral trading facility (MTF) and/or an organised trading facility (OTF). Pursuant to Austrian law, investment firms (including CRR-Investment Firms) must not take proprietary positions when providing their services, i.e. must not hold money, securities or other instruments of their clients so that the investment firm at no time becomes the debtor of its client. CRR-Investment Firms as defined above qualify as investment firms pursuant to Article 4 (1) no 2 CRR.	

Description	Legal form(s)	Limitations
<u>Investment Fund Management Companies</u>	"**Investment Fund Management Companies**" means management companies (*Verwaltungsgesellschaften*), as defined in § 3 (2) InvFG 2011, which are incorporated in Austria and have, following 1 September 2011, obtained licenses from the FMA pursuant to § 1 (1) no 13 BWG in connection with § 6 (2) InvFG 2011 and § 4 AIFMG or, prior to 1 September 2011, already held a license from the FMA pursuant to § 1 (1) no 13 BWG and which are organized as joint stock corporations (*Aktiengesellschaften – AG*) or limited liability companies (*Gesellschaften mit beschränkter Haftung – GmbH*). Investment Fund Management Companies are Banks. Therefore, the term "Banks", when used in this Opinion, also refers to Investment Fund Management Companies.	
<u>Municipalities</u>	"**Municipalities**" means municipalities (*Gemeinden*) as defined by the Austrian Federal Constitution Act (*Bundes-Verfassungsgesetz – BV-G*).	Limitations due to legislative power of the Republic of Austria and restrictions on enforcement; see at 9.6.5 and 9.6.7 above.
<u>Other Financial Institutions</u>	"**Pension Funds**" means pension funds (*Pensionskassen*) as defined in § 1 (1) of the Austrian Pension Funds Act (*Pensionskassengesetz – PKG*), which are organized as joint stock corporations (*Aktiengesellschaften – AG*) and which are incorporated in Austria and have obtained a license from the FMA pursuant to § 8 PKG.	Limitations due to Pension Funds constituting separate estates (*Sondermassen*); see at 9.5.3 above.

Description	Legal form(s)	Limitations
Partnership	"**Partnerships**" means partnerships (*Personengesellschaften*) (i.e. unlimited partnership (*offene Gesellschaft – OG*) or limited partnership (*Kommanditgesellschaft – KG*)) under Austrian law having their seat and their principal place of management in Austria. This does not include regulated entities that are operated in the legal form of a Partnership. Partnerships have legal personality (*Rechtspersönlichkeit*).	
Publicly-owned Corporations	"**OeBAG**" means Oesterreichische Beteiligungs AG, which is organised as joint stock corporation (*Aktiengesellschaft – AG*) and is wholly owned by the Republic of Austria. OeBAG is subject to the Act on the Reorganisation of the Legal Affairs of the Österreichische Industrieholding Aktiengesellschaft und Post und Telekombeteiligungsverwaltungsgesellschaft (*ÖIAG-Gesetz 2000*) which sets forth the statutory mandate of OeBAG that includes the management of certain shareholdings of the Republic of Austria. Other corporations (majority-)owned by the Republic of Austria, any State or any Municipality are, for purposes of this Opinion, considered Corporations.	

Description	Legal form(s)	Limitations
Quasi Governmental Entities	"**OeNB**" means Oesterreichische Nationalbank AG. OeNB is organised as a joint stock corporation (*Aktiengesellschaft – AG*) and is wholly owned by the Republic of Austria. OeNB performs the function of the central bank of the Republic of Austria and is as such an integral part of the European System of Central Banks (ESCB).	Limitations due to the preferential right of the OeNB pursuant to § 77 NBG; see at 9.6.3 above.

NOTE: Associations of local government are not in scope of this Opinion.

Appendix ./B
Individual Contracts

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

Legend for below table:

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

Description	**Underlying Commodity** (each a "**Commodity**")	**Eligibility for close-out netting if Austrian substantive insolvency law was to apply**[1]
Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price, and the other party agrees to pay a price for the same quantity to be set on a specified date in the future.	Electricity / Natural Gas[2]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

[1] See at 7.1.2 above for further details.
[2] As defined in Annex 1 to the EFET General Agreement Gas.

	Emission Allowances[3]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Green Certificates[4] / Capacity Rights[5]	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of	Electricity / Natural Gas	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Emission Allowances	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

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

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

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

the commodity on the exercise date and the strike price.	Green Certificates / Capacity Rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.	Electricity / Natural Gas	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Emission Allowances	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
	Green Certificates / Capacity Rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).
Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.	Electricity / Natural Gas	Eligible based on qualification as either Annex II-CRR Transaction or Trade Transaction (subject to the limitations set out at 9.1 above).

	Emission Allowances	Eligible based on qualification as either Annex II-CRR Transaction or Trade Transaction (subject to the limitations set out at 9.1 above).
	Green Certificates / Capacity Rights	Eligible based on qualification as Annex II-CRR Transaction (subject to the limitations set out at 9.1 above).

Appendix ./C
§ 20 (4) IO

§ 20 (4) IO reads (in unofficial English translation) as follows:

"*(4) [C]laims under agreements which have been terminated by virtue of the initiation of a bankruptcy proceeding concerning*

1. the special off-balance sheet financial transactions referred to in Annex II to Regulation (EU) Nr 575/2013 including derivative instruments for the transfer of credit risks,

2. interest rate, currency, precious metal, raw material, stock and other securities options sold and options on indices,

2a. trades relating to listed goods and commodities pursuant § 1 (3) of the Austrian Stock Exchange Act 2018, BGBl. I no. 107/2017, as long as such commercial transaction does not serve for own consumption *(Deckung des Eigenbedarfs) but only serves trading purposes,*

3. repurchase transactions (§ 50 (1) BWG and Article 4 (1) of Regulation (EU) Nr 575/2013) and

4. securities borrowing and securities lending transactions

may be offset, provided it has been agreed that these agreements are terminated or may be terminated by the other party upon initiation of a insolvency proceeding against the assets of one contract party and that all mutual claims resulting from such agreements shall be offset."

Appendix ./D
Annex II to CRR

Types of derivatives

1. Interest-rate contracts:

(a) single-currency interest rate swaps;

(b) basis-swaps;

(c) forward rate agreements;

(d) interest-rate futures;

(e) interest-rate options purchased;

(f) other contracts of similar nature.

2. Foreign-exchange contracts and contracts concerning gold:

(a) cross-currency interest-rate swaps;

(b) forward foreign-exchange contracts;

(c) currency futures;

(d) currency options purchased;

(e) other contracts of a similar nature;

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

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

Appendix ./E
Summary of Austrian Netting Rules

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

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

1.1.1 Insolvency proceedings

In Austria, there is a unified Insolvency Code (*Insolvenzordnung – IO*) governing insolvency proceedings (*Insolvenzverfahren*) against debtors such as, *inter alia*, Corporations and Partnerships. Depending on whether or not a recovery plan (*Sanierungsplan*) is presented with the application for the opening of insolvency proceedings, insolvency proceedings are called recovery proceedings (*Sanierungsverfahren*) or bankruptcy proceedings (*Konkursverfahren*). The term insolvency proceedings used in the IO and in this Opinion covers both recovery proceedings (*Sanierungsverfahren*) and bankruptcy proceedings (*Konkursverfahren*).

Bankruptcy proceedings must be opened by the court upon a petition filed by the debtor or any of his creditors whenever it has been established that a debtor is illiquid (*zahlungsunfähig*) or is overindebted in the meaning of insolvency law (*insolvenzrechtlich überschuldet*). If the illiquidity (*Zahlungsunfähigkeit*) is due to a natural disaster (such as a pandemic), the period during which the illiquid debtor is required to file a petition to open insolvency proceedings is extended from 60 to 120 days.

Where insolvency proceedings shall be instituted against a BRRD-Company (as defined below at 1.2.6), some of which may qualify as Corporations, the insolvency court has to inform the resolution authority thereof (unless the FMA filed for insolvency). Insolvency proceedings may only be initiated against such BRRD-Company if the resolution authority has not informed the insolvency court within seven days of its intention to take resolution measures against such BRRD-Company.

Recovery proceedings may also be initiated if the risk of the debtor's inability to pay its debts is at least imminent (*drohende Zahlungsunfähigkeit*) and the debtor files an application for the opening of recovery proceedings.

Recovery proceedings intend to discharge the debtor from a part of his debts and to enable the debtor to continue his activities. The debtor has to offer at least a quota of 20 % to the unsecured creditors, payable within two years. A qualified simple majority of unsecured creditors must approve the recovery plan. Qualified simple majority means that the simple majority of unsecured creditors in number present at the hearing must vote in favour of the recovery plan and that the total sum of these unsecured creditors' claims must amount to 50 % of the unsecured claims present at the hearing. If the recovery plan is accepted by the creditors, confirmed by the court and fulfilled by the debtor, the latter is released from the rest of his debts.

If the debtor offers a quota of at least 30 %, payable within two years, and provides certain qualified documents, he is entitled to self-administration (*Eigenverwaltung*). In this case he is monitored by a court appointed recovery administrator (*Sanierungsverwalter*) to whom certain powers are reserved.

The opening of insolvency proceedings takes effect as of 00:00 hours of the day following the publication of the receiving order in the official insolvency data base (www.edikte.justiz.gv.at) (*Ediktsdatei*)[1]. Unless the debtor meets the requirements for self-administration, the debtor is deprived of his rights to dispose of the assets subject to insolvency, i.e. the insolvent's estate (*Insolvenzmasse*). After the initiation of insolvency proceedings legal acts of the debtor in relation to the insolvent's estate take no effect towards the creditors (§ 3 (1) IO). The court appoints an insolvency administrator (*Insolvenzverwalter*) along with its decision on the opening of insolvency proceedings. After the opening of insolvency proceedings without self-administration only the insolvency administrator is entitled to act on behalf of the insolvent's estate.

If neither a recovery plan nor the sale of the debtor's business is possible, the insolvency administrator will break up the company and the bankruptcy proceedings will ultimately lead to the sale and distribution of the debtor's assets, the debtor remaining liable for his residual debts.

1.1.2 Reorganisation proceedings

A debtor who is neither illiquid nor overindebted but is in need of reorganisation (*Reorganisationsbedarf*) (which will be assumed, if he does not meet certain financial ratios) has to file for the initiation of reorganisation proceedings (*Reorganisationsverfahren*). Contrary to insolvency (bankruptcy and recovery proceedings under the IO), reorganisation proceedings do not lead to a mandatory reduction of the creditors' claims to a certain quota. The Austrian Act on Company Reorganisation

[1] Procedural steps <u>following</u> (formal) opening of the insolvency proceedings will also be published in the official insolvency data base. Solvency-related facts (such as financial statements, corporate actions in respect of a certain company) may, by contrast, be retrieved from the companies' register (*Firmenbuch*) maintained by the court competent for the seat of the company.

(*Unternehmensreorganisationsgesetz – URG*) does not apply to Banks, Insurance Undertakings, Investment Firms and CRR-Investment Firms and Pension Funds (§ 2 URG).

An application for the opening of reorganisation proceedings can only be filed by the debtor. Within 60 days after the initiation of reorganisation proceedings, the debtor has to present a reorganisation plan (*Reorganisationsplan*) containing measures to improve its financial and earnings status. The court appoints a reorganisation auditor (*Reorganisationsprüfer*) to examine and assess the reorganisation plan. The opening of such proceedings is not made public.

According to § 18 URG, the "suspect periods" under Austrian insolvency law are extended for the term of pending reorganisation proceedings and this may, in a sense, affect creditors' rights.

Pursuant to § 19 URG, a contractual stipulation providing for automatic termination or a contractual right to terminate an agreement in the event reorganisation proceedings are opened will be unenforceable (if this was the only reason for terminating that agreement).

1.1.3 Restructuring proceedings

Debtors can reorganize their liabilities in a restructuring proceeding (*Restrukturierungsverfahren*) pursuant to the Austrian Restructuring Code (*Restrukturierungsordnung – ReO*)[2] in order to prevent insolvency and ensure their viability. An application for the opening of restructuring proceedings can only be filed by a debtor. As a prerequisite for the opening of restructuring proceedings, the insolvency of the relevant debtor must be likely (*wahrscheinliche Insolvenz*).

Together with the application for the opening of restructuring proceedings or, upon request by the debtor, within a period of up to 60 days, the debtor has to present a restructuring plan (*Restrukturierungsplan*) containing, *inter alia*, the proposed restructuring measures (*Restrukturierungsmaßnahmen*) and a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of its business in form of a going-concern prognosis (*Fortbestehensprognose*). Permissible restructuring measures *inter alia* include the reduction of claims ("haircut"). Once the restructuring plan has been finally confirmed by the competent court (after the restructuring plan

[2] Implementing Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 into Austrian law (the "**Restructuring Directive**").

had been adopted by creditors in accordance with the ReO), the restructuring measures laid down in the restructuring plan become legally effective for all creditors concerned (even if they voted against the restructuring plan).

If restructuring proceedings are opened, the court may decide that certain actions or agreements require the consent of the restructuring administrator (*Restrukturierungsbeauftragter*) or the court.

Upon request of the debtor, and if certain requirements are met, the competent court has to impose an enforcement stay (*Vollstreckungssperre*) in order to support negotiations with creditors on a restructuring plan. This enforcement stay can apply to all or only to certain (classes of) creditors and may also extend to secured claims. The total duration of the enforcement stay, including potential extensions and renewals, may not exceed six months. In addition, during such enforcement stay, the relevant debtor is not required to file for opening of insolvency proceedings because of over-indebtedness. During such enforcement stay, there is also a stay on any applications filed by creditors for the opening of insolvency proceedings against the relevant debtor because of over-indebtedness. If during the enforcement stay a creditor files an application for opening of insolvency proceedings for reasons of illiquidity of the debtor, insolvency proceedings shall only be opened if it is in the general interest of the creditors.

A contractual stipulation providing for a right to rescind, terminate or accelerate an agreement on account of, *inter alia*, the application for or the initiation of restructuring proceedings will be unenforceable (if this was the only reason for terminating / accelerating that agreement; see § 26 (3) ReO). However, § 26 (4) ReO provides for an exemption to that rule for close-out netting arrangements. Pursuant to § 26 (4) third sentence ReO, the enforcement of a claim in Austria resulting from the operation of the relevant (close-out) netting arrangement will, however, be subject to any enforcement stay imposed by a competent court (see above).

The ReO does not apply to Banks, Insurance Undertakings, Investment Firms and CRR-Investment Firms, Pension Funds and BRRD-Entities (§ 2 (1) ReO). Based on § 2 (1) no 9 ReO, according to which public bodies (*öffentliche Stellen*) shall also be exempt from the scope of application of the ReO, we believe that the ReO should not apply to Municipalities and States either.

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

1.2.1 General

The rules governing insolvency of Banks are set forth in §§ 82 to 91 BWG. Pursuant to § 82 (1) BWG, only bankruptcy proceedings (*Konkursverfahren*) but not recovery proceedings (*Sanierungsverfahren*) under the IO may be instituted against a Bank. Also, the URG as well as the ReO do not apply to Banks (see at 1.1.2 and 1.1.3 above).

In addition to bankruptcy proceedings the BWG provides for special receivership proceedings (*Geschäftsaufsichtsverfahren*) that may be instituted against an illiquid or overindebted Bank (§§ 83 to 91 BWG) as well as regulatory measures according to § 70 (2) BWG (*aufsichtsbehördliche Maßnahmen*).

Special provisions which may be relevant for certain aspects of the insolvency of Banks are also contained in other statutes including the Act on Custody (*Depotgesetz – DepotG*), the Act on Mortgage Bonds (*Pfandbriefgesetz – PfandbriefG*) and the Act on Cooperative Associations (*Gesetz über Erwerbs- und Wirtschaftsgenossenschaften – GenG*).

1.2.2 Bankruptcy proceedings

As regards bankruptcy proceedings of a Bank, the rules of the BWG refer to the provisions of the IO.

Pursuant to § 82 (3) BWG, only the FMA, in its capacity as banking supervisory authority, may file for the institution of bankruptcy proceedings against a Bank. When special receivership proceedings are instituted against the Bank, only the court appointed receiver (and not the FMA) may file for the institution of bankruptcy proceedings.

Where insolvency proceedings shall be instituted against a BRRD-Company (as defined below at 1.2.6), including CRR-Financial Institutions, the insolvency court has to inform the resolution authority thereof (unless the FMA filed for insolvency). Insolvency proceedings may only be initiated against such BRRD-Company if the resolution authority has not informed the insolvency court within seven days of its intention to take resolution measures against such BRRD-Company.

1.2.3 Special receivership proceedings

Banks that are overindebted or illiquid may, if the overindebtedness or illiquidity is likely to be cured, apply for special receivership proceedings with the competent court.

Such application may also be made by the FMA. If receivership is ordered, the court appoints a receiver (*Aufsichtsperson*) who supervises the management of the Bank. Special receivership proceedings take effect as of 00:00 hours of the day following publication of the receiving order in the insolvency data base. Unless the court orders otherwise, the Bank may continue its business operations under the supervision of the receiver (§ 87 (2) BWG). For the conduct of business which does not belong to its normal business operations, the consent of the receiver is required. Moreover, the Bank must refrain from activities which are part of its normal business operations where the receiver objects to such activities. Special receivership according to §§ 83 et seqq. BWG can last for up to one year. It affects creditors' rights, *inter alia*, because it is not possible for the Bank's business partners to set off claims originating prior to the institution of receivership against claims of the Bank under supervision originating after the institution of such proceedings.

1.2.4 Regulatory measures

If a Bank's obligations towards its creditors are endangered, in particular if the assets entrusted to it are at risk, the FMA can order, by way of decree, measures limited in time prior to bankruptcy proceedings and special receivership proceedings in order to avoid such risk (§ 70 (2) BWG) but bankruptcy proceedings or special receivership proceedings may still follow.

For this purpose, a government commissioner (*Regierungskommissär*) with expert experience can be appointed who shall prohibit the Bank from conducting any business which might increase the risk referred to above. The FMA may even take more far-reaching measures and prohibit the Bank from conducting its business in whole or in part. In this event, the Bank may conduct only individual transactions expressly approved by the government commissioner that do not increase the risk for the Bank's creditors. Current practice allows the government commissioner to comprehensively interfere with the business activities of a Bank. The government commissioner may prohibit transactions or, if the Bank was already prohibited from conducting such transactions, may allow individual transactions. Within the scope of his powers, the government commissioner may prevent the Bank from satisfying its legal obligations. In particular, the government commissioner's possibilities to interfere with the Bank's business do not (necessarily) include insolvency measures because his activities do not depend on over-indebtedness or illiquidity of a Bank.

1.2.5 Regulatory measures against Investment Fund Management Companies

If a Fund's obligations towards the unit holders or customers of the Investment Fund Management Company are endangered, in particular if the assets entrusted to it are at risk, the FMA can order, by way of decree, measures in order to avoid such risk, for a period of up to 18 months (§ 148 (1) of the Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*)).

These measures are similar to § 70 (2) BWG (see at 1.2.4 above) and may include:

(i) prohibiting of withdrawal of capital or profits of the Investment Fund Management Company;

(ii) requesting that units in a fund shall not be issued, redeemed or paid out;

(iii) appointment of a government commissioner (*Regierungskommissär*) with expert experience who shall, *inter alia*, prohibit the Investment Fund Management Company from conducting any business which might increase the risk referred to above;

(iv) barring the managing directors of the Investment Fund Management Company from conducting business for the Investment Fund Management Company; or

(v) appointing a government commissioner (*Regierungskommissär*) and prohibiting the Investment Fund Management Company from conducting business at all.

1.2.6 Recovery and resolution measures

The Austrian legislator implemented Directive 2014/59/EU ("**BRRD**") and Directive (EU) 2019/879 ("**BRRD II**") into Austrian law by way of the Austrian Act on Banking Recovery and Resolution (*Bundesgesetz über die Sanierung und Abwicklung von Banken (Sanierungs- und Abwicklungsgesetz – BaSAG)*).

The BaSAG applies to:

(i) CRR-Credit Institutions and CRR-Investment Firms;

(ii) CRR-Financial Institutions if they are a subsidiary of a credit institution or investment firm (each as defined in Regulation (EU) No 575/2013 ("**CRR**"), or of a company referred to in point (iii) or (iv) below, and are covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 CRR;

(iii) financial holding companies, mixed financial holding companies and mixed-activity holding companies (each as defined in CRR);

(iv) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies (each as defined in CRR);

(v) branches of CRR-Credit Institutions and CRR-Investment Firms that are established outside the Union in accordance with the specific conditions laid down in the BRRD

(each a "**BRRD-Entity**" and the entities referred to in (ii) to (iv) above each a "**BRRD-Company**").

The FMA acts, via a newly established unit, as resolution authority pursuant to BaSAG.

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

1.2.6.1 Recovery planning

One focus of the BaSAG is for certain BRRD-Entities to present to the FMA a recovery plan (*Sanierungsplan*), on an individual or group basis – in which they describe measures proposed to restore their or the group's financial situation following significant deterioration. Recovery plans must contemplate a range of different stress scenarios.

These plans are subject to review by the FMA as competent authority.

1.2.6.2 Resolution planning

In addition to recovery planning, the resolution authority will prepare resolution plans (*Abwicklungspläne*) in relation to certain BRRD-Entities or groups. Resolution plans are aimed at identifying any impediments to resolvability and lay out such resolution actions that the resolution authority may take.

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

Furthermore, the resolution authority also assesses the extent to which institutions are resolvable. If the resolution authority determines that there are significant impediments to the resolvability of an institution, it may, where necessary and proportionate, exercise certain powers (§ 29 BaSAG). Such powers of the resolution authority to restore resolvability include *inter alia* ordering the institution to:

(i) limit exposures;

(ii) divest specific assets;

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

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

(v) renegotiate any eligible liability, AT1 or Tier 1 instrument.

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

1.2.6.3 Crisis prevention measures; early intervention

The BaSAG also contains a variety of early intervention measures and crisis prevention measures that co-exist with the measures already contained in the BWG (see 1.2.3 and 1.2.4 above).

Crisis prevention measures serve for early intervention and to prevent a resolution and failure of an institution and *inter alia* include:

(i) the power to remove deficiencies or significant impediments to recoverability and resolvability (§ 29 BaSAG; see at 1.2.6.2 above);

(ii) the application of early intervention measures (*Frühinterventionsmaßnahmen*) pursuant to § 44 BaSAG:

- require management to take actions outlined in the recovery plan (within a certain period of time);
- removal and replacement of management board members, supervisory board members or members of senior management to the extent any such persons were found unfit to perform their duties;
- require management to draw up a plan for negotiations on a (voluntary) debt restructuring;
- require changes in business strategy;
- require changes to legal or operational structure;

(iii) in case the application of early intervention measures pursuant to § 44 BaSAG (see at (ii) above) was deemed not sufficient to prevent a resolution and failure of an institution, removal and replacement of management board members, supervisory board members or members of senior management to the extent (a) there is a significant deterioration in the financial situation of the institution or (b) there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities (§ 45 BaSAG);

(iv) in case the removal and replacement of management board members, supervisory board members or members of senior management pursuant to § 45 BaSAG (see at (iii) above) was deemed not sufficient to prevent a resolution and failure of an institution, appointment of a temporary administrator (*Vorläufiger Verwalter*)

- as replacement of, or to work together with, the management;

- with powers as granted by the authority (up to all powers that management has under statutes; § 46 BaSAG);

(v) exercise of write-down or conversion of relevant capital instruments and eligible liabilities pursuant to § 70 BaSAG if it is determined that an institution or group would no longer be viable or would require extraordinary public financial support unless bail-in tool is applied ("PONV write-down/conversion"; §§ 70 et seqq. BaSAG).

None of the early intervention measures appears predominantly focused at interfering with contractual obligations of an institution under derivatives or other financial contracts. However, if the resolution authority e.g. orders a CRR-Credit Institution to cease certain areas of business (e.g. derivative business) this could trigger certain events of default / termination events or could leave the institution in a situation where it is forced by applicable law to terminate certain contracts.

1.2.6.4 Crisis management measures; application of resolution tools

If crisis prevention measures (see 1.2.6.3) are <u>not</u> (expected to be) successful (i.e. if an institution is failing or likely to fail) and the other preconditions as set forth below (and prescribed by § 49 (1) BaSAG) are also met, the resolution authority may apply crisis management measures which *inter alia* include:

(i) appointment of a special manager (*Sonderverwalter*) (replacing management);

(ii) application of resolution tools, i.e.:

- the sale of business tool;
- the bridge institution tool;
- the asset separation tool;
- the bail-in tool.

Any resolution action must satisfy the following objectives (§ 48 (1) and (2) BaSAG):

- preservation of critical functions;
- preventing significant adverse effects on the financial stability, in particular by preventing contagion, e.g. of market infrastructures, and by maintaining market discipline;
- protection of public funds;
- protection of covered depositors; and
- protection of client funds and assets.

Resolution actions must be taken if (§ 49 (1) BaSAG):

- the competent authority or the resolution authority determines that an institution or group is failing (or likely to be failing);
- there is no reasonable prospect that, within a reasonable period of time, any alternative private measures or supervisory actions (e.g. point-of-no-viability (PONV) write-down/conversion) would prevent failure; and
- the resolution actions are in the public interest.

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

In case the resolution conditions are met, the resolution authority may apply the bail-in tool (i.e. the write-down or conversion) to eligible obligations of an institution, subject to the safeguards as described below in this 1.2.6.5. Eligible obligations include also claims under Individual Contracts, to the extent that such claims are not secured liabilities as set out in § 86 (2) BaSAG or Article 27 (3) SRM-Regulation.

According to § 91 (1) BaSAG in conjunction with § 91 (5) BaSAG, the resolution authority shall exercise the bail-in tool in relation to a liability arising from a derivative[3] or another financial contract[4] only upon or after closing-out the derivatives / other financial contracts.

For the purposes of applying § 91 BaSAG the resolution authority has the resolution power to close out and terminate derivatives contracts and other financial contracts (§ 58 (1) no 11 BaSAG). In case the resolution conditions are met, the resolution authority has to close-out derivatives and other financial contracts for the purpose of a bail-in (§ 91 (2) BaSAG). Should claims under derivatives transactions or other financial contracts be excluded from bail-in pursuant to § 86 (4) BaSAG, the resolution authority does not have to (but still may) exercise its close-out powers.

Derivatives and other financial contracts that are entered into under a framework contract containing a netting agreement are subject to the protection of § 91 BaSAG.

The right for the resolution authority to close-out (*glattstellen*) derivatives and other financial contracts exists irrespective of whether the transactions are subject to a close-out netting arrangement or not.

In case that derivatives or other financial contracts are subject to a close-out netting arrangement, the resolution authority or the independent valuer appointed by the resolution authority shall calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (§ 91 (3) BaSAG). This net-amount should then be

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[3] Defined by reference to item 4 to 10 of Section C of Annex I MiFID II.
[4] Defined to include, in particular, the transactions listed in § 20 (4) no 1 to 4 IO (see Appendix ./C).

the basis for application of the bail-in tool. However, according to § 91 (4) no 1 to 3 BaSAG, the resolution authority shall determine the value of liabilities arising from derivatives or other financial contracts in accordance with the following:

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

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

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

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

According to the Commission Delegated Regulation,

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

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

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

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

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

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

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

1.2.6.6 Protection of derivatives in case of partial transfer of assets

§ 110 BaSAG (implementing Article 77 BRRD) contains some safeguard for cases in which the resolution authority decides to apply tools available to it in order to effect a transfer of rights and obligations under an agreement that contains a netting arrangement, such as the EFET General Agreement.

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

§ 110 (1) BaSAG therefore states that for the purpose of an appropriate protection of a title transfer financial collateral arrangement, a set-off arrangement or a netting agreement,

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

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

is to be prevented (*ist zu vermeiden*).

1.2.6.7 Resolution powers

Partly in addition to what is stated above and partly in order to be able to exercise the rights mentioned above, the resolution authority has been granted certain resolution powers as outlined in §§ 47a and 58 through 69 BaSAG.

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

(i) suspend any payment or delivery obligations pursuant to any contract to which an institution is a party (in case of early intervention, provided that certain conditions are met; §§ 47a (1) and 64 (1) BaSAG);

(ii) restrict secured creditors of an institution from enforcing security interests in relation to any assets of that institution (§§ 47a (10) and 65 (1) BaSAG); or

(iii) suspend the termination rights of any party to a contract with an institution, provided that the payment and delivery obligations and the provision of collateral continue to be performed (§§ 47a (10) and 66 (1) BaSAG)

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

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

1.3.1 General

The rules governing insolvency of Insurance Undertakings (other than Re-Insurance Undertakings) are set forth in §§ 307 to 316 VAG 2016. Pursuant to § 309 (3) VAG 2016, only bankruptcy proceedings (*Konkursverfahren*), but not recovery proceedings (*Sanierungsverfahren*) under the IO may be instituted against an Insurance Undertaking (other than Re-Insurance Undertaking). Also, the URG as well as the ReO do not apply to Insurance Undertakings (other than Re-Insurance Undertakings) (see at 1.1.2 and 1.1.3 above).

In addition to bankruptcy proceedings the VAG 2016 provides for certain regulatory measures (*aufsichtsbehördliche Maßnahmen*). The rules governing regulatory measures on Insurance Undertakings only partly apply to Re-Insurance Undertakings.

The (special) rules governing insolvency of Insurance Undertakings as set forth in the VAG 2016 do not apply to Re-Insurance Undertakings[5] (with one minor exception for Re-Insurance undertakings established as mutual insurance companies (*Versicherungsverein auf Gegenseitigkeit*) as regards the treatment of additional contributions in cases of insolvency). As regards Re-Insurance Undertakings the rules of the IO apply. Therefore, also recovery proceedings (*Sanierungsverfahren*) under the IO (see 1.1.1 above) may be instituted against a Re-Insurance Undertaking.

1.3.2 Bankruptcy proceedings

Unless the VAG 2016 provides otherwise, the provisions of the IO also apply to bankruptcy proceedings of Insurance Undertakings.

Pursuant to § 309 (2) VAG 2016 only the FMA (being also the insurance supervisory authority) may file for the institution of bankruptcy proceedings against an Insurance Undertaking (other than a Re-Insurance Undertaking).

As regards Re-Insurance Undertakings, not only the FMA but also creditors of a Re-Insurance Undertaking may file for the opening of insolvency proceedings under the IO.

1.3.3 Regulatory measures

In case an Insurance Undertaking (other than a Re-Insurance Undertaking) is illiquid or overindebted, but if the opening of bankruptcy proceedings would not be in the interest of the insurants (*Versicherte*), the FMA is obliged (should this be required in the interests of the insurants arising out of insurance contracts):

(i) to prohibit payments, in particular in respect of insurance benefits (as well as repurchases and advance payments under life insurances) to the extent necessary to overcome the financial difficulties; or

(ii) to reduce obligations of the Insurance Undertaking (other than a Re-Insurance Undertaking) under the life insurance business according to the existing assets as regards the business carried out under the license granted pursuant to § 6 VAG 2016 (§ 316 (1) no 1 and 2 VAG 2016). The FMA will not be able to exercise the remedies set out in § 316 VAG 2016 against a Re-Insurance Undertaking.

[5] §§ 307 to 316 VAG 2016 *expressis verbis* only refer to insurance undertakings (*Versicherungsunternehmen*) whereas certain other provisions of the VAG 2016 refer to both insurance undertakings and reinsurance undertakings.

Such prohibitions and reductions may, according to the letter of the law, only relate to the business carried out under the license granted pursuant to § 6 VAG 2016 (i.e. the insurance contract business (*Versicherungsvertragsgeschäft*)). It is, however, uncertain whether only those payments, which are connected with insurance contracts or whether all payments an Insurance Undertaking (other than a Re-Insurance Undertaking) may have to make may be prohibited. We believe that the FMA may, in principle, prohibit all kinds of payments to be effected by an Insurance Undertaking (other than a Re-Insurance Undertaking) and not only those connected to insurance contracts. This view is also taken in Austrian legal writing (as regards a previous version of the previously applicable § 98 (1) VAG, which did not yet contain the wording "*as regards the business carried out under the license granted pursuant to § 4 (1) VAG*", which according to the Explanatory Notes of the Austrian legislator should, however, only clarify the territorial application of this provision but not its substantial scope of application).

The regulatory measures described under (i) above are to be revoked as soon as the financial situation of the Insurance Undertaking (other than a Re-Insurance Undertaking) allows such revocation (§ 316 (2) VAG 2016). The regulatory measures described under (ii) above will, once they have been adopted, continue for an indefinite period.

The FMA can comprehensively interfere with the business activities of an Insurance Undertaking:

Pursuant to § 275 (1) VAG 2016, the FMA is obliged to issue all kinds of orders that are

(i) necessary and appropriate to keep the business operations of an Insurance Undertaking in line with the provisions applicable to the business of contract insurance;

(ii) necessary and appropriate to remedy weaknesses (*Schwächen*) and insufficiencies (*Unzulänglichkeiten*) that have been discovered by the FMA in the course of its supervision; or

(iii) necessary and appropriate to keep the business operations of an Insurance Undertaking in line with the established principles for proper business operations of Insurance Undertakings and Insurance Undertakings licensed solely for reinsurance business, if the interests of the insured or beneficiaries so require.

Further, § 283 (1) VAG 2016 provides that the FMA may restrict or prohibit the free disposal of the assets of an Insurance Undertaking with a view to securing, at any time, the fulfilment of an Insurance Undertaking's obligations under insurance contracts, if:

(i) actuarial reserves are not set aside in sufficient extent or the provisions on investments for the coverage of such reserves are not complied with;

(ii) the Insurance Undertaking's solvability does not reach the requirements set forth in the VAG 2016 (or is expected to not be reached within the next three months) and it is to be expected that the financial situation of the Insurance Undertaking will further deteriorate or if such action is required due to extraordinary circumstances; or

(iii) the Insurance Undertaking's own funds do not reach the requirements set forth in the VAG 2016 (or are expected to not be reached within the next three months); or

(iv) the license of the Insurance Undertaking falls away (*weggefallen*).

These restrictions and prohibitions are published in the official gazette (*Amtsblatt zur Wiener Zeitung*). Disposals violating such restrictions and prohibitions to dispose of assets are null and void.

In case of a continued deterioration of an Insurance Undertaking's solvability and if the interests of the insurants (*Versicherte*) or beneficiaries (*Anspruchsberechtigte*) are endangered, in particular if the fulfilment of obligations of an Insurance Undertaking under insurance contracts is at risk, the FMA may order measures limited in time (which are to be or are deemed repealed no later than 18 months after being ordered) to avoid such risk (§ 284 (1) VAG 2016). Such measures must be reasonable (*verhältnismäßig*) and reflect the level (*Grad*) and term (*Dauer*) of the deterioration of the Insurance Undertaking's solvability. For this purpose, the FMA may (i) prohibit the members of the management board in whole or in part from managing the Insurance Undertaking, (ii) appoint a government commissioner (*Regierungskommissär*) with expert experience and/or (iii) prohibit the Insurance Undertaking in whole or in part from conducting its business.

1.4 Types of proceedings under Austrian law that may affect creditors' rights in respect of Investment Firms and CRR-Investment Firms

The insolvency related provisions in §§ 79 to 88 WAG 2018 in relevant parts correspond to the rules governing insolvency of Banks set forth in §§ 81 to 91 BWG.

As it is the case with respect to Banks only bankruptcy proceedings (*Konkursverfahren*), but not recovery proceedings (*Sanierungsverfahren*) under the IO may be instituted against Investment Firms and CRR-Investment Firms. Also, the URG as well as the ReO do not apply to Investment Firms and CRR-Investment Firms (see at 1.1.2 and 1.1.3 above).

In addition to bankruptcy proceedings the WAG 2018 provides for special receivership proceedings (*Geschäftsaufsichtsverfahren*) and regulatory measures (*aufsichtsbehördliche Maßnahmen*) such as the appointment of a government commissioner (*Regierungskommissär*). Also, the provisions concerning regulatory measures set out in § 92 (1) et seq. WAG 2018 (almost) literally correspond to § 70 (2) BWG (see at 1.2.4 above). Thus, the statements made in 1.2.1 to 1.2.4 above with respect to Banks apply *mutatis mutandis* to Investment Firms and CRR-Investment Firms.

In addition to what is stated above, pursuant to § 77 WAG 2018, the provisions set out in §§ 81 through 81m BWG (dealing in particular with international jurisdiction with respect to such special receivership proceedings) do also apply *mutatis mutandis* to CRR-Investment Firms. These provisions will, however, not apply to (other) Investment Firms.

Where insolvency proceedings shall be instituted against a BRRD-Company (as defined above at 1.2.6), including CRR-Investment Firms, the insolvency court (*Insolvenzgericht*) has to inform the resolution authority thereof (unless the FMA filed for insolvency). Insolvency proceedings may only be initiated against such BRRD-Company if the resolution authority has not informed the insolvency court within seven days of its intention to take resolution measures against such BRRD-Company.

1.5 Types of Proceedings under Austrian Law that may affect creditors' rights in respect of Pension Funds

Pursuant to § 37 of the Austrian Pension Funds Act (*Pensionskassengesetz – PKG*), only bankruptcy proceedings (*Konkursverfahren*), but not recovery proceedings (*Sanierungsverfahren*) under the IO may be instituted against Pension Funds. Also, the URG as well as the ReO do not apply to Pension Funds (see at 1.1.2 and 1.1.3 above). Pursuant to § 37 (3) PKG, only the FMA, in its capacity as supervisory authority, may file for the institution of bankruptcy proceedings.

In addition to bankruptcy proceedings, the PKG provides for certain regulatory measures. In case the fulfilment of the Pension Fund's obligations are at risk, the FMA may order measures limited in time (for up to 18 months) to avoid this risk (§ 33 (4) PKG). These include the appointment of a government commissioner (*Regierungskommissär*), who may prohibit the Pension Fund from entering into transactions that might increase that risk. Moreover, the FMA may also take measures such as prohibiting a Pension Fund from conducting its business in whole or in part. Under certain conditions, the FMA has to restrict or prohibit the discretionary disposal of the Pension Fund's assets, including the assets allocated to an investment and risk sharing group (*Veranlagungs- und Risikogemeinschaft*). Disposals in violation of such restrictions and prohibitions are invalid.

1.6 Types of Proceedings under Austrian Law that may affect creditors' rights in respect of OeNB

The NBG does not contain any provisions regarding the question of whether insolvency proceedings can be opened against OeNB.

Pursuant to § 3 (1) no 1 of the BWG, the BWG (including its provisions in respect of the opening of insolvency proceedings against credit institutions; see 1.2.2 et seq. above) does not apply to OeNB.

We believe that OeNB can theoretically be subject to insolvency proceedings, but neither creditors of OeNB nor the FMA should have a right to file for the institution of insolvency proceedings against OeNB. We believe that only OeNB itself may file a petition in insolvency. Furthermore, according to § 78 NBG, OeNB can only be dissolved by a federal law. In this case assets and liabilities of OeNB are, by operation of law, transferred to the institution which carries on the business of OeNB.

Pursuant to § 75 NBG, actions against OeNB may only be brought before the Commercial Court of Vienna (*Handelsgericht Wien*). According to Austrian legal writing[6], § 75 NBG constitutes mandatory jurisdiction (*Zwangsgerichtsstand*) and thus takes precedence over any contractual agreement that would give rise to a different place of jurisdiction.

1.7 Types of Proceedings under Austrian Law that may affect creditors' rights in respect of OeBAG

The Act on the Reorganisation of the Legal Affairs of the Österreichische Industrieholding Aktiengesellschaft und Post und Telekombeteiligungsverwaltungsgesellschaft (*ÖIAG-Gesetz 2000*) does not contain any specific provisions on the opening of insolvency proceedings against OeBAG.

In the absence of any specific provisions in respect of the opening of insolvency proceedings, restructuring proceedings or reorganisation proceedings against OeBAG, we believe that the general rules on insolvency proceedings, restructuring proceedings and reorganisation proceedings against Corporations as set out in the IO, the ReO and the URG, respectively, should apply *mutatis mutandis* to OeBAG. Therefore, please refer to the statements made at 1.1 above.

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6 *Simotta* in *Fasching/Konecny*, ZPO[3] Introductory remarks to § 83a-83b JN recital 12.

1.8 Types of Proceedings under Austrian Law that may affect creditors' rights in respect of States and Municipalities

Austrian law – contrary to e.g. German law[7] – does not contain any specific provision regarding the question whether insolvency proceedings can be opened against States and Municipalities as public law entities and, if so, the potential effects of such insolvency proceedings against States and Municipalities on the enforceability of close-out netting provisions.

The question whether a legal entity has the capacity to be subject to insolvency proceedings is not regulated in the IO. An entity may be subject to insolvency proceedings (*Insolvenzverfahren*) or reorganisation proceedings (*Reorganisationsverfahren*) only to the extent such entity has legal personality (*Rechtspersönlichkeit*) and capacity to sue and be sued (*Parteifähigkeit*). There is no doubt that the States as public law entities have legal personality and capacity to sue and be sued. As to Municipalities, the Austrian Supreme Court[8] already ruled that insolvency proceedings may be opened with respect to such entities.

Considering the above and in the absence of statutory provisions to the contrary, we believe that also the States may, in principle, be subject to insolvency proceedings (albeit the IO does not provide for a specific set of rules governing their insolvency). However, we also believe it is unlikely that the Republic of Austria would rely on a set of insolvency rules (including avoidance/claw-back rules) that are designed for corporations. Rather, we believe that the Republic of Austria would probably seek to make use of its legislative powers to amend (or introduce) legislative protections (see also at 9.6.7 above) – if and when those are needed. This is also confirmed by the Austrian Constitutional Court (*Verfassungsgerichtshof – VfGH*)[9] who, while acknowledging (by reference to a State, but we believe that the underlying reasoning should also apply to Municipalities) that an Austrian (sub-)sovereign can become insolvent, also refers to the application of (corporate) insolvency laws to a State (/Municipalities) not being reconcilable with basic principles of the Austrian constitution (separation of powers, democracy and rule of law).

Notwithstanding assumption 5.2.1 above, we note that certain limitations exist with respect to the capacity of the States and Municipalities to enter into the EFET General Agreement and Individual Contracts. A breach of relevant laws[10] providing for such limitations might lead to the respective Transaction being void.

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[7] § 12 of the German Insolvency Code (*Insolvenzordnung – InsO*) states that insolvency proceedings are not permissible with respect to the assets of the Federal Republic (*Bund*) and a state (*Land*).

[8] See OGH 21.11.1933, 4 Ob 435/33.

[9] See VfGH G 248/2017-32, G 2/2018-19, G 55/2018-8, G56/2018-7 of 14 March 2018.

[10] General rules with respect to the budget management, including certain provisions dealing with the entering into derivative transactions, have been adopted by the States in the Agreement between the States on Budget Management (*Vereinbarung gemäß Art. 15a Abs. 2 B-VG zwischen den Ländern über gemeinsame Grundsätze der Haushaltsführung*). In addition, most States have adopted own rules in this respect which might also affect the capacity of the respective State and its Municipalities to enter into an Individual Contract.

2 Applicable insolvency law

Austrian international insolvency law is governed by several bilateral insolvency treaties[11], the Regulation and the provisions on international insolvency law in §§ 217 to 251 IO (the "**Provisions on International Insolvency Law**").

A prerequisite for the application of the Regulation or the Provisions on International Insolvency Law is that insolvency proceedings have a cross-border effect. Insolvency proceedings without a cross-border effect are solely governed by Austrian substantive insolvency law excluding the Regulation and the Provisions on International Insolvency Law.

2.1 The Regulation

2.1.1 Scope of application of the Regulation

The Regulation is directly applicable in Austria and throughout the European Union except for Denmark (each such State, a "**Regulation State**").

It applies to collective insolvency proceedings (as defined in Annex A of the Regulation) that are opened against a debtor, which has its COMI situated within a Regulation State. In the case of a company or legal person, it is refutably presumed that the place of the registered office is the COMI (Article 3 (1) of the Regulation).

The Regulation shall not apply to insolvency proceedings concerning (a) insurance undertakings, (b) credit institutions (see below), (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of banks ("**Directive 2001/24/EC**"), or (d) collective investment undertakings (Article 1 (2) of the Regulation).

Directive 2001/24/EC also applies to investment firms pursuant to Article 4 (1) no 2 CRR and their branches located in Member States other than those in which they have their head offices (Article 1 (3) of Directive 2001/24/EC). It follows from this that investment firms pursuant to

[11] Austria has entered into bilateral insolvency treaties with Belgium (1969), France (1979), Germany (1985), Italy (1990) and the UK (1962). All insolvency treaties cover insolvency proceedings. The treaties with Belgium and France also cover special receivership proceedings of banks and bankruptcy proceedings of banks. Insolvency proceedings of banks are expressly excluded from the scope of application of the bilateral treaties with Germany and Italy. Insurance Undertakings are only covered by the treaty with France. In general, these treaties provide that all assets and liabilities are combined and handled as part of the proceedings in the country of the debtor's headquarters. After its entry into force, the Regulation replaced, in respect of the matters referred to therein, the above-mentioned bilateral insolvency treaties (the bilateral treaties still have some application to peripheral issues though).

Article 4 (1) no 2 CRR (including CRR-Investment Firms) are covered by Directive 2001/24/EC and thus not subject to the Regulation.

Since Investment Firms, in contrast to investment firms pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms), are not covered by Directive 2001/24/EC, the Regulation applies to Investment Firms. Further, the Regulation does not expressly exclude Pension Funds from its scope of application (see Article 1 (2) of the Regulation).

In respect of this Opinion the Regulation applies to insolvency proceedings opened in Austria against Corporations, CRR-Financial Institutions, Financial Institutions, Investment Firms, Partnerships, Pension Funds and Re-Insurance Undertakings, which have their COMI situated in a Regulation State.

2.1.2 Credit institution vs financial institution under CRR

Austrian law generally (see, however, below) uses the term "credit institution" as a reference to entities regulated and licensed under § 1 (1) BWG. By way of the bill implementing certain provisions of the CRR and CRD IV, the Austrian legislator has introduced the term "CRR-credit institution" into the BWG.

The domestic definition of a credit institution is considerably wider when compared to the definition of credit institution under CRR. Pursuant to Article 4 (1) CRR an entity only constitutes a credit institution if such entity is licensed to take deposits or other repayable funds from the public and to grant credits for its own account. Entities the principal activity of which is to acquire holdings or to pursue one or more activities listed in points 2 to 12 and point 15 of Annex I of Directive 2013/36/EU[12] are defined as "financial institutions" in CRR. Annex I of CRD IV, however, contains various activities that are subject to licensing in Austria under § 1 (1) BWG. In addition, § 1 (1) BWG also contains some activities that are only regulated in Austria as banking activities but do not qualify as services under CRR or CRD IV.

It follows from this that a "credit institution" under the BWG might carry a license to perform activities that in contrast to domestic Austrian law would cause the same entity to constitute a "financial institution" under CRR or even an entity that is not regulated under CRR at all.

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

The Regulation uses EU-terminology and thus applies to CRR-Financial Institutions and Financial Institutions, but does not apply to CRR-Credit Institutions.

2.1.3 International jurisdiction

Pursuant to Article 3 (1) of the Regulation, the courts of the Regulation State within the territory of which the debtor's COMI is situated shall have jurisdiction to open so-called main insolvency proceedings. The conditions for the opening of such proceedings shall be determined by the law of that Regulation State. The effects of main insolvency proceedings generally cover all of the debtor's assets located in Regulation States. Any judgement opening insolvency proceedings handed down by a court of a Regulation State which has jurisdiction shall be recognized in all other Regulation States from the time it becomes effective in the State of the opening of proceedings. As a basic principle, main insolvency proceedings shall with no further formalities produce the same effects in any other Regulation State as under the law of the Regulation State of the opening of proceedings (Articles 19 and 20 of the Regulation). Article 33 of the Regulation contains an *ordre public* reservation.

Before the opening of main insolvency proceedings, territorial insolvency proceedings may be opened in another Regulation State, if the debtor has an establishment in the territory of that other Regulation State and the conditions laid down by Article 3 (4) of the Regulation are met. For purposes of the Regulation, an "establishment" is any place of operations where the debtor carries out, or has carried out during the last three months prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets (Article 2 no 10 of the Regulation) The effects of those territorial insolvency proceedings shall be restricted to the assets of the debtor located in the territory of the latter Regulation State (Article 3 (2) of the Regulation). When main insolvency proceedings are opened, territorial insolvency proceedings become secondary insolvency proceedings (see below).

Article 34 of the Regulation provides that after the opening of main insolvency proceedings secondary insolvency proceedings may be initiated in another Regulation State aside from the main proceedings, if the debtor has an establishment in that Regulation State. In this case, the debtor's insolvency does not have to be re-examined in respect of the secondary insolvency proceedings. The effects of secondary insolvency proceedings are restricted to the assets located in the Regulation State of the establishment.

The liquidator in the main proceedings has the right to request the opening of secondary proceedings. However, any other person or authority empowered to request the opening of insolvency proceedings under the law of the Regulation State within the territory of which the opening of secondary proceedings is requested, also has the right to request the opening of secondary proceedings (Article 37 (1) of the Regulation).

2.1.4 Substantive law in respect of close-out netting

The Regulation contains conflict of law rules in respect of insolvency proceedings having a cross-border effect in a Regulation State.

Pursuant to Article 7 (1) of the Regulation, as a general rule, the effects of insolvency proceedings opened in a Regulation State shall be subject to the law of the Regulation State in which such proceedings are opened (*lex fori concursus*). This general rule applies to main insolvency proceedings and particular insolvency proceedings (Article 7 of the Regulation) as well as to secondary insolvency proceedings (Article 35 of the Regulation).

According to Article 7 (2) lit d and Article 7 (2) lit e of the Regulation, the law of the Regulation State in which such proceedings are opened shall determine in particular the conditions under which set-off may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

Hence, as an interim result, as far as the Regulation applies (see at 2.1.1 above), the termination of the EFET General Agreement and the set-off of all transactions entered into thereunder are governed by the law of the State in which proceedings are opened.

Article 8 to Article 18 of the Regulation contain special conflict of law rules that provide exemptions to the general rule set out in Article 7 and Article 35 of the Regulation.

Pursuant to Article 9 (1) of the Regulation, the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim. As with all other special conflict of law rules of the Regulation (Article 8 to Article 18), Article 9 of the Regulation is limited to Regulation States. For this reason, the law applicable to the debtor's claim must be the law of another Regulation State. If so, as far as mere set-off is concerned, the solvent party may also set off its claims if this is admissible under the law of the other Regulation State applicable to the insolvent debtor's claim.

The results of close-out netting are arguably economically equivalent to the results of set-off, but there is a technical difference in the contractual mechanism. Close-out netting is a process involving (i) the termination of open transactions on the occurrence of a pre-defined event, (ii) the liquidation of those transactions so as to attribute to them a value (usually either by reference to their market value or to the cost of replacing them) and (iii) the aggregation of the values attributed to those transactions, giving rise to a single net debt owed by one party to the other.

Article 9 (1) of the Regulation does not cover the termination and liquidation of the transactions. It only applies to the mere set-off after the termination and valuation of the transactions. Therefore, we believe that Article 9 (1) of the Regulation protects close-out netting only insofar as the claims resulting from the termination and liquidation of the transactions were already in a position to be set off at the time of the opening of the insolvency proceedings. This interpretation of Article 9 (1) of the Regulation is supported by the fact, that – contrary to Directive 2001/24/EC – the Regulation does not contain a specific rule in respect of netting agreements. It only deals with netting agreements in connection with payment or settlement systems and financial markets (Article 12 of the Regulation in connection with recital 71 of the Regulation).

In addition, a prerequisite for the application of Article 9 of the Regulation is that the claims were already in a position to be set off at the time of the opening of the insolvency proceedings, since Article 9 stipulates that the opening of insolvency proceedings shall not affect the (already existing) right of creditors to demand set-off[13].

In conclusion, as far as the Regulation applies (see at 2.1.1 above) and insolvency proceedings are opened in Austria, apart from mere set-off, Austrian insolvency law (including the Conflict Rules (as defined at 2.2.1 below)[14]) as the *lex fori concursus* is to be applied to the Close-out Netting Provisions (as defined at 2.3.2 below) of the EFET General Agreement.

2.2 Austrian law provisions on International Insolvency Law

2.2.1 General

As outlined at 2 above, the Provisions on International Insolvency Law shall only apply to insolvency proceedings having a cross-border effect ("**International Insolvency Proceedings**") as far as the Regulation or

[13] See *Maderbacher* in *Konecny*, Insolvenzgesetze EuInsVO 2015 Art 9 mn 12; *J. Schmidt* in *Mankowski/Müller/J. Schmidt*, EuInsVO 2015 Art 9 mn 17 et seq.; *Virgos-Schmit*, Report on the Convention on Insolvency Proceedings, 110.

[14] See at 2.3 below for an analysis of the Conflict Rules applicable to close-out netting.

international law do not provide otherwise (§ 217 IO). This means that the provisions of the Regulation shall take precedence over the Provisions on International Insolvency Law where the Regulation applies (see at 2.1.1 above) and where the Regulation contains relevant conflict of law rules. Where the Regulation does not provide for a specific conflict of law rule (as is the case with close-out netting arrangements; see at 2.1.4 above), the *lex fori concursus* and thus the relevant Conflict Rules (as defined below) comprised in the Provisions on International Insolvency Law will apply. Insolvency proceedings without a cross-border effect are solely governed by Austrian substantive insolvency law excluding the Regulation and the Provisions on International Insolvency Law.

The level of international element that needs to be present in order to apply the Provisions on International Insolvency Law, however, remains yet to be clarified by the Austrian courts. In the various scenarios that are conceivable (ranging from a "true" cross-border environment in transactions between an entity having its head or home office abroad and an Austrian entity, via scenarios where the foreign entity would operate via its Austrian branch, scenarios where two Austrian entities contract but one of them has at least one foreign branch (that may or may not be involved in the transactions under the relevant EFET General Agreement) to scenarios where the only foreign element is to be seen in some of the assets underlying the Individual Contracts, for example) it is difficult to predict where the line will finally be drawn by the Austrian courts. The stronger the nexus to Austria (and, conversely, the more remote the international element) gets on the aforementioned sliding scale, the higher the likelihood that Austrian courts will finally not resort to the law applicable by virtue of the Conflict Rules (as defined below), including § 233 IO (see at 2.3.2 below)[15], and Austrian private international law, but will apply Austrian substantive insolvency law (including the substantive netting privileges set out in § 20 (4) IO; see at 7.1.2.1.1 for further details).

According to § 221 (1) IO, as a general principle, Austrian substantive insolvency law shall be applicable to International Insolvency Proceedings and their effects, if insolvency proceedings are opened in Austria (*lex fori concursus*). In respect of these proceedings Austrian substantive insolvency law shall determine in particular (§ 221 (2) IO):

1. which debtors insolvency proceedings may be brought against on account of their capacity;

[15] As far as § 233 IO is concerned, Austrian legal writing holds that there is sufficient international element and, hence, § 233 IO is to be applied if the underlying agreement is subject to a choice of foreign (i.e. non-Austrian) law (see, *e.g.*, *Maderbacher* in *Konecny/Schubert*, Insolvenzgesetze § 233 KO mn 3).

2. the assets which form part of the estate and the treatment of assets acquired by the debtor after the opening of the insolvency proceedings;

3. the respective powers of the debtor and the liquidator;

4. the conditions under which set-offs may be invoked;

5. the effects of insolvency proceedings on current contracts to which the debtor is party;

6. the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

7. the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

8. the rules governing the lodging, verification and admission of claims;

9. the rules governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;

10. the conditions for and the effects of closure of insolvency proceedings, in particular by recovery proceedings (*Sanierungsverfahren*) under the IO;

11. creditors' rights after the closure of insolvency proceedings;

12. who is to bear the costs and expenses incurred in the insolvency proceedings; and

13. the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

§§ 222 to 235 IO contain exemptions to that general principle (*lex fori concursus*) by providing conflict of law rules that are largely identical to those set out in the Regulation ("**Conflict Rules**").

According to § 222 (1) IO (see also Article 8 (1) of the Regulation), the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or a third-party in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor and which are situated within the territory of another state at the time of opening of insolvency proceedings.

Such rights shall pursuant to § 222 (2) IO in particular mean:

1. the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a pledge (*Pfandrecht*);

2. the exclusive right to have a claim met (*Einziehen einer Forderung*), in particular by virtue of a pledge (*Pfandrecht*) or a security assignment (*Sicherungszession*);

3. the right to demand the assets from, and / or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; and

4. the right *in rem* to the beneficial use of assets.

The Conflict Rules applicable to close-out netting are further discussed under 2.3 below.

In addition, §§ 236 to 242 IO contain provisions that govern the effects of insolvency proceedings in Austria on assets situated abroad as well as the recognition of foreign insolvency proceedings in Austria (see, in particular, at 2.2.3.1 and 2.2.3.2 below).

The Provisions on International Insolvency Law also implement Directive 2001/24/EC and Article 26 et seq. of Directive 2009/138/EEC[16] into Austrian law. The legislator adopted special provisions in §§ 243, 244 and 246 to 251 IO, which apply exclusively to CRR-Credit Institutions, investment firms pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) and Insurance Undertakings ("**Special Provisions for CRR-Institutions and Insurance Undertakings**"). Further amendments in application of these Directives were made in the BWG and the VAG 2016. They deal with the international aspects of special receivership proceedings in respect of Banks and regulatory measures in respect of Banks and Insurance Undertakings (please see at 1.2 and 1.3 above).

The Special Provisions for CRR-Institutions and Insurance Undertakings do not apply to Re-Insurance Undertakings. Questions relating to international

[16] Directive 2009/138/EEC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) ("**Directive 2009/138/EEC**").

jurisdiction of Austrian insolvency courts for Re-Insurance Undertakings will thus follow IO-provisions applicable to Corporations and Partnerships (see at 2.2.3 below).

2.2.2 Scope of the Provisions on International Insolvency Law

The Provisions on International Insolvency Law, in particular the Conflict Rules, apply to International Insolvency Proceedings where the Regulation does not apply, i.e. if:

(i) the Austrian party is a CRR-Credit Institution; or

(ii) the Austrian party is an Insurance Undertaking (other than a Re-Insurance Undertaking); or

(iii) the Austrian party is an investment firm pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms); or

(iv) the Austrian party is neither a CRR-Credit Institution or an investment firm pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) nor an Insurance Undertaking (other than a Re-Insurance Undertaking) and the counterparty is established in a Regulation State, but only as far as the Regulation does not provide otherwise; or

(v) the Austrian party is neither a CRR-Credit Institution or an investment firm pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) nor an Insurance Undertaking (other than a Re-Insurance Undertaking) and the counterparty is established in a State which is not a Regulation State, but only as far as international law does not provide otherwise.

In respect of (iv), the legislator has adopted Article 25 of Directive 2001/24/EC concerning netting agreements within the Conflict Rules (§ 233 IO) that are not only applicable to Insurance Undertakings (excluding Re-Insurance Undertakings), investment firms pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) and CRR-Credit Institutions, but also to Banks generally, Corporations, Investment Firms, Partnerships, Pension Funds and Re-Insurance Undertakings as well as Municipalities and States (see at 2.3.1 and 2.3.2 below).

In respect of (v), there are currently no relevant international regulations in place that would provide otherwise.

2.2.3 International jurisdiction in respect of Corporations, Partnerships, CRR-Financial Institutions, Financial Institutions, Pension Funds and Re-Insurance Undertakings

Where the Regulation does not apply in respect of a Corporation, CRR-Financial Institution, Financial Institution, Re-Insurance Undertaking, Pension Fund or Partnership (see at 2.1.1 and 2.1.3 above), Austrian courts have jurisdiction to open insolvency proceedings against such debtor if there are at least assets of that debtor located in Austria (§ 63 (2) IO). Payment claims of an insolvent party to an EFET General Agreement are located in Austria, if the insolvent party's debtor is domiciled in Austria. In this case, insolvency proceedings might be opened against this insolvent party in Austria.

2.2.3.1 Effect of Austrian insolvency proceedings

Pursuant to § 237 (1) IO, the effects of insolvency proceedings opened in Austria also cover assets situated abroad, unless:

(i) the debtor's COMI is in another State;

(ii) insolvency proceedings were opened in that other State; and

(iii) these insolvency proceedings also include the assets situated abroad.

If Austrian insolvency proceedings cover the assets situated abroad, the debtor is obliged, in agreement with the insolvency administrator, to participate in the sale of these foreign assets (§ 237 (2) IO).

2.2.3.2 Recognition of foreign insolvency proceedings

Pursuant to § 240 (1) IO, the effects of insolvency proceedings opened in another State and the decisions issued in these proceedings are recognized in Austria if:

(i) the debtor's COMI is in that other State; and

(ii) these insolvency proceedings are comparable to Austrian insolvency proceedings, in particular Austrian creditors are treated equal to creditors from the State in which proceedings were opened.

Pursuant to § 240 (2) IO, insolvency proceedings conducted abroad are not recognized in Austria if:

(i) insolvency proceedings were opened in Austria or preliminary injunctions (*einstweilige Vorkehrungen*) were ordered; or

(ii) the recognition of proceedings would lead to a result which apparently contradicts the fundamental values of the Austrian legal system.

Pursuant to § 240 (3) IO, insolvency proceedings may be opened and conducted in Austria, notwithstanding foreign insolvency proceedings. If (i) the debtor's COMI is in another State, (ii) insolvency proceedings were opened in that other State and (iii) these insolvency proceedings also include the assets situated abroad, the (secondary) insolvency proceedings opened in Austria will, however, only cover the assets located in Austria (§ 237 (1) IO; see at 2.2.3.1 above).[17] In this case, the assets located in Austria form a separate estate (*Sondermasse*) of the insolvent debtor which will be subject to territorial Austrian insolvency proceedings.

2.2.4 International jurisdiction in respect of Banks

2.2.4.1 Bankruptcy proceedings

The Special Provisions for CRR-Institutions and Insurance Undertakings are applicable to credit institutions which are licensed in a contracting State of the European Economic Area (EEA) pursuant to Articles 4 to 11 of Directive 2000/12/EC[18] and to credit institutions domiciled outside the EEA ("**Foreign Banks**"), if there is at least a branch in an EEA State (§ 243 IO).

§ 244 (1) IO provides that Austrian courts shall have jurisdiction for the opening of bankruptcy proceedings against the assets of credit institutions licensed in the EEA only if the credit institution is a CRR-Credit Institution.

[17] *Oberhammer* in *Konecny/Schubert*, Insolvenzgesetze § 240 KO mn 17 et seq.
[18] Austrian law still makes reference to outdated European law provisions.

§ 244 (2) IO provides that Austrian courts shall have jurisdiction for the opening of bankruptcy proceedings against the assets of Foreign Banks, if there is a branch in Austria.

Pursuant to § 250 IO, the decision of a court (or other governmental authority) in an EEA State to open proceedings in order to liquidate a credit institution as defined in CRR will be recognized in Austria without regard to the requirements of § 240 IO (see at 2.2.3.2 above). Such proceedings take effect in Austria as soon as they become effective in the State in which the proceedings were opened.

The decision of a court (or other governmental authority) in another State to open insolvency proceedings against a Foreign Bank and the effects of such insolvency proceedings shall be recognized in Austria within the scope of § 240 IO (see at 2.2.3.2 above).

The effects of bankruptcy proceedings opened against a CRR-Credit Institution in Austria would also cover assets situated abroad unless the conditions laid down by § 237 (1) no 1 to 3 IO (see at 2.2.3.1 above) were met. If insolvency proceedings are opened against a Foreign Bank in another State and such proceedings are recognized in Austria pursuant to § 240 IO, insolvency proceedings that were nevertheless opened in Austria against the Austrian branch of this Foreign Bank will only cover the assets situated in Austria.

2.2.4.2 Special receivership proceedings and regulatory measures pursuant to § 70 (2) BWG

Special receivership proceedings and regulatory measures pursuant to § 70 (2) BWG constitute reorganisation measures as defined in Article 2 of Directive 2001/24/EC (§§ 70 (2b) and 81 (2) BWG). The provisions of the BWG in respect of special receivership proceedings apply *mutatis mutandis* to regulatory measures pursuant to § 70 (2) BWG.

Austrian courts shall have jurisdiction for the opening of special receivership proceedings against Banks (i.e. banks licensed in Austria) as well as against branches of Foreign Banks in Austria. Similarly, the FMA shall be entitled to institute regulatory measures against Banks (i.e. banks licensed in Austria) as well as against branches of Foreign Banks in Austria. It is not entirely clear whether Austrian courts would have jurisdiction for the opening of special receivership proceedings against Austrian branches of EEA Financial Institutions. The relevant provisions of the BWG refer to "credit institution" and we thus believe that the BWG does not provide for legal basis for Austrian courts to open special receivership proceedings against Austrian branches of EEA Financial Institutions. This view is corroborated by § 11 (5) BWG which lists BWG-provisions applicable to branch offices of EEA Financial Institutions and does not contain reference to the relevant provisions regarding special receivership proceedings and regulatory measures.

The provisions under the BWG dealing with special receivership proceedings and regulatory measures are not limited to CRR-Credit Institutions but apply to all Banks. However, such proceedings or measures against a Bank that "only" constitutes a CRR-Financial Institution or a Financial Institution would – in contrast to what is stated in §§ 81 (2) and 70 (2b) of the BWG – not constitute reorganisation measures under Directive 2001/24/EC (that applies to CRR-Credit Institutions and investment firms pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) only). It follows that such proceedings and measures against CRR-Financial Institutions and Financial Institutions would not necessarily have to be recognized by other Member States. Pursuant to § 81 (1) BWG, the effects of special receivership proceedings – and by way of reference in § 70 (2b) BWG, the effects of regulatory measures – opened against a CRR-Credit Institution also cover the CRR-Credit Institution's assets located throughout the EEA, and in particular its branches.

Pursuant to § 81 (6) BWG, the effects of special receivership proceedings – and by way of reference in § 70 (2b) BWG, the effects of regulatory measures – opened against the branch of a Foreign Bank do not cover its assets located abroad.

If special receivership proceedings are opened or regulatory measures are instituted against a Bank or a branch of a Foreign Bank in Austria, the Austrian court or the FMA, respectively, shall promptly inform the competent authorities of the Member States in which the Bank or the branch of a Foreign Bank (also) has a branch or provides services ("**Host Member State**") of its decision to open special receivership proceedings / institute regulatory measures and their effects (§§ 83 (4) BWG and 83

(5) BWG)[19]. Where the implementation of the reorganisation measures is likely to affect the rights of third parties in a Host Member State, the Austrian court or the FMA, respectively, shall publish its decision to open special receivership proceedings / institute regulatory measures in the Official Journal of the European Communities and two national newspapers in each of these Host Member States (§ 83 (7) BWG).

Pursuant to § 81 (3) BWG a decision issued according to the law of another EEA State to carry out a measure to reorganize a bank (including the opening of special receivership proceedings and the institution of regulatory measures) will take effect in Austria without any further formalities as soon as the decision is effective in the EEA State in which the proceedings were opened[20].

2.2.5 International jurisdiction in respect of Insurance Undertakings (other than Re-Insurance Undertakings)

2.2.5.1 Bankruptcy proceedings

The Special Provisions for CRR-Institutions and Insurance Undertakings are applicable to insurance undertakings which are licensed in a contracting State of the EEA pursuant to Article 14 of Directive 2009/138/EEC and are also applicable to insurance undertakings domiciled outside the EEA if there is at least a branch in an EEA State (§ 243 IO). The Special Provisions for CRR-Institutions and Insurance Undertakings are thus not applicable to Re-Insurance Undertakings.

§ 244 (1) IO provides that Austrian courts shall have jurisdiction for the opening of bankruptcy proceedings against the assets of insurance undertakings licensed in the EEA only if the insurance undertaking is an Insurance Undertaking (other than Re-Insurance Undertakings).

§ 244 (2) IO provides that Austrian courts shall have jurisdiction for the opening of bankruptcy proceedings against the assets of insurance undertakings domiciled outside the EEA, if they have a branch in Austria.

[19] This provision will apply also with respect to special receivership proceedings opened against a CRR-Financial Institution or Financial Institution.

[20] For the avoidance of doubt, similar measures taken by foreign regulators against foreign financial institutions could be recognized in Austria not as reorganisation measure under Directive 2001/24/EC but only under the Regulation (to the extent applicable).

Pursuant to § 250 IO the decision of a court (or other governmental authority) in an EEA State to open proceedings in order to liquidate an insurance undertaking will be recognized in Austria without regard to the requirements of § 240 IO (see at 2.2.3.2 above). Such proceedings take effect in Austria as soon as they become effective in the State in which the proceedings were opened.

Insolvency proceedings to liquidate an insurance undertaking domiciled outside the EEA shall be recognized within the scope of § 240 IO (see at 2.2.3.2 above).

The effects of bankruptcy proceedings concerning an Insurance Undertaking (other than a Re-Insurance Undertaking) opened in Austria also cover assets located abroad (see § 237 (1) IO and 2.2.3.1 above). If insolvency proceedings are opened against an insurance undertaking domiciled outside the EEA and these proceedings are recognized in Austria pursuant to § 240 IO, insolvency proceedings that were nevertheless opened in Austria against the Austrian branch of this insurance undertaking only cover the assets located in Austria.

2.2.5.2 Regulatory measures

Regulatory measures against Insurance Undertakings (other than Re-Insurance Undertakings) according to § 316 VAG 2016 constitute reorganisation measures as defined in Article 268(1)(c) of Directive 2009/138/EEC.

The FMA is entitled to institute regulatory measures against Insurance Undertakings (other than Re-Insurance Undertakings) as well as against branches of insurance undertakings domiciled outside the EEA in Austria. The effects of regulatory measures opened in Austria also cover the Insurance Undertaking's (other than Re-Insurance Undertakings) obligations throughout the EEA.

A decision issued according to the law of another EEA State to carry out a measure to reorganize an insurance undertaking takes effect in Austria without any further formalities as soon as the decision is effective in the EEA State in which the proceedings were opened (§ 316 (4) VAG 2016).

2.2.6 International jurisdiction in respect of Investment Firms

2.2.6.1 Bankruptcy proceedings

The explanations at 2.2.3 above apply to Investment Firms *mutatis mutandis*.

The effects of Austrian bankruptcy proceedings opened against an Investment Firm will be determined pursuant to § 237 IO (see at 2.2.3.1 above). Insolvency proceedings to liquidate an investment firm domiciled outside of Austria shall be recognized within the scope of § 240 IO (please see at 2.2.3.2 above).

2.2.6.2 Special receivership proceedings and regulatory measures pursuant to §§ 80 et seqq. WAG 2018

Contrary to the special receivership proceedings and regulatory measures in relation to Banks (see at 2.2.4.2 above), there is no Austrian law provision setting out the recognition abroad / the extra-territorial effects of special receivership proceedings pursuant to §§ 80 et seqq. WAG 2018 in relation to an Investment Firm. Furthermore, special receivership proceedings for Investment Firms do not constitute insolvency proceedings as referred to in Annexes A and B of the Regulation.

2.2.7 International jurisdiction in respect of CRR-Investment Firms

2.2.7.1 Bankruptcy proceedings

The effects of Austrian bankruptcy proceedings opened against a CRR-Investment Firm will be determined pursuant to the Special Provisions for CRR-Institutions and Insurance Undertakings. The explanations at 2.2.4.1 above apply to CRR-Investment Firms *mutatis mutandis*.

2.2.7.2 Special receivership proceedings and regulatory measures pursuant to §§ 80 et seqq. WAG 2018

Pursuant to § 77 WAG 2018, the provisions set out in §§ 81 through 81m BWG with respect to international jurisdiction relating to special receivership proceedings apply *mutatis mutandis* to CRR-Investment Firms.

Austrian courts shall have jurisdiction for the opening of special receivership proceedings against CRR-Investment Firms in Austria.

The effects of special receivership proceedings opened against a CRR-Investment Firm also cover the CRR-Investment Firm's assets located throughout the EEA, and in particular its branches.

2.3 Austrian conflict of law in respect of close-out netting

2.3.1 Banks

The provisions of § 223 IO ("Set-off") and § 233 IO ("Netting agreements") (see at 2.3.2 below) apply to bankruptcy proceedings opened in Austria against Banks or Austrian branches of Foreign Banks. The identical provisions in § 81c BWG ("Set-off") and § 81l BWG ("Netting agreements") apply to special receivership proceedings and – pursuant to § 70 (2b) BWG – regulatory measures instituted in Austria in respect of Banks or Austrian branches of Foreign Banks.

2.3.2 Corporations, Partnerships, Insurance Undertakings, Pension Funds, Investment Firms and CRR-Investment Firms

In respect of Corporations, Partnerships, Insurance Undertakings (subject to the specific limitations set out at 9.5.2 and 9.6.1 above), Pension Funds, Investment Firms and CRR-Investment Firms § 223 IO and § 233 IO apply. As mentioned under 2.2.1 above, § 223 IO and § 233 IO contain exemptions in respect of set-off and netting agreements to the general principle that Austrian substantive insolvency law shall apply to insolvency proceedings and their effects if insolvency proceedings are opened in Austria (*lex fori concursus*).

§ 223 IO implements Article 23 of Directive 2001/24/EC and Article 288 of Directive 2009/138/EEC into Austrian law. § 233 IO implements Article 25 of Directive 2001/24/EC into Austrian law.

Whilst Directive 2001/24/EC only applies to credit institutions and investment firms pursuant to Article 4 (1) no 2 CRR (including CRR-Investment Firms) and Directive 2009/138/EEC only applies to insurance undertakings, § 223 IO and § 233 IO generally apply to all types of parties to netting agreements which are within the scope of the Conflict Rules (see at 2.2.1 above). § 223 IO but not § 233 IO applies to regulatory measures in respect of Insurance Undertakings (other than Re-Insurance Undertakings) (§ 316 (6) VAG 2016).

§ 223 IO is identical to Article 9 (1) of the Regulation (with respect to its interpretation please refer to 2.1.4 above). In terms of netting agreements (as defined in the BaSAG; see below), § 233 IO is to be considered as *lex specialis* to § 223 IO.[21]

§ 233 IO[22] reads (in English translation) as follows:

"*Netting agreements (Saldierungsvereinbarungen) shall be governed solely by the law of the contract which governs such agreements*".

The BaSAG implementing BRRD and BRRD II into Austrian law, in § 2 (1) no 97 contains a definition of "netting agreement (*Saldierungsvereinbarung*)":

"*netting agreement: an agreement under which a number of claims or obligations can be converted into a single net claim, including close-out netting agreements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim. This includes 'set-off following termination' (Aufrechnung infolge Beendigung) as defined in § 3 (1) no 14 sub-paragrapgh a) of the Act on Financial Collateral Arrangements* (*Finanzsicherheiten-Gesetz – FinSG*) *and "set-off" as defined in § 12 of the Austrian Act on Settlement Finality (Finalitätsgesetz – FinalitätsG)*".

Based upon this definition, we believe that the Close-out Netting Provisions constitute a netting agreement within the meaning of § 233 IO and § 2 (1) no 97 BaSAG.

If (i) in respect of insolvency proceedings, § 233 IO, (ii) in respect of special receivership proceedings and regulatory measures against Banks, § 81l[23] BWG and (iii) in respect of restructuring proceedings (*Restrukturierungsverfahren*) under the ReO[24], § 26 (4) last sentence ReO[25] apply

[21] *Koller* in *Koller/Lovrek/Spitzer*, IO § 233 mn 3.

[22] See also § 81l BWG.

[23] Please note that § 81l BWG in the German original uses still the wording as did § 233 IO until 31 December 2014 and refers to "*Aufrechnungs- und Schuldumwandlungsvereinbarungen (netting agreements)*" (instead of "*Saldierungsvereinbarung (netting agreement)*"). We do not believe though that from a substantive point of view there is any material difference between the wording used in § 81l and § 233 IO. § 81l BWG also serves for the implementation of Article 25 of Directive 2001/24/EC and Article 25 of Directive 2001/24/EC was amended by BRRD to reflect the same wording that is used in § 233 IO since 1 January 2015. Therefore, we believe that an interpretation in accordance with BRRD / Directive 2001/24/EC should lead to the conclusion that § 81l BWG and § 233 IO have the same meaning.

[24] See at 1.1.3 of Appendix ./E for details on the types of counterparties in respect of which restructuring proceedings (*Restrukturierungsverfahren*) under the ReO may be opened.

[25] In contrast to § 233 IO and § 2 (1) no 97 BaSAG, § 26 (4) ReO uses the term "*Nettingmechanismus (netting mechanism)*" instead of "*Saldierungsvereinbarung (netting agreement)*". The ReO does not contain an autonomous definition of the term "*Nettingmechanismus (netting mechanism)*". We do not believe though that

("**Provisions on Netting Agreements**"), it is a matter of the law governing the EFET General Agreement (i.e. the *lex contractus*) whether close-out netting is enforceable in insolvency proceedings, special receivership proceedings or restructuring proceedings (*Restrukturierungsverfahren*) (as applicable) opened against the relevant Austrian counterparty.[26]

2.3.3 Scope of application of the Provisions on Netting Agreements

The Provisions on Netting Agreements apply to the following proceedings:

(A) § 233 IO in respect of:

(i) insolvency proceedings opened in Austria against the assets of Corporations and Partnerships;

(ii) bankruptcy proceedings opened in Austria against the assets of Banks;

(iii) bankruptcy proceedings opened in Austria against the assets of Investment Firms and CRR-Investment Firms;

(iv) bankruptcy proceedings opened in Austria against the assets of Insurance Undertakings; and

(v) bankruptcy proceedings opened in Austria against the assets of Pension Funds;

provided that the above-mentioned proceedings have a cross-border effect (see at 2.2.1 above as to the level of international element that needs to be present in order for the Provisions on International Insolvency Law, including § 233 IO, to apply).

(B) § 81l BWG in respect of:

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the different wording used in § 26 (4) ReO and § 233 IO / § 2 (1) no 97 BaSAG leads to different results. This is because both the BRRD (implemented into Austrian law by means of the BaSAG) and the Restructuring Directive (implemented into Austrian law by means of the ReO) in their official English language versions refer to "netting agreements". It appears that the different wording in § 26 (4) ReO and § 2 (1) no 97 BaSAG can be traced back to the German language versions of these directives and, consequently, to a mere translation issue: While the German language version of the BRRD refers to "*Saldierungsvereinbarung (netting agreement)*", the German language version of the Restructuring Directive refers to "*Nettingmechanismus (netting mechanism)*".

26 In insolvency proceedings, this interpretation has also been confirmed by the German Federal Court of Justice (in regards to § 340 of the German Insolvency Code, which implements Article 25 of Directive 2001/24/EC; see BGH IX ZR 314/14) in a case involving an entity being part of the Lehman group having its corporate seat in London and the German Master Agreement for Financial Derivative Transactions. While not binding precedent for Austrian courts, this is a useful reference supporting this interpretation.

(i) special receivership proceedings opened in Austria against the assets of Banks; and

(ii) regulatory measures instituted in Austria against Banks;

provided that such special receivership proceedings or regulatory measures have a cross-border effect[27].

(C) § 26 (4) last sentence ReO in respect of restructuring proceedings (*Restrukturierungsverfahren*) under the ReO opened in Austria over the assets of Corporations and Partnerships.

We believe that for restructuring proceedings under the ReO it is sufficient that the parties have chosen a law other than Austrian law as the law governing the relevant close-out netting agreement. This is based on the letters of the law that do not require an (additional) international nexus in order for § 26 (4) last sentence ReO to apply.

The Provisions on Netting Agreements do not apply:

(i) if the above-mentioned insolvency proceedings, special receivership proceedings or regulatory measures (see under (A) and (B) above) have no cross-border effect;

(ii) to regulatory measures in respect of Pension Funds;

(iii) to regulatory measures in respect of Insurance Undertakings; and

(iv) to special receivership proceedings opened in Austria against the assets of an Investment Firm or a CRR-Investment Firm as well as regulatory measures instituted in Austria against an Investment Firm or a CRR-Investment Firm.

2.4 Set-off under Austrian law

2.4.1 Set-off in a non insolvency-related scenario

Contractual bilateral set-off arrangements subject to Austrian law do not need to observe specific formal requirements. Such arrangements are, in principle, subject to the contractual freedom (*Vertragsfreiheit*) and, respectively, the private autonomy (*Parteiautonomie*) of the parties involved. In particular, a contractual (*i.e.* consensual) set-off of claims does not require

[27] As with § 233 IO (see at 2.3.2 above), we believe that the stronger the international nexus (and, conversely, the more remote the nexus to Austria), the higher the likelihood that an Austrian court will resort to the law applicable by virtue of § 81l BWG.

compliance with the requirements set out in §§ 1438 et seq. ABGB for unilateral set-off of claims[28] to be enforceable and valid. Furthermore, it does not matter whether the claims to be set-off result from the same (framework) agreement. Hence, Parties may (contractually) agree upon a set-off arrangement applying to mutual claims of the Parties arising under the EFET General Agreement and outside the EFET General Agreement.

Since there is no need for reciprocity (*Gegenseitigkeit*) of the claims to be set off in case of contractual (*i.e.* consensual) set-off arrangements (see above), Parties are free to (contractually) agree upon the inclusion of claims of the Parties against certain third parties (such as Affiliates or Credit Support Providers of the Parties) in the relevant set-off arrangement between the Parties.

However, certain mandatory statutory limitations on set-off (*zwingende gesetzliche Aufrechnungsverbote*) may limit the enforceability of contractual set-off arrangements.

2.4.2 Set-off in an insolvency-related scenario

According to Article 7 (2) lit d of the Regulation and § 221 (2) no 4 IO, respectively, the conditions under which set-offs may be invoked following the opening of insolvency proceedings are, generally, subject to the law of the *forum concursus*, *i.e.*, Austrian law in case of opening of local insolvency proceedings over the assets of an Austrian counterparty.

As a matter of Austrian law, set-off will be enforceable only if both the claim and the counterclaim against which set-off shall be effected were in the position to be set-off (*i.e.*, reciprocal (*gegenseitig*), even if conditional) at the time of opening of insolvency proceedings (§ 19 (1) IO). Whether the claims to be set-off result from the same agreement, is not decisive. Hence, to the extent relevant claims were in a position to be set-off at the time of opening of local insolvency proceedings over the assets of Party A, Party B may also set off with (counter-)claims against Party A arising outside the EFET General Agreement.

For set-off to become effective, set-off will, however, need to be declared (executed) by either party (*Aufrechnungserklärung*). If set-off had been declared (executed) prior to the opening of insolvency proceedings, such set-off would initially be valid but could, in certain circumstances, subsequently be subject to an action for avoidance (*Anfechtung*) by the

[28] Under Austrian law, any unilateral set-off requires that the claims to be set off are in a position to be set off (*i.e.* reciprocal (*gegenseitig*), even if conditional), due (*fällig*) and congeneric (*gleichartig*), *e.g.*, claims for payment of money (*Geldforderungen*) can only be set off against counterclaims for payment of money. In addition, the counterclaim to be set off must be accurate (*richtig*).

insolvency administrator (*Insolvenzverwalter*) of the insolvent party. In a *post*-insolvency scenario, set-off should, generally, not be affected by the opening of insolvency proceedings if both claims were already in a position to be set-off (as outlined above) prior to the opening of insolvency proceedings as well as prior to the hardening periods and the periods pursuant to § 20 (1) IO (see below).

Generally, pursuant to § 20 (1) IO set-off, *inter alia*, will not be enforceable if:

(i) the creditor of the insolvent party only became the debtor of the insolvency estate (*Insolvenzmasse*) after the opening of insolvency proceedings; or

(ii) the creditor of the insolvent party acquired its counterclaim to be set-off against the insolvent party's claim within six months prior to the opening of insolvency proceedings against the insolvent party and, at that time, the creditor was aware or should have been aware of the insolvent party's illiquidity (*Zahlungsunfähigkeit*). While Austrian legal writing indicates that this should not apply (and set-off should thus be enforceable) if the claim and counterclaim arose contemporaneously prior to the opening of insolvency proceedings, no case law is available to support this view. If courts did not follow legal writing on this very point, enforceability will essentially depend on whether, on the date of acquiring its counterclaim, the creditor of the insolvent party was aware or should have been aware of the insolvent party's illiquidity (*Zahlungsunfähigkeit*).

In respect of contractual (close-out) netting agreements, the Austrian substantive netting privilege in § 20 (4) IO is, however, to be considered as *lex specialis* to § 20 (1) IO.

If set-off was held to be unenforceable in accordance with the above, the creditor of the insolvent party might, however, still be able to resort to Article 9 (1) of the Regulation and § 223 IO, respectively, to preserve the enforceability of set-off: Pursuant to Article 9 (1) of the Regulation / § 223 IO the opening of insolvency proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the insolvent debtor, where such a set-off is enforceable under the law applicable to the insolvent debtor's claim, *i.e.*, the law governing the agreement under which the relevant claim has arisen.

Even if set-off was enforceable in accordance with §§ 19 and 20 IO, set-off could still be subject to an action for avoidance (*Anfechtung*) under Austrian insolvency law. Also, Article 9 (1) of the Regulation / § 223 IO do not preclude actions for voidance, voidability or unenforceability under the law of the *forum concursus*.[29] Therefore, claims for avoidance (see Appendix ./F for further details) remain possible under Austrian law, even if Article 9 (1) of the Regulation / § 223 IO was resorted to in an attempt to preserve the enforceability of set-off.

Article 16 of the Regulation and § 229 IO (where applicable) impose, however, a restriction on the ability of an Austrian insolvency administrator (*Insolvenzverwalter*) to set aside set-off. Article 16 of the Regulation and § 229 IO limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (*e.g.*, set-off), if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

According to case law available in Austria, a creditor who does not make use of the statutory set-off right pursuant to § 19 (1) IO during the course of an insolvency proceeding may, following acceptance of a recovery plan (*Sanierungsplan*) and completion of the insolvency proceedings, only set off claims in the amount of the insolvency quota (*Insolvenzquote*).

Multi-party set-off arrangements may not be enforceable in the event of opening of local insolvency proceedings over the assets of an Austrian counterparty. This is because, as mentioned above, reciprocity (*Gegenseitigkeit*) of the claims to be set-off is a prerequisite for enforceability of set-off upon the opening of local insolvency proceedings. Hence, even if contractually provided for in an amendment to the EFET General Agreement, Party B may, in the event of opening of local insolvency proceedings over the assets of Party A, only set-off with (counter-)claims against Party A but not with claims against any third party (such as an Affiliate or Credit Support Provider of Party A).

[29] See Article 9 (2) of the Regulation / § 229 (2) IO.

Appendix ./F
Summary of Austrian Avoidance Rules

1. Introduction

1.1. In insolvency proceedings the insolvency administrator can void and reverse legal actions and legal transactions concerning the debtor's assets that have taken place within certain suspect periods prior to the opening of insolvency proceedings. Such reversal of legal transactions is referred to as "**avoidance**".

1.2. General requirements for avoidance are:

(i) the avoidance must result in an increase of the insolvent's estate (*Befriedigungstauglichkeit*);

(ii) the challenged legal action or challenged legal transaction must have caused a direct or indirect discrimination of the other creditors (*Gläubigerbenachteiligung*); and

(iii) the avoidance claim must be filed by the insolvency administrator within one year after the opening of the insolvency proceedings; the insolvency administrator and the relevant creditor may agree to extend such period for three months.

1.3. The grounds for avoidance regulated in § 28 and § 29 IO apply regardless of whether the debtor was insolvent or not at the date of the transaction. As to the grounds for avoidance regulated in § 30 and § 31 IO, insolvency is a prerequisite.

1.4. Insolvency in this context means illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness in terms of insolvency law (*insolvenzrechtliche Überschuldung*). A debtor is considered to be illiquid (*zahlungsunfähig*) if it is unable to pay its debts in due time (i.e. when they fall due), and is not in a position to acquire the necessary funds to satisfy those due liabilities (i.e. liabilities that are due at that very point in time) within a reasonable period of time. The debtor company is considered to be over-indebted in terms of insolvency law, if the company's liabilities exceed its assets **and** the company has a negative prospect (*negative Fortbestehensprognose*).

2. Grounds for avoidance

The IO sets forth several grounds for avoidance in § 28 *et seq* IO:

2.1. Avoidance due to intent to discriminate (*Anfechtung wegen Benachteiligungsabsicht*):

2.1.1. Pursuant to § 28 IO, legal acts of the debtor concluded with the intention to discriminate other creditors may be avoided.

The intention to discriminate requires knowledge as well as intention on behalf of the debtor to discriminate a creditor / creditors by concluding the legal act. It is nonetheless sufficient if the debtor suspects the result (discrimination) and accepts it. Intention to discriminate is fulfilled not only if the satisfaction of another creditor is prevented but also when it is delayed or aggravated.

The debtor's intention to discriminate does not have to be directed against certain or all of the debtor's creditors. The legal act may even be challenged if the debtor had no creditors at the time of the transaction.

The debtor's intention to discriminate must be present at the time of the transaction.

2.1.2. Depending on the extent of the other party's knowledge the hardening periods vary.

2.1.3. If the other party **knew** about the debtor's intention to discriminate, the transaction may be challenged if it was entered into within a period of **ten years** prior to the opening of insolvency proceedings (§ 28 no 1 IO).

2.1.4. If the other party was not aware but **should have been aware** of the debtor's intention to discriminate its creditors the period is shortened to **two years** prior to the opening of the insolvency proceedings (§ 28 no 2 IO). Slight negligence (*leichte Fahrlässigkeit*) of the other party is sufficient.

2.1.5. If the legal act was concluded with or for the benefit of a related party (as described by law) the burden of proof regarding the knowledge of the intention to discriminate is shifted to the related party i.e. the related party must prove that it had no knowledge and was not negligent in having no knowledge respectively (§ 28 no 3 IO). Should the debtor be a legal entity capable of being a party in a lawsuit then

(i) members of the management and the supervisory bodies;

(ii) shareholders with unlimited liability; as well as

(iii) shareholders pursuant to § 5 of the Austrian Equity Capital Replacement Act (*Eigenkapitalersatz-Gesetz – EKEG*)

are deemed to be related parties.

2.2. Avoidance due to squandering of assets (*Anfechtung wegen Vermögensverschleuderung*):

2.2.1. Pursuant to § 28 no 4 IO, avoidance may apply to certain contracts, including purchase and exchange contracts, entered into by the debtor that are considered a squandering of assets at the expense of other creditors, if the counterparty to the contract had or should have knowledge of such squandering.

2.2.2. Squandering of assets is assumed if an obvious incongruity exists between performance and consideration.

2.2.3. § 28 no 4 IO applies to transactions that took place within **one year** prior to the opening of insolvency proceedings.

2.3. Avoidance of dispositions with no considerations and analogous transactions (*Anfechtung unentgeltlicher Verfügungen und ihnen gleichgestellter Verfügungen*):

2.3.1. Dispositions of the debtor that were concluded free of charge or equated with such dispositions may be challenged.

2.3.2. A disposition free of charge requires that the disposing person acts with the intention not to receive any consideration in return. The disposition amounts to a sacrifice by the debtor. Examples for such dispositions are: donations, acknowledgement of a debt, granting of security for liabilities, and payment of someone else's debt. If the debtor receives an adequate consideration in return (*angemessenes Entgelt*) the disposition may not be challenged pursuant § 29 IO. Any economic benefit or interest may qualify as a consideration.

2.3.3. § 29 IO applies to dispositions concluded within two years prior to the opening of insolvency proceedings.

2.4. Avoidance due to preferential treatment (*Anfechtung wegen Begünstigung*):

2.4.1. Pursuant to § 30 para 1 IO, the collateralization or satisfaction of a creditor carried out after insolvency or after the request for the opening of insolvency proceedings or within 60 days preceding such event may be avoided if:

(i) the creditor obtained security or satisfaction which it was not or not in that way or at that time entitled to, unless it was not favoured by this transaction (objective preferential treatment); or

(ii) the transaction took place for the benefit of a creditor who knew or should have known about the debtor's intention of the preferential treatment (subjective preferential treatment).

If the preferred creditor is a related party of the debtor, it must prove that it had no knowledge of the debtor's intention.

2.4.2. Objective preferential treatment does not require any subjective elements on part of the counterparty. In particular the counterparty's knowledge of the financial state of the debtor is irrelevant. The creditor is considered "**not entitled**" to the satisfaction/security if its claim is for instance an *obligatio naturalis* or if the creditor asks for security for an unsecured loan. "**Not in that way**" can be a satisfaction/security by assignment on payment (*Zession zahlungshalber*) or the return of goods instead of cash payment. A satisfaction "**not at that time**" is for instance a payment before the due date.

2.4.3. Subjective preferential treatment requires the debtor's intention and the relevant creditor's knowledge of the debtor's intention to favour a creditor. As insolvency is a prerequisite and the debtor in insolvency is bound by the principle of equal creditor treatment, the debtor's intention to satisfy/secure a particular creditor before another creditor is sufficient to be considered subjective preferential treatment. Courts usually consider the debtor's perception of its own financial situation when judging whether a debtor intended to favour a creditor. The debtor must therefore know of its (imminent) insolvency in order to favour a creditor.

2.4.4. Transactions carried out more than **one year** before the opening of the insolvency proceedings may not be contested pursuant to § 30 IO.

2.5. Avoidance due to knowledge of insolvency (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*):

2.5.1. Pursuant to § 31 IO legal acts carried out after insolvency or after filing for the opening of insolvency proceedings may be challenged if (i) the legal act constitutes satisfaction or securing of a creditor (*Befriedigung oder Sicherstellung*) or (ii) is considered a disadvantageous legal transaction (*nachteiliges Rechtsgeschäft*).

2.5.2. Satisfying or securing a creditor:

The legal act by which a creditor's claim is satisfied or secured may be challenged if the creditor knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition.

2.5.3. Disadvantageous legal transactions:

Legal transactions of the debtor that are **directly** disadvantageous to the creditors may be challenged if the other party knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition. Legal transactions are considered as being directly disadvantageous if the parties' considerations are objectively unbalanced.

Legal transactions of the debtor that are **indirectly** disadvantageous to creditors may only be challenged if the other party (i) knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition **and** (ii) the disadvantage for the insolvency estate was objectively predictable at the time of the transaction. Such objective predictability is in particular on hand if a recovery plan is obviously unqualified (*offensichtlich untaugliches Sanierungskonzept*).

A legal transaction is considered as indirectly disadvantageous (*mittelbare Nachteiligkeit*) if the transaction is objectively balanced at the time of its conclusion but becomes objectively unbalanced later on.

If the contracting partner and thus beneficiary of the satisfaction/securing or disadvantageous act is a related party, it must prove that he had no knowledge of the debtor's illiquidity or insolvency petition. In case of an indirectly disadvantageous transaction the contracting partner must in addition prove the disadvantage to the insolvency estate was objectively unpredictable.

2.5.4. Transactions carried out more than **six months** before the opening of the insolvency proceedings may not be contested pursuant to § 31 IO.

Appendix ./G
Summary of the Financial Collateral Act

1. General remarks

For the reasons set out at 2 to 5 below and subject to the assumptions made herein, we believe that the FinSG, implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended (the "**Financial Collateral Directive**"), should apply to any Eligible Credit Support in the form of Cash delivered by Party A to Party B under the Eligible Credit Support Annex, provided that either Party A or Party B is an institution pursuant to § 2 (1) FinSG (see at 2 below for further details).

By contrast, for the reason set out at 4 below, the FinSG will not apply to any Eligible Credit Support in the form of Letters of Credit / Parent Company Guarantees provided by Party A to Party B under the Eligible Credit Support Annex.

2. Personal scope

The FinSG applies to collateral takers and collateral providers mentioned in Article 1 (2) points (a) to (d) of the Financial Collateral Directive. Collateral takers and collateral providers mentioned in Article 1 (2) point (e) of the Financial Collateral Directive (*i.e.*, corporations, entrepreneurs (*Einzelunternehmer*) and partnerships (*Personengesellschaften*)) are covered by the FinSG provided that the other party is an institution as defined in § 2 (1) FinSG (i.e., in particular, a financial institution subject to prudential supervision (*beaufsichtigtes Finanzinstitut*), including, *inter alia*, the entities listed in footnote 30)[30].

In order for an entity entering into a collateral arrangement to benefit from the FinSG (*i.e.*, to fall within the scope of the FinSG), such entity and/or its counterparty will thus need to qualify as institution pursuant to § 2 (1) FinSG.

Provided that Party B qualifies as institution pursuant to § 2 (1) FinSG, any collateral arrangement entered into with an Austrian counterparty defined in Appendix ./A will

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[30] Financial institutions subject to prudential supervision are in particular:

(i) a credit institution as defined in Article 4 (1) CRR, including the institutions listed in Article 2 (3) CRD IV;

(ii) an investment firm as defined in Article 4 (1) no 1 MiFID;

(iii) a financial institution as defined in Article 4 (1) no 26 CRR;

(iv) an insurance undertaking as defined in Article 13 (1) of Directive 2009/138/EEC;

(v) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1 (2) of Directive 2009/65/EC; and

(vi) a management company as defined in Article 2 (1) lit b of Directive 2009/65/EC.

fall within the personal scope of the FinSG. Similarly, if Party A qualifies as institution pursuant to § 2 (1) FinSG, any collateral arrangement entered into with Party B will fall within the personal scope of the FinSG, irrespective of whether Party B is an institution pursuant to § 2 (1) FinSG.

3 Type of collateral arrangements covered

The EFET Credit Support Annex constitutes a(n) (outright) title transfer collateral arrangement (see § 7 (1) of the EFET Credit Support Annex) which is covered by the FinSG.

This is because the FinSG applies to financial collateral arrangements in the form of (i) title transfer financial collateral arrangements (*Finanzsicherheit in Form der Vollrechtsübertragung*) under which full ownership in a financial collateral is transferred and (ii) security financial collateral arrangements (*Finanzsicherheit in Form eines beschränkten dinglichen Rechts*) under which a financial collateral is provided as security interest being a limited *in rem* right (i.e. the ownership in the financial collateral remains with the collateral provider).

4 Type of collateral covered

Only "financial collateral" as defined in the FinSG will be covered by the FinSG. Pursuant to § 3 (1) no 1 FinSG, the following assets shall be considered "financial collateral" for purposes of the FinSG:

(i) cash (*Barsicherheiten*) in the form of money credited to an account in any currency, or similar claims for the repayment of money such as money market deposits;

(ii) financial instruments (*Finanzinstrumente*) being shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including interest in undertakings for collective investments, money market instruments and claims relating to or rights in or in respect of any of the foregoing; and

(iii) credit claims (*Kreditforderungen*), being pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4 (1) CRR, including the institutions listed in Article 2 (3) CRD IV, grants credit in the form of a loan, excluding claims the debtor of which is (a) a consumer (*Konsument*) pursuant to § 1 (1) no 2 and (3) of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*) or (b) a micro or small enterprise (*Kleinstunternehmen oder kleines Unternehmen*) as defined in Article 1 and Article 2 (2) and (3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, save where the collateral taker or the collateral provider of such credit claims is one of the institutions referred under § 2 (1) no 2 FinSG[31].

Based on the above, Letters of Credit (as such term is defined in the EFET Credit Support Annex)[32] and Parent Company Guarantees do not qualify as "financial collateral" under the FinSG.

Hence, the FinSG may only apply to Eligible Credit Support in the form of Cash but not to Eligible Credit Support in the form of Letters of Credit / Parent Company Guarantees.

5 Further requirements under the FinSG

5.1 Evidence in writing

Any financial collateral arrangement under the FinSG must be evidenced in writing (including recording by electronic means and any other durable medium) and must be sufficiently clear as to identify the financial collateral. For this purpose, it will suffice when cash collateral (*Barsicherheiten*) is credited to, or forms a credit in, a designated account (§ 4 (1) FinSG).

Based on the above, the delivery of Eligible Credit Support in the form of Cash under the EFET Credit Support Annex by Party A will be evidenced by deposit of the Cash into the account of Party B.

5.2 Collateralization of the relevant financial obligations

According to the FinSG, the financial collateral arrangement to be established must serve the purpose of securing "the relevant financial obligations" owed by a collateral provider to a collateral taker.

"Relevant financial obligations" are defined as obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments. Relevant financial obligations may consist of or include (i) present or future, (ii) conditional or unconditional, (iii) actual or prospective obligations (including such obligations arising under an EFET General Agreement or similar arrangement), (iv) obligations owed to the collateral taker by a

[31] *I.e.*, superordinate institutions of the financial market (*übergeordnete Finanzmarkteinrichtungen*): central banks, the ECB, the Bank for International Settlements, multilateral development banks (as referred to in Article 117 CRR), the International Monetary Fund and the European Investment Bank.

[32] For further details on the legal nature of Letters of Credit under Austrian law, please refer to 8.3.1.3.2 above.

person other than the collateral provider, or (v) obligations of a general or specified class or kind arising from time to time (§ 3 (1) no 6 FinSG).

The main purpose of the EFET Credit Support Annex is to collateralize outstanding obligations of a party under or in connection with a related EFET General Agreement (see also first paragraph of the EFET Credit Support Annex). Based on the aforesaid, we believe that such obligations should fall within the definition of "relevant financial obligations" provided for under the FinSG.

5.3 Possession or control over the financial collateral

Further, any collateral provided must be in the possession or under the control of the collateral taker, or of a person acting on the collateral taker's behalf, in order to qualify as financial collateral under the FinSG. Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider shall, however, not prejudice the collateral taker being considered as having possession of, or control over, the collateral provided (§ 3 (1) no 16 FinSG). In this context, the European Court of Justice ("**ECJ**")[33] ruled that the collateral taker (or any person acting on the collateral taker's behalf) must actually be in a position to dispose of the collateral when an enforcement event occurs in order to be considered as having possession of, or control over, the collateral provided. As the ECJ made clear, this prerequisite will only be fulfilled if the collateral provider is contractually and factually prevented from disposing of the collateral. Lastly, the ECJ held that the relevant collateral must have been provided to the collateral taker before the opening of insolvency proceedings in respect of the collateral provider (or on the day of opening of insolvency proceedings, if the collateral taker was not aware and could not have been aware of those proceedings) in order to qualify as financial collateral arrangement under the FinSG.

As we are not in a position to verify whether the factual aspects of the above-mentioned requirements will be fulfilled, we have, for purposes of this Opinion, assumed that (i) the required "possession or control" test will, in each case, be factually satisfied and (ii) the relevant Eligible Credit Support will have been provided to Party B before the opening of insolvency proceedings over Party A.

[33] ECJ 10 November 2016, C-156/15 (*Private Equity Insurance Group*).