Legal Opinion Summary

Switzerland

Date: December 20, 2022 **Prepared by: Lenz & Staehelin**

Coverage: EFET Gas & Electricity

Date of opinions: EFET Gas & Electricity December 20, 2022

Summary

Types of Counterparty *What types of counterparty are covered by the opinion?*	Corporations (art 620 et seq. CO), Limited liability companies (art. 772 et seq. CO), Commercial enterprises in the form of a partnership (art. 552 et seq. / 594 et seq. CO); Swiss branch of a foreign corporation; Swiss banking institutions licensed under the BA; Securities Firm under the FinIA; Swiss branch of a foreign bank or securities firm; Insurance Company licensed under the ISA; Fund management company licensed under the FinIA; Collective investment schemes licensed under the CISA.	EFET: para. B
Types of Transaction *What types of transaction are eligible for close-out netting?*	The opinion covers Individual Contracts that provide for the physical delivery of electricity, natural gas, (green) certificates, capacity rights or emission rights.	EFET: para. B
Automatic Early Termination *Does the opinion require or recommend that automatic early termination applies to a counterparty organised in the jurisdictions?*	Yes, due to the uncertain enforceability of Optional Early Termination, the opinion strongly recommends to elect Automatic Early Termination.	EFET: para. D.II.2.2
Early termination provision *Is the early termination provision of the agreement enforceable in the jurisdiction?*	The opinion confirms that the early termination is enforceable in Switzerland, but strongly recommends Automatic Early Termination due to uncertainties as to the enforceability upon the occurrence of an Insolvency Event as defined in the opinion.	EFET: para. D.II.2.2
Close-out netting *Is the close-out netting provision of the agreement enforceable in a local insolvency?*	Yes, the Close-Out Netting Provisions are valid and binding outside and prior to the occurrence of an Insolvency Event as well as in case of the occurrence of an Insolvency Event, subject to the detailed discussion of certain limitations, in particular as to the requirement of mutuality prior to an insolvency, the date for the calculation, need for conversion into CHF for claiming in insolvency proceedings and clawback provisions	EFET: para. DII.2
Characterization of collateral *Would laws of jurisdiction characterize transfer of collateral as effecting an unconditional transfer of ownership or is there risk of re-characterizing such transfer as creating a security interest?*	The opinion discusses cash collateral and letters of credit. With respect to cash collateral the conclusion is that the collateral provider of cash collateral transfers cash to the account of the collateral taker and does not have any proprietary rights to such collateral any longer. The question does not arise with respect to letters of credit that are directly addressed to the collateral taker as beneficiary.	EFET: para. D.IV.1.1
Further action required *Is any action required to ensure that ownership title continues to rest with Party B?*	No.	-
Amendments necessary *Are there any recommended amendments to the standard documents?*	If the parties wish to restrict Automatic Early Termination for a Swiss counterparty the opinion proposes an amendment to§ 10.4 of the EFET Agreement. Furthermore, when dealing with a Swiss counterparty which is either a Bank, a Securities Firm, a Special Insolvency Regime Swiss Branch or a Fund Management Company, the opinion proposes an amendment to § 10.5(c) of the EFET Agreement for consideration by the parties.	EFET: Appendix A
Other remarks *Does the opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in the jurisdiction?*	The opinion advises parties to specify London as the venue with respect to the jurisdiction of the courts of England by adding "sitting in London" as venue in the jurisdiction clauses for England and Wales rather than just providing for the jurisdiction of the courts of England. Further, the opinion discusses certain Swiss law limitations such as: Tax Gross-up (§14.9), Calculation of Floating Contract Prices (§15), Deemed receipt of notices (§23.2 (b)), Amendments in writing (§23.3) and Partial Invalidity (§23.4). The	EFET: para. VIII.2 & X

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Zurich, dated as of December 20, 2022
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EFET European Federation of Energy Traders - Opinion on General Agreement Concerning the Delivery and Acceptance of Electricity and of Natural Gas and its Collateral Arrangements

Dear Sirs,

You have asked us to render an opinion as to Swiss law aspects on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity ("**Electricity EFET General Agreement** ") and the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas ("**Gas EFET General Agreement** ") (and each of the Electricity EFET General Agreement and/or the Gas EFET General Agreement an "**EFET General Agreement** "), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement ("**EFET Credit Support Annex**") and other related issues as outlined herein ("**Opinion**").

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A. Documents considered

The Opinion is rendered in respect of the following documents ("**EFET Documents**"):

For Electricity:

– EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007) **(**Enclosure 1);

– EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (Enclosure 2);

– 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) (Enclosure 3);

– 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) (Enclosure 4)

– EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 2018) (Enclosure 5);

– EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1, published 4 November 2021) (Enclosure 6);

– EFET French Capacity Certificates Appendix, (Version 1.0, published March 2013) (Enclosure 7);

– EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (Enclosure 8);

– 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) (Enclosures 9);

– EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013) (Enclosure 10);

– 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) (Enclosure 11);

– UK ETS Allowances Appendix (Power) (Version 1.0, published July 29, 2021) (Enclosure 12);

For Natural Gas:

– EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007)1 (Enclosure 13);

– EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003) (Enclosure 14);

– 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) (Enclosure 15);

– 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) (Enclosure 16);

– 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) (Enclosure 17);

– 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) (Enclosure 18);

– 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 on 28 February 2018) (Enclosure 19);

– EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0/4 December 2017) (Enclosure 20);

– EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 27 March 2020) (Enclosure 21);

– [tbc EFET Italian Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004)2 (Enclosure 22)];

– [tbc Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 20 September 2013) (Enclosure 23)];

– EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014) (Enclosure 24);

– EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 - 29 May 2020) (Enclosure 25);

– EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018) (Enclosure 26);

– EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 14 December 2013) (Enclosure 27);

– EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/ June 21, 2021) (Enclosure 28);

– EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/May 2021) (Enclosure 29);

– EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published February 2020) (Enclosure 30);

– EFET Recommended Clauses for use with Ukrainian Counterparties, published February 2020 (Enclosure 31);

– EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017) (Enclosure 32);

– EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016) (Enclosure 33);

– EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 7 September 2015) (Enclosure 34);

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

– Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, published 26 July 2021 (Enclosure 36);

– UK ETS Allowances Appendix (Gas) (Version 1.0, published December 13, 2021) (Enclosure 37);

For Electricity and Natural Gas:

– 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) (Enclosure 38);

– Amendment Agreement IBOR Transition wording for General Agreements, CPPNA, PPA and Appendices, published November 4, 2021 (Enclosure 39);

– EFET Credit Support Annex to the General Agreement (Version 1.0(a), published September, 2005) (Enclosure 40);

– EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010) (Enclosure 41);

– EFET Credit Support Annex to the General Agreement (Version 3.1, published November 4, 2021) (Enclosure 42);

– Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020 (Enclosure 43);

– Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020 (Enclosure 44);

For purposes of Part D.VI (Confirmation Practices) only:

– EFET Electronic Confirmation Agreement (published 20 March 2017) (Enclosure 45);

For purposes of Part D.VII (Core Provision) only:

– EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005) (Enclosure 46);

– EFET Master Netting Agreement (Version 1.0, published June 2010) (Enclosure 47);

– 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) (Enclosures 48);

– EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (Enclosure 49); and

– EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published

February 2011) (Enclosure 50).

Capitalized terms used in this Opinion and not otherwise defined herein shall have the same meaning ascribed to such terms in the EFET Documents and references to numbered paragraphs shall be to the respective paragraphs, as applicable, in the Electricity EFET General Agreement (Version 2.1 published 21 September 2007) or the Gas EFET General Agreement (Version 2.0 published 11 May 2007).

B. General Assumptions and Limitations

Our opinions are based on the following general assumptions:

– Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized in Switzerland ("**Party A**"). 1

– Party A is (a) an unregulated trading or industrial company incorporated as a corporation (*Aktiengesellschaft*), a limited liability company (*Gesellschaft mit beschränkter Haftung*) or a commercial enterprise in the form of a partnership (*Kollektiv / Kommanditgesellschaft*) under the Swiss Code of Obligations ("**CO**")[1], in each case having its registered seat in Switzerland and, (b) a Swiss branch of a foreign corporation established in Switzerland, (c) a banking institution licensed under the Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[2], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Bank**"), (d) a securities firm licensed under the Swiss Federal Act on Financial Institutions ("**FinIA**")[3] (*Wertpapierhaus*), organized as a joint stock corporation and having its registered seat in Switzerland (a "**Securities Firm**")[4] (e) a Swiss branch of a foreign bank or securities firm established and licensed under the Banking Act or the FinIA in Switzerland, (f) an insurance company licensed under the Swiss Federal Act on the Supervision of Insurance Companies ("**ISA**")[5], organized in the form of a joint stock corporation (*Aktiengesellschaft*) or a cooperative (*Genossenschaft*) and having its registered seat in Switzerland (an "**Insurance Company**"), (g) a fund management company (*Fondsleitung*) licensed under the 2

[1] Schweizerisches Obligationenrecht (OR), SR 220.

[2] Bundesgesetz über die Banken und Sparkassen (BankG), SR 952.0.

[3] Bundesgesetz über die Finanzinstitute (FINIG), SR 954.1.

[4] This includes securities dealers (*Effektenhändler*) that were until December 31, 2019 licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**"). The SESTA has been abolished concurrently with the entering into force of the FinIA. Such securities dealers are not required to obtain new licenses under the FinIA. Rather, their licenses granted under the SESTA will continue to be valid under the FinIA.

[5] Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (VAG), SR 961.01.

FinIA to manage a Contractual Fund, organized in the form of a joint stock corporation and having its registered seat in Switzerland (a "**Fund Management Company**") and (h) collective investment schemes licensed under the Swiss Federal Act on Collective Investment Schemes ("**CISA**")[6], organized under Swiss law as (i) a contractual fund (*Vertraglicher Anlagefonds*) subject to Art. 25 et seq. CISA (a "**Contractual Fund**") or (ii) an investment company with variable capital (*Investmentgesellschaft mit variablem Kapital, SICAV*) subject to Art. 36 et seq. CISA (a "**SICAV**"). Regulated entities or entities subject to a particular insolvency regime (other than Banks, Securities Firms, Fund Management Companies (and Contractual Funds managed by them) or SICAVs), public law institutions as well as cantonal banks within the meaning of Art. 3a of the Banking Act are not considered in these opinions.

– The relevant EFET General Agreement is governed by the laws of Germany or England and Wales; provided that, with respect to the discussion of close-out netting in Part D only, the EFET General Agreement could be governed by another law. 3

– Each EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) are enforceable under the laws of any jurisdiction (other than the laws of Switzerland) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document. 4

– Each of Party A and Party B has the requisite licenses, permits and other governmental approvals necessary to carry on its business, including without limitation the business of trading in electricity and/or Allowances, as applicable, as contemplated by the EFET Documents. 5

– The entering into the EFET Documents and the execution and delivery of, and performance under the EFET Documents does not violate Party A's or Party B's constitutive documents. 6

– 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 transactions ("**Transactions**") described in Appendix B. 7

– Each of Party A and B when entering into the EFET Documents initially and as of the date of the conclusion of an Individual Contract is neither insolvent (*zahlungsunfähig*) nor overindebted (*überschuldet*) within the meaning of Swiss law or any other law 8

[6] Bundesgesetz über die kollektiven Kapitalanlagen (KAG), SR 951.31.

applicable to such party.

– The Individual Contracts provide for the physical delivery of electricity, natural gas, (green) certificates, capacity rights or emission rights in exchange for cash. However, some of them may also provide for cash settlement or, in the event that offsetting physical delivery obligations are entered at different times, may be settled by agreement through the combination of, as applicable, a partial or total cancellation of otherwise offsetting physical delivery obligations, coupled with a net financial payment. 9

Without derogation to the specific limitations and qualifications below, this Opinion is subject to the following general limitations: 10

– this Opinion is limited to Swiss law as in force and interpreted at the date hereof; 11

– this Opinion is limited to matters of law and does neither address any factual circumstances or statements of the parties to the EFET Documents, whether contained in representations or warranties of the parties thereunder or otherwise, nor any tax matters, including without limitation any tax consequences of the entering into, execution and delivery of, and performance under the EFET Documents, other than the qualification under D.X in respect of the gross-up for Swiss withholding taxes (*Verrechnungssteuer*). 12

– Swiss insolvency laws are based on the principle of active universalism such that effects of the opening of Swiss insolvency proceedings would generally affect all of the insolvent party's property worldwide. In practice, though, the effectiveness of the principle of active universalism depends on the reaction of the laws in the jurisdiction where specific assets of the insolvent party are located. If such jurisdiction accepts the effects of Swiss insolvency proceedings either automatically or upon a formal recognition order, the conclusions reached herein would apply mutatis mutandis. If, in turn, the jurisdiction where assets of the insolvent are located either proceeds with separate ancillary / parallel insolvency proceedings in reaction to the opening of main Swiss insolvency proceedings, then the effects of the insolvency laws in the jurisdiction where assets of the insolvent are located would prevail and may lead to conclusions which differ from the conclusions reached herein under Swiss insolvency laws. The same holds true if the jurisdiction where assets are located does not recognize the Swiss insolvency proceeding without opening ancillary / parallel proceedings.

C. Executive Summary

This executive summary highlights those issues identified in our Opinion which we, in our discretion, consider to be material in the context of Individual Contracts. This executive summary does not, however, purport to be exhaustive and reading this executive summary is not a substitute for reading this Opinion in its entirety. The executive summary is subject to the in depth discussion and the limitations as set out in this Opinion. 13

I. Insolvency and Early Termination

We are of the opinion that Early Termination is valid and binding notwithstanding the opening of Insolvency Proceedings. We strongly recommend, however, to elect "Automatic Early Termination" rather than to provide for a short term period within which an "Optional Early Termination" would need to be declared and to provide for the day of the occurrence of an Insolvency Event as the effective date for such termination in case of a Swiss party being involved. 14

II. Close-Out Netting

We are of the opinion that as a matter of Swiss bankruptcy and insolvency law, the Close-Out Netting Provisions are valid and binding outside and prior to the occurrence of an Insolvency Event as well as in case of the occurrence of an Insolvency Event. The same holds true for Banks, Securities Firms, Fund Management Companies (and thereby the Contractual Funds managed by such Fund Management Company) based on the Banking Act and the FinIA respectively and Insurance Companies based on the ISA. 15

III. Branches of Foreign Companies established in Switzerland

Swiss branches of foreign corporations are subject to Swiss bankruptcy and insolvency law and thus to the same rules as Swiss corporations but only to the extent the debts and obligations are incurred and entered into by the Swiss branch. The particular rules for Banks and Securities Firms under the Banking Act and the FinIA respectively also apply to branches of foreign banks and securities firms established and licensed in Switzerland. 16

IV. Collateral

Cash and Letters of Credit can be validly posted as Eligible Credit Support under the EFET Credit Support Annex and may be subjected to the provisions on close-out-netting as provided for under the EFET General Agreement in connection with the EFET Credit Support Annex in accordance with § 11 of the EFET Credit Support Annex. 17

V. MiFID / FMIA Considerations

Article 2 para. 3 lit b FMIO[7] (based on Article 94 para. 4 FMIA[8]) carves out derivative transactions relating to electricity and gas which are traded on an organised trading facility, must be physically delivered and cannot be settled in cash at a party's discretion from the definition of "derivatives" within the meaning of the FMIA. While the carve out is thereby structurally broader (in particular it is not limited to wholesale transactions) the rationale for this carve-out in essence was to mirror the REMIT[9] carve-out under MiFID2[10]/EMIR[11]. We understand that the rationale of the REMIT carve-out is to avoid a duplication of the REMIT trade regulation of certain whole-sale transactions under MiFID2/EMIR. 18

D. Issues and additional assumptions

I. Definitions

"**Close-out Netting Provisions**" refers to the termination of all Individual Contracts and determination of one single Termination Amount in respect of all such Individual Contracts payable by either the Terminating Party or the other Party as contemplated by § 10 and 11 of the EFET General Agreement. 19

"**Insolvency Event**" means the particular point in time of the occurrence with respect to a Party A either of (i) the declaration of bankruptcy (*Konkurseröffnung*) or (ii) the ratification of a composition agreement with assignment of claims (*Nachlassvertrag mit Vermögensabtretung*) and (iii) in the case of a Special Insolvency Regime Entity the declaration of the bankruptcy under the particular regime applicable to it, all as discussed in in paragraph D.II.1. 20

"**Insolvency Proceedings**" means the procedures discussed in paragraph D.II.1 and the terms "**Insolvency**" and "**Insolvent**" shall be construed accordingly. 21

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7 Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (FinfraV), SR. 958.11

8 Bundesgesetz über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (FinfraG), SR 958.1

9 Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency

10 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

11 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories Text with EEA relevance.

"**Insolvency Representative**" means a liquidator, administrator, receiver or analogous or equivalent official in Switzerland. 22

"**Special Insolvency Regime Entity**" means a Bank, a Securities Firm or a Swiss branch of a foreign bank or securities firm, a Fund Management Company (and a Contractual Fund managed by it) or a SICAV. 23

II. Enforceability of Close-out Netting

1. Description of Swiss insolvency proceedings

1.1 Insolvency

Enforcement of contractual obligations is generally subject to limitations in case of insolvency procedures being instituted against Party A under applicable Swiss law in case of Party A's insolvency. In a nutshell, the various insolvency procedures against Party A qualifying as a Swiss party and their main impact on Party A's faculty to abide by its obligations under the EFET Documents can be described as follows: 24

1.2 Bankruptcy

Except for Special Insolvency Regime Entities, the enforcement of claims and the questions relating to insolvency and bankruptcy in general against Party A are dealt with by the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**")[12]. For Special Insolvency Regime Entities see paragraphs D.II.1.8 through D.II.1.10. 25

Except for branches of foreign banks and securities firms, Swiss branches of foreign corporations are also subject to the SDEBA but on the liability side only with respect to debts and obligations incurred and entered into by the branch and on the assets side only with respect to assets located within Switzerland or to which Swiss authorities have access. Please note that all questions regarding corporate authority and capacity are governed by the law governing the foreign corporation and are thus not covered in this Opinion. 26

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against a Party A (other than Special Insolvency Regime Entities) have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and hence a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the collateral (*Betreibung auf Pfandverwertung*). However, if the bankruptcy is declared while such a proceeding is pending, the special proceeding is ceased and the creditor participates with the other creditors in the 27

12 Bundesgesetz über Schuldbetreibung und Konkurs (SchKG), SR 281.1

bankruptcy proceedings.

For a Party A (other than Special Insolvency Regime Entities) bankruptcy is declared by the court either on the initiative of a creditor or at the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy proportionally the creditors. 28

As a rule the declaration of a bankruptcy by the competent court needs to be preceded by a prior debt enforcement procedure (*Konkurs mit vorgängiger Betreibung*). Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request in which the creditor need not evidence its claim the competent debt enforcement authority (*Betreibungsamt*) will issue a payment summons (*Zahlungsbefehl*). The debtor may object to the payment summons by simple declaration (*Rechtsvorschlag*). If the debtor does so object, then the creditor needs to lift such objection by a court procedure. If the creditor has a written debt acknowledgement of the debtor it can start a special summary procedure (*Rechtsöffnungsverfahren*), otherwise a full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, then it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into legal effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority (*Betreibungsamt*) would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt is performed within 20 days. After the lapse of such deadline without payment of the debtor, the creditor may request that the competent court open bankruptcy proceedings. It is our understanding that only the latter request, but not the preceding debt enforcement procedure, would constitute an event described under §10.5 c (iv) of the EFET General Agreement . 29

The competent court may, however, declare a Party A (other than Special Insolvency Regime Entities) bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung*) under the following circumstances: at the request of the debtor (i) if the debtor's board of directors declares that the debtor is overindebted within the meaning of Article 725 par. 2 CO or (ii) the debtor declares to be insolvent (*zahlungsunfähig*) and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung*) or, (iii) if certain events happen during composition proceedings. Any of these events would constitute an event described under §10.5 c (iv) of the EFET General Agreement. 30

The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the Insolvency Representative. 31

For the final distribution there is a ranking of creditors in three classes. The first and the second class, which are privileged, comprise claims under employment contracts, accident insurance, pension plans and family law. Certain privileges can further result for the government and its subdivisions based on specific provisions of federal law. All other creditors are treated equally in the third class. 32

The declaration of bankruptcy (*Konkurseröffnung*) has, *inter alia*, the following effects: 33

Loss of capacity to dispose of assets: With the declaration of bankruptcy the bankrupt party loses its capacity to dispose of its assets. 34

Revocation of powers and instructions: With the declaration of bankruptcy any powers, instructions and similar arrangements given or made by the bankrupt party prior to its bankruptcy authorizing or directing a third party to legally represent it or to dispose of its assets would automatically expire. 35

Currency of filing: Claims in a foreign currency against a bankrupt party initially remain unaffected by the declaration of bankruptcy. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A creditor is free to choose a currency rate provider (such as the Swiss National Bank), bearing in mind that the bankruptcy liquidator may decide to reduce a claim in case the rate applied by the creditor differs from the rates published by other market currency rate providers. 36

Interest: Unless a claim is secured by collateral, interest stops to accrue following the declaration of bankruptcy. In case of secured claims, only an excess of the realization of the credit support over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 37

Performance of Obligations: With the declaration of bankruptcy all obligations of the bankrupt party become due and payable and non-monetary obligations of the bankrupt party would, as a rule, have to be converted into monetary claims. 38

Date of calculation of a claim: Calculations to be made with respect to a claim may have to be made as of the date of the declaration of bankruptcy in order to ascertain equal treatment of all creditors of the bankrupt party. 39

Set-off/netting: A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where the debtor of the bankrupt party seeking to set-off a claim has become the creditor of 40 the bankrupt party prior to the declaration of bankruptcy or where the creditor of the bankrupt party seeking to set-off a claim has become the debtor of the bankrupt party prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired by a debtor of the bankrupt party prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party 's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors.[13] In other words, Art. 213 SDEBA mirrors the substantive law requirements of a unilateral right of set-off, i.e. the claims to be set-off must have existed prior to the bankruptcy and must be mutual as between the bankrupt party and the counterparty, such mutuality must have existed prior to the declaration of bankruptcy and the claims must be of the same kind. Art. 214 SDEBA provides for the possibility to challenge the set-off of claims for which the mutuality has existed prior to the declaration of bankruptcy, but where such mutuality has been created under the particular circumstances set out in Art. 214 SDEBA. The analysis is to be made on the basis of each claim that is to be set-off. These provisions are further supplemented by the general avoidance actions (see paragraph D.II.1.5)

Disposal of and security interest in future rights: The undertaking to grant a security interest in collateral in the future would be recognized under Swiss law. However, the transfer, assignment or the creation of the security interest constitutes a disposal with respect to such collateral by the respective party and, hence, under Swiss law requires the ability to dispose of such collateral at such time. Such ability is, however, lost upon the declaration of bankruptcy under the SDEBA, therefore, the transfer or assignment of collateral could no longer be validly made and a security interest no longer be validly created by the party subject to bankruptcy. 41

Where collateral that has been posted (irrespective of whether this has been done under a title transfer or assignment or through the grant of a security interest in the form of a pledge or equivalent security interest) also comprises future rights and claims, such future rights and claims that only arise after the occurrence of an Insolvency Event will not be validly transferred, assigned or subjected to the security interest and will remain part of its bankruptcy estate. 42

Security interest without transfer of property: Assets over which a party has granted a mere limited security interest, such as a regular pledge remain its property and would in the event of its bankruptcy form part of its bankruptcy estate. As a rule, a secured party is under an obligation to remit the pledged assets to the bankruptcy estate. Such credit support is, hence, liquidated by the receiver in bankruptcy in the same manner as the other assets of the bankruptcy estate, but the secured party retains its privilege to be satisfied from the proceeds of the liquidation of such credit support with priority over unsecured creditors, provided that 43

13 These provisions are further supplemented by the general avoidance actions provided for in the SDEBA (see paragraph D.II.1.5.)

Swiss law provides for certain safeguards of private realization, that need not be discussed herein, as the EFET Credit Support Annex provides for a full title transfer of the cash collateral comprised as eligible collateral thereunder.

Security interest with full title transfer: Collateral that have been transferred to the secured party on full title transfer basis (irregular pledge, fiduciary transfer or assignment or outright full title transfer) are no longer deemed to be the property of the bankrupt party (who merely retains contractual rights for the return of such assets) and, based thereon, would in case of its bankruptcy not form part of its bankruptcy estate. The realization of such collateral would not be effected through the Insolvency Representative. The secured party would, hence, realize the collateral outside official realization proceedings, i.e. through private realization (*Privatverwertung*). However, the secured party would be required to account for the sales proceeds and remit any excess sales proceeds to the receiver in bankruptcy (*Abrechnungspflicht*). 44

1.3 Reorganization Composition Agreement

As an alternative to bankruptcy, and for a Party A (other than Special Insolvency Regime Entities), the SDEBA also provides for reorganization procedures by composition with a party's creditors. Reorganization is initiated by a party lodging a request with the competent court for a moratorium (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors (majority vote) and confirmation of such agreement by the competent court. The debtor may also attempt to restructure consensually with the creditors during the composition moratorium in which case no composition agreement would be concluded. 45

A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) which leads to a private liquidation and in many instances has effects analogous to a bankruptcy, and a dividend composition (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich*).

The grant of a moratorium has, *inter alia*, the following effects: 46

Stay of Debt Collection Proceedings: No debt collection proceedings, including debt collection proceedings aimed at a realization of collateral (*Betreibung auf Pfandverwertung*) can be initiated for the duration of the moratorium and pending proceedings are stayed. Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for (a) collection proceedings for claims of employees arising in the course of the preceding six months and certain claims based on social security laws and family law (so-called first class claims), (b) collection proceedings for debt secured by real property, and (c) collection proceedings for new debt arising out of the permitted continuation 47 of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations.

Power to dispose: During the moratorium, the insolvent party's power to dispose of its assets and to manage its affairs is restricted. While the insolvent party may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law from (a) disposing of or pledging any fixed assets (such as holdings in other companies or real property), (b) creating new security interests, (c) issuing guarantees, and (d) entering into transactions which are not at arm's length. Such acts performed without court approval are invalid. The counterparty's claims for rescission of the contract must be recorded, and treated just like any other creditors' claim. Such counterparty will therefore only be entitled to receive a dividend from or a share in the liquidation proceeds of the insolvent party. 48

Stay of enforcement of collateral: Where collateral has been provided under a security interest without transfer of property (regular pledge), the secured party is, furthermore, (except as permitted by a safeguard of private realization under Swiss law) not entitled to proceed with a private liquidation until the competent court has approved the composition agreement. The private liquidation may also be stayed for a further period. Swiss law provides for certain safeguards of private realization, that need not be discussed herein, as the EFET Credit Support Annex provides for a full title transfer of the cash collateral comprised as eligible collateral thereunder. In case of a security interest with full title transfer (irregular pledge, fiduciary transfer or assignment or outright full title transfer), the sale of the collateral may take place without delay. A secured party would participate in the settlement only for the amount of its claim not covered by proceeds from the sale of the collateral or, if the collateral is appropriated, the amount by which its claim exceeds the value ascribed to the collateral. 49

Future rights and claims: Where collateral that has been posted (irrespective of whether this has been done under a title transfer or assignment or through the grant of a security interest in the form of a pledge or equivalent security interest) also comprises future rights and claims, Art. 297 para. 4 SDEBA states that such future rights and claims that only arise after the grant of the moratorium will not be validly transferred, assigned or subjected to the security interest.

Interest: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium. 50

Due Dates: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 51

Set-off: Set-off is allowed, subject to the same limitations as in a bankruptcy (see paragraph D.II.1.2), whereby the date of the granting of the moratorium is relevant for determining which claims qualify for set-off. 52

The moratorium aims at facilitating the consensual restructuring or the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims. 53

1.4 Emergency Moratorium

The SDEBA confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is (i) temporary and (ii) due to extraordinary circumstances of general implication (e.g. a general economic crisis). The competent authority can order that the grant of a security interest during such stay be subject to its prior approval. The emergency moratorium is an exceptional remedy, which has only been very rarely applied in the past. 54

1.5 Clawback/Avoidance of Transactions

The receiver in bankruptcy, the liquidator under a composition agreement with assignment of assets or creditors to which the relevant right has been assigned may, by means of an appropriate lawsuit (*actio pauliana*) or by way of objection or otherwise, challenge certain arrangements or dispositions made by the insolvent party during a period (suspect or look-back period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), the grant of the moratorium. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor (described in more detail below), undertaken at such time as the debtor was overindebted (*Überschuldungspauliana*), and/or (iii) dispositions made by the debtor with the intention to disadvantage its creditors or to give a preference to certain creditors to the detriment of other creditors (all as described below). 55

For all avoidance actions it is required that the challenged transaction has caused damages to other creditors of the insolvent party which is presumed by law but may be overcome by 56 counterproof of the defendant in an avoidance action.[14] Court precedents suggest that this requirement is to be interpreted extensively and is met if (i) the act to be set aside caused actual damages to the creditors by reducing the assets available for distribution or the quota of a specific creditor or (ii) if the position of the creditors in the insolvency proceeding has otherwise been affected negatively.[15] The targeted acts may be summarised as follows:

1.5.1 Avoidance of Gifts and Gratuitous Transactions (*Schenkungspauliana*)

Art. 286 SDEBA allows the avoidance of gifts and other gratuitous transactions (as well as some further specifically mentioned transactions, which are, however, of no relevance in the context of this Opinion), which the insolvent party made within a suspect period of 12 months prior to being declared bankrupt or the grant of a moratorium. Not only outright gratuitous transactions, but also transactions where the obligations of the parties measured in economic terms are disproportionate to the detriment of the insolvent party, are to the extent of such disproportion and for purposes of Art. 286 SDEBA treated as gratuitous transactions. 57

Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) the established damages resulting therefrom for other creditors of the insolvent party. Where the gratuitous transaction is concluded among related parties (which includes, among other, entities of the same corporate group), the counterparty of the insolvent party bears the burden of proof that the transaction was not disproportionate in nature. 58

1.5.2 Avoidance due to Over-Indebtedness (*Überschuldungspauliana*)

Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a moratorium, where the insolvent debtor, as an additional objective prerequisite, was already overindebted (*überschuldet*) at the time the relevant act was undertaken by the insolvent debtor. The term "overindebted" refers to the fact that the insolvent debtor's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof. 59

The targeted acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity. 60

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[14] BGE 99 III 27, 33, recently confirmed in BGE 137 III 268, 283.

[15] BGE 137 III 268, 283, confirmed in 5A_95/2019, c.3.1.

Art. 287 para. 3 SDEBA specifies that no challenge is possible if: (1) the collateral consists of securities, book-entry securities or other financial instruments traded on a representative market (*repräsentativer Markt*)[16]; and (2) the collateral provider had previously (i) agreed to provide additional collateral in case of a diminution of the collateral value or an increase in the value of the obligation to be secured and/or (ii) had reserved the right to substitute other collateral. 61

There is a subjective element also, in that the insolvent debtor's counterparty to the challenged transaction or act may avoid a challenge of the transaction or act if it can prove that it did not and, being diligent, could not know about debtor's over-indebtedness (such knowledge or deemed knowledge being one of the subjective tests). While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the counterparty to the transaction or act is, subject to the proof of the contrary, presumed to have been aware thereof. This proof will certainly fail if the over-indebtedness was reflected in financial statements made available to such counterparty. It would in our view also fail, if the counterparty did not specifically ask for financial statements despite that due diligence warranted to ask for financial statements in the light of the nature and the magnitude of the transaction contemplated, and if the financial statements would indeed have revealed the over-indebtedness. 62

1.5.3 Avoidance for Intent (*Absichtspauliana*)

Art. 288 SDEBA subjects any act of a bankrupt party within the suspect period of 5 years prior to the declaration of bankruptcy or the granting of a moratorium in respect of such insolvent party, to challenge to the extent that (i) such act was taken by the insolvent party with the intention of preferring certain creditors over others or disadvantaging certain of its creditors and (ii) this intention was or, exercising the requisite due diligence, must have been known to the counterparty. 63

The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the insolvent party, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA. 64

The subjective tests for an ‘avoidance for intent’ are (i) the actual or presumed presence of an intention of the insolvent party to prefer or to disadvantage creditors and (ii) such intention having been recognizable to the counterparty of the relevant act. 65

16 While Art. 287 SDEBA has not been amended in the context of the changes of Art. 31 BESA and Art. 27 para. 1 Banking Act we think that representative market should also be interpreted as having an objectively determinable value in the context of Art. 287 SDEBA.

The insolvent party is presumed to have such an intention where such insolvent party recognized or using the diligence required in the circumstances should have recognized that the challenged act would prefer or disadvantage creditors. It is sufficient if the insolvent party, even while not directly aiming for such preference or disadvantage to occur as a result of its act, merely accepted such preference or disadvantage was a possible consequence of its act.[17] 66

Jurisprudence holds that such intent is recognizable to a counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the debtor. If there are signs of a potential disadvantage to other creditors, then the counterparty has to discuss this with the debtor and make the necessary further inquiries. 67

In respect of counterparties that are banks, Swiss legal doctrine holds that the suspicion of the bank that the party when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the party's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the party but also if there are indications of a distressed financial situation. 68

While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. 69

Neither Art. 286 SDEBA nor Art. 288 SDEBA (unlike Art. 287 SDEBA) require over-indebtedness of the bankrupt party at the moment when the challenged act is undertaken. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios: 70

(i) Under the first scenario, there is insufficient indication of financial difficulties when the debtor acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to, certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy, so that in fact the intention is that the counterparty should only be granted a preferential right over an asset if and when the party is declared bankrupt, but with no intent to treat the counterparty as a secured party other than in bankruptcy or an artificial 71

[17] BGE 137 III 268, 283 et seq.

creation of an overstated claim upon such declaration of bankruptcy in order to achieve a higher basis for a bankruptcy dividend or the like).

(ii) The second scenario is where the debtor is in financial difficulties at the time the act occurs. The scope of acts that can be challenged under such circumstances is significantly broader and, in respect of a debtor on the verge of a bankruptcy at the time such act occurs, eventually would include the payment of a matured claim or providing collateral, if the counterparty must have recognized that the debtor would have had to file for bankruptcy and, by making such payment outside the bankruptcy or by providing collateral, prefers or is deemed to have preferred such counterparty over other creditors (as insolvency proceedings require proportional satisfaction of claims of the same class) who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty.[18] 72

1.6 Jurisdiction Clauses and Insolvency Actions

It should be noted that under Swiss law jurisdiction or arbitration clauses have no effect on actions brought under the SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the court at the place of the Insolvency Proceeding. Accordingly, the arbitration clause provided for in the EFET General Agreement would not be effective in case of actions relating to Insolvency Proceedings. With respect to avoidance actions (see paragraph D.II.1.5), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents hold that the forum provided for in Art. 289 SDEBA (place of defendant) may be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with 73

18 In its decision NR. 5A.892/2010 of August 22, 2011 c.4., the Federal Supreme Court first confirmed that an avoidance action under Art. 288 SDEBA was independent of the other avoidance actions and, hence, could also, if the further qualified conditions are met, affect acts that could not be challenged under such other avoidance actions. It then held in the context of a collateralized total return swap documented under a 1992 ISDA Master Agreement and presumably an English law CSA-Transfer, that in the case at hand collateral was transferred for *existing obligations* and without *pre-existing obligation* to do so and, hence, caused damages for the other creditors and thereby subject to avoidance. The decision is in our view not properly reasoned, in particular as it denies the existence of a pre-existing obligation to transfer collateral on the basis of a perceived lack of predictability of the amount that would need to be collateralized when the parties entered into the agreement. At the same time it held that periodic balancing payments that the parties had agreed in longer intervals than the ones for the transfer of collateral with the last such payment having been made after the last transfer of collateral were part of the exchange of payments agreed by the parties at the outset and, hence, not subject to avoidance. As both the balancing payments and the transfer of collateral aim at the same reduction of exposure, are to be calculated on the same basis and were agreed at the outset, the different treatment seems inconsistent. So what in essence seems to be the immediate conclusion from this decision for derivative transactions (with secured amounts that necessarily will fluctuate), is that the risk perceived in our opinion that collateral posted under an existing security undertaking could be clawed back under Art. 288 SDEBA notwithstanding the existence of a security undertaking providing for additional collateral calls during the life of transaction(s) is confirmed by the decision, albeit with a less than convincing reasoning.

either the administrator or the creditors.

1.7 Seizure and Attachments of Assets

Assets located in Switzerland (either physically or, in case of claims, if the debtor of the claim is located in Switzerland) can be seized or attached as a provisional measure by a third party notwithstanding the fact that such assets are subject to a security interest without transfer of property (*regular pledge*). In case of seizure or attachment, the security taker loses its right to private liquidation, unless it is obvious that such assets do not cover the claims of the security taker in full, and hence, no excess value would be available to such third party. In case of liquidation by the competent authority the security taker retains its right to be satisfied from the proceeds of the liquidation of the assets pledged in its favor with priority over all other unsecured creditors. This, however, does not apply though for a security interest with full title transfer (irregular pledge, fiduciary transfer or assignment or outright full title transfer) as provided for in the EFET Credit Support Annex. 74

1.8 Special rules for banks, securities firms and branches of foreign banks and securities dealers and fund management companies[19]

Special bankruptcy and insolvency rules are applicable to Banks and branches of foreign banks established in Switzerland. Pursuant to Art. 67 FinIA, the same rules apply *mutatis mutandis* also to Securities Firms[20] and to branches of foreign securities firms established in Switzerland and to Fund Management Companies. A reference to a Bank shall in this para. D.II.1.8, hence, include Securities Firms and branches of foreign banks and securities firms as well as Fund Management Companies. The rules are set out in the Banking Act and in the Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Firms ("**BIO-FINMA**")[21]. 75

The SDEBA rules are applicable (only) to the extent that the Banking Act and the BIO-FINMA do not provide for special rules. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether 76

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19 Swiss Parliament has passed a partial revision of the Banking Act in December 2021 making certain changes to the insolvency measures in the Banking Act. Such amendments for one part create a more robust legal basis of such measures and clarify certain competences of the regulator at the level of the Banking Act as opposed to the BIO-FINMA (as defined below). The changes in the Banking Act are not yet in force. Such changes will also need to be implemented in the BIO-FINMA and there are no drafts available at this time. Based on the changes in the Banking Act and while this Schedule will need to be adapted, we do not think that in substance they will have a material impact on the conclusions of this opinion letter.

20 Securities Firms (*Wertpapierhäuser*) regulated under the FinIA correspond to Securities Dealers (*Effektenhändler*) that were regulated under the former Stock Exchange Act (SESTA) and to which the bankruptcy, rehabilitation or other insolvency or reorganisation procedures of the Banking Act also applied mutatis mutandis.

21 Verordnung der Eidgenössischen Finanzmarktaufsicht über die Insolvenz von Banken und Effektenhändlern (BIV-FINMA), SR 952.05.

with respect to Banks.

In addition, the Swiss Financial Market Supervisory Authority ("**FINMA**") may also deviate from the rules of the SDEBA where it deems appropriate to do so. Yet, according to the explanatory report accompanying the amendment of the Banking Act ("**Report**") and judging from the BIO-FINMA, such derogation is mostly of a formal nature. 77

The Banking Act grants broad powers to FINMA which is entitled to handle the insolvency proceedings against banks and securities dealers. In particular, FINMA has the authority to implement (i) protective measures (*Schutzmassnahmen*) in case of justified concern of an insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen*) or (iii) solvent or insolvent liquidation proceedings relating to banks (*Bankenkonkurs*). 78

Pursuant to the Banking Act, bankruptcy is declared and made public by FINMA if there is no prospect of restructuring the Bank (*Aussicht auf Sanierung*) or where the attempt to restructure the Bank have failed. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by one or more special liquidators which are to be appointed by FINMA (*Konkursliquidatoren*). 79

Protective measures may include a broad variety of measures such as in particular a bank moratorium (*Stundung*) or a maturity postponement (*Fälligkeitsaufschub*) and may be ordered by FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by FINMA. 80

Pursuant to Art. 30 Banking Act, FINMA further has the power, by ordering reorganization proceedings (*Sanierungsmassnahmen*), to order that selected banking services be continued, regardless of the continued existence of the reorganized Bank. In particular, FINMA may order the transfer of all or part of the business with assets, liabilities and contracts to another existing entity or a newly established bridge bank, with such transfer becoming effective upon the ratification of the reorganization plan by FINMA. 81

The reorganization plan can also provide for a debt for equity swap. Where a reorganization plan affects creditors' rights, FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent in excess of 50% of the amounts of third class claims in the books of the Bank reject such plan, then the reorganization plan has failed and FINMA has to order the bankruptcy.[22] 82

In this context, it is to be noted that Art. 31 Banking Act requires that any reorganization plan and reorganization measures contemplated therein (transfer of banking services or bail in 83

22 Pursuant to an amendment of the Banking Act in 2012, the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

measures such as capital reduction or conversion) adequately take into account and preserve the legal and economic connections between assets, liabilities and contractual relationships that are to be subjected to such measures. This then translates into the safeguards of Art. 49 lit. b and Art. 50 BIO-FINMA, that except claims that are subject to set-off/netting rights or collateral arrangements from bail-in measures (capital reduction or conversion) to the extent of such netting and collateralization. A net excess claim or an unsecured excess claim against the reorganizing Bank, though, would then be subject to such measures. In the case of a transfer of a banking business, the principle of Art. 31 Banking Act translates into an obligation to see to it that claims that are subject to a set-off/netting arrangement or collateral arrangement or have other legal or economic ties only be transferred as a whole pursuant to Art. 51 para. 1 lit. h no. 1 BIO-FINMA.

Art. 27 para. 1 of the Banking Act provides for the safeguard of netting arrangements (lit. a), private collateral realization arrangements (lit. b) and, in addition, porting arrangements (lit. c) in case of protective measures (*Schutzmassnahmen*), reorganization proceedings (*Sanierungsverfahren*) or an insolvent liquidation (*Konkursliquidation*) being taken in respect of a Bank. 84

Art. 27 paragraph 1 lit. a of the Banking Act not only safeguards contractual netting arrangements as such, but also the methodology for such netting and the valuation thereunder. 85

As Art. 27 para. 1 of the revised Banking Act is particularly meant to very broadly protect netting arrangements, we think that Art. 27 para. 1 of the Banking Act gives additional arguments for the prevalence of contractual close-out and set-off over both Art. 211 para. 2 and Art. 211 para. 2^{bis} SDEBA in the context of Banks and with the freedom to agree on the method and valuation of the close-out and set-off also in our view gives a further strong argument to allow Optional Early Termination for Banks. This is also supported by the fact that the stay right of Art. 30a Banking Act addresses both a termination (*Beendigung*) and the exercise of termination rights (*Ausübung von Beendigungsrechten*). The accompanying report of the Federal Council states that "termination" is a reference to automatic early termination and "exercise of termination rights" a reference to optional early termination. 86

The same holds true for the right to privately realize collateral in the form of securities and financial instruments even though collateral has been provided outside a title transfer collateral arrangement. Art. 27 para. 1 lit. b, however, replaces the controversial requirement of a "representative market" by a concept of an "objectively determinable value" for such collateral as a prerequisite for such private realization in case of any of the afore stated measures or proceedings being taken against a Bank. Thus, collateral that consists of securities or other financial instruments that has merely been pledged and that for the Swiss law analysis is to be treated as a mere regular pledge *(reguläres Pfandrecht*), may still be realized outside insolvency proceedings and even after the opening of the particular insolvent liquidation 87 pursuant to Art. 33 Banking Act against a Bank or a Securities Firms as long as an objective value for such collateral can be established. It is no longer required that such value be established through transactions on an exchange, trading platform or other standard market (Art. 27 para. 1 Banking Act and Art. 18 BIO-FINMA). In our view collateral in the form of cash would equally be protected by the safeguard of Art. 27 para. 1 lit. b Banking Act and Art. 18 BIO-FINMA. While the wording of Art. 27 para. 1 lit. b Banking Act refers to "financial instruments", the legislative materials state explicitly that this term was meant to include cash collateral (*Barsicherheiten*). This is also supported by doctrine but we are not aware of any court precedents discussing this topic. [23]

The safeguard of porting in paragraph 1 lit. c is new and thereby expands the protection with 88
a view to the particular needs of cleared derivatives transactions.

At the same time, though, paragraph 2 of Art. 27 Banking Act provides for one exception to 89
this overarching safeguard, in that it expressly reserves the temporary stay (*Aufschub*) of a termination (*automatic termination*) or of the exercise of termination rights (*optional termination*) or of the exercise of netting, private realization of collateral or porting rights provided for in Art. 30a Banking Act.

Such stay can be ordered in conjunction with any protective measure (*Schutzmassnahmen*), or 90
more likely any measure taken in a reorganization proceeding (*Sanierungsverfahren*) (e.g. a transfer of bank services or bail-in measures such as capital reduction or capital conversion) and would take precedence over the safeguard of netting, private realization of collateral and porting rights that otherwise protects such arrangements against protective measures or reorganization proceedings. It cannot be ordered in conjunction with an outright order for the Insolvent liquidation of a Bank (*Konkursliquidation*). However, where certain bank services should be transferred, that would basically mean that FINMA would first order such transfer of banking services and then only order the insolvent liquidation of the reorganizing Bank. The stay targets any termination/exercise of termination rights and as a consequence of such termination the exercise of the netting, private realization and porting rights, where such termination is predicated on the very measure ordered by FINMA. It would, hence, not hinder termination or the exercise of termination and consequential rights based on the occurrence of another event of default such as an outright payment/delivery default. In any event, not if the event of default occurred prior to the measure ordered coupled with the stay. Where the measure coupled with the stay is a moratorium or otherwise defers the due date of an obligation that would otherwise have fallen due during the stay, this may arguably be caught by the stay. Following the lapse of the stay, however, termination could occur unless payment or delivery is being made as such termination would only be barred if FINMA confirms that the

23 We note, though, that the Swiss Parliament passed a partial revision of the Banking Act in December 2021 (see Footnote 19), clarifying that its Art. 27 para. 1 lit.b indeed also covers cash collateral. The changes in the Banking Act are not yet in force.

reorganization was successful, which in turn would require that the measure be lifted. If it's not lifted, the reorganization was not successful and the stay period having lapsed there is no issue with terminating.

The maximum duration of such stay is 2 business days. The stay becomes permanent with 91
respect to the particular measure for which it was ordered, where FINMA confirms within the 2 business days stay that the protective or reorganization measure was successful in reinstating the orderly state of a Bank's business and the satisfaction of the legal requirements by such Bank in respect of which such measures have been ordered. Where the reorganization measure consists in a transfer of all or part of the Bank's business, it is sufficient that the Bank's business as transferred to another Bank and to which the agreements subject to the stay of a termination or of the exercise of termination rights have been transferred satisfy such orderly state or other legal requirements. For completeness' sake, we note that no precedents are available as of the date hereof with respect to the application of Art. 27 Banking Act.

It is further noteworthy that the prerequisites for actions for the avoidance of transactions 92
(*actio pauliana*) are somewhat different from the respective SDEBA rules in that such actions can also be brought in case of a reorganization of a bank or a securities dealer. Furthermore in the first instance the Bank itself is competent to challenge these arrangements or dispositions once the reorganization plan has been approved by FINMA. If the reorganization plan does not provide for the challenge of these actions by the Bank itself, the creditors of the Bank may initiate these actions.

Finally, FINMA has the competence to recognize foreign insolvency decisions (whether 93
rendered in the country of such bank's legal seat or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. Federal Act on Private International Law ("**PILA**")[24], subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors.

24 Bundesgesetz über das Internationale Privatrecht (IPRG), SR 291.

1.9 Special rules for insurance companies[25]

The ISA and the implementing ordinance thereto ("**ISO**")[26], and the Ordinance of FINMA on the Bankruptcy of Insurance Companies ("**IBO-FINMA**")[27] provide for a special bankruptcy and insolvency regime applicable to Insurance Companies.

In relation to Insurance Companies, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the ISA and/or IBO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Insurance Companies. 94

Pursuant to the ISA, bankruptcy is declared and made public by FINMA if it has reasonable grounds of concern that an Insurance Company is overindebted *(Begründete Besorgnis der Überschuldung*) and there is no prospect of restructuring the Insurance Company (*Aussicht auf Sanierung*). The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator which is to be appointed by FINMA (*Konkursliquidator*). In addition, FINMA is granted the competence to deviate from the SDEBA rules where it deems it appropriate. This would in our view, though, be limited to procedural aspects and could not affect creditor's rights beyond what the ISA or the SDEBA provides for. 95

We note in particular that the IBO-FINMA grants a liquidator appointed by FINMA (*Konkursliquidator*) the power to challenge certain arrangements or dispositions made by the insolvent Insurance Company. The liquidator has to examine *ex officio* whether certain arrangements or dispositions made by the insolvent Insurance Company may be subject to challenge. In calculating the lapse of the suspect period, the duration of a preceding 96

25 Swiss Parliament has passed a partial revision of the ISA in March 2022 making various changes to the insolvency measures in the ISA. Such amendments mainly concern protective measures and now provide for reorganization measures that in many respects are similar to the ones for banks. Such reorganization measures in particular comprise bail-in measures such as reduction or conversion of claims into equity (with safeguards for claims that are subject to netting or collateral arrangements) as well as a transfer of part or all of the insurance portfolio or other parts of the insurance business. The revision also introduces a safeguard of netting, collateral and porting arrangements in that such arrangements take precedence over any protective, reorganization measures or in case of the order of a bankruptcy. There is one exception, namely FINMA can in connection with the order of protective or reorganization measures order a stay, of termination rights and for the exercise of netting, private realization of collateral or porting for up to 2 business days ("**Stay Order**"). Both the safeguards and the Stay Order are instruments already known today for Banks. The changes in the ISA are not yet in force. Such changes will also need to be implemented in the IBO-FINMA and there are no drafts available at this time. Based on the changes in the ISA and while this opinion letter will need to be adapted, we do not think that in substance they will have a material impact on the conclusions of the opinion letter, other than the introduction of the Stay Order in case of an insolvency of an Insurance Company.

26 Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen (AVO), SR 961.011.

27 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von Versicherungsunternehmen (Versicherungskonkursverordnung-FINMA, VKV-FINMA), SR 961.015.2.

reorganization (*Sanierung*) or of preceding reorganization measures (*Sanierungsmassnahmen*) as per Art. 51 ISA are not counted. If the liquidator concludes that certain arrangements or dispositions may be subject to challenge, the liquidator requires the approval of FINMA in order to initiate the respective court proceedings. If FINMA refuses to approve, or the liquidator declines to initiate, such proceedings, the respective claims are to be offered to the creditors for assignment, all in accordance with Art. 260 SDEBA, i.e. it is up to single creditors whether they are willing to take such assignment and thereby start an avoidance action. In substance, though, the avoidance actions that are applicable to Insurance Companies as well and there consequences correspond to what is discussed above (see paragraph D.II.1.3) in general.

The ISA further provides for comprehensive rights of FINMA to order or take precautionary measures in case an Insurance Company does not comply with the solvency requirements or if it seems otherwise warranted in the circumstances to safeguard the interests of the insured persons. 97

Pursuant to Art. 51 ISA, FINMA can, *inter alia*, take the following protective measures, which are of interest in the context discussed herein: 98

- limit the right of an Insurance Company to dispose of its assets; 99
- order a freezing of assets or order that such assets be deposited with a third party (freezing); 100
- transfer the powers of corporate bodies of an Insurance Company to a third party; 101
- order that an insurance portfolio be transferred to another insurance company together with the pertaining Allocated Assets (transfer of assets); 102
- order the liquidation of a pool of Allocated Assets (liquidation of allocated assets); 103
- allocate free assets to a pool of Allocated Assets; 104
- in the case of a threatening insolvency order a moratorium and payment deferral. 105

Finally, with regard to the recognition of foreign insolvency decisions, Art. 54d ISA refers to the relevant provision of the Banking Act (see paragraph D.II.1.8 above). 106

Such measures could affect the Insurance Company's ability to provide collateral, irrespective of whether the underlying security agreement is to be qualified as an unconditional transfer of title in the assets or as an irregular or regular pledge. 107

An Insurance Company active in direct insurance must at all times allocate qualifying assets to a segregated pool of assets in order to cover insurance claims (Art. 17 ISA), such rule not being applicable to the reinsurance business (Art. 35 ISA). The rules applicable to, and the designation as allocated assets (*Gebundenes Vermögen*) (the "**Allocated Assets**") have in respect of the issues relevant in this context, been harmonized for all insurance categories. An 108

Insurance Company has to form separate pools of Allocated Assets in respect of certain business lines (Art. 77 ISO) and FINMA may order to form further separate pools of Allocated Assets if necessary to secure the claims under the concerned contracts (Art. 77 para. 3 ISO). An Insurance Company is also free to voluntarily further sub-divide its insurance portfolio and create separate pools of Allocated Assets for each such sub-divided insurance portfolio. Hence, an Insurance Company may have several pools of Allocated Assets. Any assets, which are not so segregated in a particular pool of Allocated Assets, are referred to herein as "**Free Assets**".

Due to the particular function of the Allocated Assets as security for insurance claims, only assets which are unencumbered and which are not subject to any right of set-off may as a rule form part of the Allocated Assets (Art. 84 para. 2 ISO)[28]. However, Art. 91 para. 3 ISO explicitly reserves netting in respect of financial derivatives, which form part of one and the same pool of Allocated Assets. Art. 91a para. 1 ISO expressly stipulates that collateral required to secure financial derivatives under a master agreement may also be provided out of the particular pool of Allocated Assets without the need to replace such encumbered assets in the Allocated Assets and specifically allows the use for both providing initial and variation margin. However, FINMA may restrict the provision of such collateral from Allocated Assets or may grant exceptions in duly justified cases (Art. 91a para. 3 ISO). The investment guidelines for allocated assets (IGA 2016/5)[29] ("**IGA**") provide for detailed rules in respect of the use of derivatives and providing collateral from Allocated Assets and in particular provide for a series of documentation requirements that have to be met.[30] 109

28 Art. 84 para. 2 ISO literally stipulates that liabilities which do not form part of Allocated Assets may not be set-off against assets of the Allocated Assets. There are some doubts, though, that such a prohibition to set-off in a mere ordinance is a sufficient legal basis. It is more likely to be interpreted as a prerequisite for an asset to qualify for the Allocated Assets that it indeed is not exposed to a right of set-off. FINMA, therefore, also requests that the parties to a master agreement clearly exclude a set-off of claims under the master agreement for Allocated Assets with claims outside such master agreement and that this waiver is meant to be applicable prior to and after insolvency of a party (IGA note 495).

29 FINMA Rundschreiben 2016/5 (*Anlagerichtlinien Versicherer*).

30 The IGA provides for a requirement that a separate master agreement be used for each pool of Allocated Assets (IGA note 451) and that such master agreement provides that no set-off be allowed with respect to claims outside the particular pool of Allocated Assets (IGA note 462). IGA note 466 now stipulates that derivative transactions in connection with Allocated Assets need to be collateralized on a bilateral basis. The Insurance Company may provide collateral from its Allocated Assets (IGA note 467) under a Swiss law regular or irregular pledge or foreign equivalent security interest (i.e. with or without title transfer) (IGA note 468). If the Insurance Company has to provide initial margin in respect of transactions of its Allocated Assets, then such initial margin must be deposited with a third party on a segregated basis and may only be used to cover derivatives transactions of the respective Allocated Assets (IGA note 468). Collateral posted by an Insurance Company from its Allocated Assets is still accounted for as part of the Allocated Assets and the credit support document needs to specifically address the fact that the claim for a return of collateral which is part of a pool of Allocated Assets belongs to such pool of Allocated Assets (IGA note 465). Thresholds and minimal transfer amounts need to be kept low and need to take into account the counterparty's credit (IGA notes 473-474). Collateral received by the pool of Allocated Assets needs to be held as the Allocated Assets, i.e. be kept at the Insurance Company or deposited in Switzerland with a Swiss custodian under a particular custody

If an Insurance Company is dissolved and to be liquidated, FINMA appoints a special liquidator and supervises its activity (Art. 52 ISA). 110

To the extent that the pools of Allocated Assets are not being transferred to another insurance company together with the respective insurance portfolio, but rather liquidated, the proceeds of such liquidation are to be utilized in first priority to discharge the insurance claims secured by such pools of Allocated Assets. As for a bankruptcy (see below), we are of the view, that the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such Allocated Assets and not from its Free Assets only. 111

The Allocated Assets are also liquidated in the context of the bankruptcy. As mentioned above, though, the proceeds from the liquidation of the Allocated Assets are first to be used to cover the insurance claims secured by the particular Allocated Assets and only the excess becomes part of the bankruptcy estate (Art. 54a and 17 ISA). 112

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 113

1.10 Special rules applicable to collective investment vehicles

1.10.1 Collective Investment Vehicles in general

The CISA and the Ordinance of FINMA on the Bankruptcy of Collective Investment Vehicles ("**CISBO-FINMA**")[31] provide for a special bankruptcy and insolvency regime applicable to Contractual Funds and SICAVs (Collective Investment Vehicles), i.e. to the relevant FINMA license holder of such Collective Investment Vehicles (other than Fund Management Companies of a Contractual Fund). 114

In relation to Collective Investment Vehicles, the general bankruptcy and insolvency rules of the SDEBA apply only to the extent that the CISA and/or the CISBO-FINMA do not provide for special rules. The SDEBA rules regarding moratorium (*Nachlassstundung*) pursuant to Art. 293-336 SDEBA are expressly disapplied altogether (Art. 137 para. 2 CISA). 115

agreement or if abroad or with a foreign custodian abroad (in which case the Insurance Company must provide evidence that the respective foreign bankruptcy law will respect the priority of use of the Allocated Assets for insurance holders as described herein (IGA note 156 and 470) and such evidence can take the form of an official confirmation or an acceptable legal opinion (IGA note 157)). Collateral posted by the counterparty is legally attributed to the Allocated Assets and IGA note 475 requires that this be made evident for third parties, but no value may be allocated to it as it constitutes a mere security.

31 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von kollektiven Kapitalanlagen (Kollektivanlagen-Konkursverordnung-FINMA, KAKV-FINMA), SR 951.315.2.

Pursuant to Art. 137 CISA, FINMA declares the bankruptcy of a Collective Investment Vehicle, i.e. the relevant FINMA license holder of such Collective Investment Vehicle, in case there are reasonable concerns (*begründete Besorgnis*) that such person is overindebted (*überschuldet*) or has serious liquidity problems (*ernsthafte Liquiditätsprobleme*) and if a mere reorganization (*Sanierung*) is not viable or has failed. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator appointed by FINMA (*Konkursliquidator*). 116

The CISBO-FINMA provides for a more detailed legal framework in respect of insolvency proceedings of Collective Investment Vehicles. Having said this, the CISBO-FINMA adapts the general insolvency regime set by the SDEBA to the particularities of Collective Investment Vehicles, and to the extent that the CISBO-FINMA does not provide for particular rules, the general rules on bankruptcy as per the SDEBA apply. 117

1.10.2 Collective Investment Vehicles in the form of a SICAV.

By contrast to Contractual Funds, SICAVs are incorporated forms of collective investments and it is the SICAV itself that is the holder of the relevant FINMA license under Art. 13 para. 2 lit. b CISA. 118

Insolvency proceedings may, therefore, be initiated against the SICAV as for any other company. SICAVs are, however, subject to the particular insolvency regime applicable to Collective Investment Vehicles pursuant to Art. 137 CISA and the CISBO-FINMA set-out above. 119

In the specific case of an umbrella SICAV, the insolvency of a single sub-fund of such umbrella SICAV does not necessarily trigger the insolvency of the whole SICAV. The SICAV's entrepreneurial sub-fund assets (*Unternehmerteilvermögen*) are, however, on a subsidiary basis used to cover the liabilities of another investors' sub-fund not covered by such sub-fund's assets (*Anlegerteilvermögen*) pursuant to Art. 97 para. 3 CISA and Art. 28 para. 2 CISBO-FINMA. In case of an insolvency of a sub-fund of an umbrella SICAV that is not made up by a payment by the SICAV, the Insolvency Proceedings would be initiated against the SICAV. In the Insolvency of the SICAV, Art. 35 para. 1 CISBO-FINMA provides that the special liquidator may in the interests of the SICAV's investors apply to FINMA that FINMA order based on Art. 141 CISO that the fund or a sub-fund be transferred to another solvent SICAV, which includes all of the fund's or the sub-fund's assets and liabilities rather than to dissolve and liquidate such fund or sub-fund. 120

Where a sub-fund is liquidated, the participating creditors are the creditors of the particular sub-fund. Following the enactment of the FinIA, it is now made clear that each sub-fund is 121 only liable for its own liabilities under such structure and that there will be no cross-liability between sub-funds.[32]

1.10.3 Collective Investment Vehicles in the form of a Contractual Fund

A Collective Investment Vehicle in the form of a Contractual Fund is not a separate legal entity but merely a separate asset pool (with its own rights and obligations)[33]. As such, it does not have legal capacity to act and is represented by its Fund Management Company in accordance with Art. 32 et seq. FinIA. The Fund Management Company is the license holder for a Contractual Fund and the subject of bankruptcy proceedings. The Fund Management Company (contrary to the Contractual Fund as such) is, however, not any longer regulated under the CISA, but rather the FinIA.[34] A Fund Management Company must be organized as a joint stock corporation (*Aktiengesellschaft*) and is pursuant to Art. 67 FinIA subject to the insolvency regime applicable to Banks and Securities Firms (see paragraph D.II.1.8). This has the effect that the particular safeguards with respect to set-off, netting and close-out netting as well as private realization of collateral applicable to Banks now also apply with respect to a Fund Management Company. 122

A Contractual Fund's assets are held on a fiduciary basis by the applicable Fund Management Company on behalf of such Contractual Fund's investors. In other words, the Fund Management Company is the legal owner of all assets pertaining to the Contractual Fund. Art. 40 para. 1 FinIA accordingly provides that, in case of a bankruptcy of the Fund Management Company, the Contractual Fund's assets are segregated from the Fund Management Company's bankruptcy estate in favor of the Contractual Fund's investors. However, the Fund Management Company and thereby its insolvency estate have a claim to be held harmless and indemnified for any obligation or expense incurred or fees earned in due performance in due performance of its duties with respect to the Contractual Fund and may pay such claims from the Contractual Fund's assets. Pursuant to Art. 40 para. 2 FinIA only obligations of a particular Contractual Fund may be set-off against claims of such Contractual Fund. It is being held in Swiss legal doctrine that this provision evidences the principle that the Contractual Fund's separate pool of assets not only comprises the physical assets and rights of such Contractual Fund but also its obligations. 123

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32 Previously, such limitation was disregarded where the limited liability was not disclosed to the counterparty when entering into the respective obligations.

33 According to Art. 92 and 93 CISA.

34 Fund Management Companies were until December 31, 2019 licensed under the CISA. Following the enactment of the FinIA, Fund Management Companies are now subject to the FinIA instead and the insolvency regime applicable to Fund Management Companies is not any longer the one under Art. 137 CISA, but pursuant to Art. 67 FinIA, in principle the regime applicable to Banks under the Banking Act. However, such Fund Management Companies were not required to obtain new licenses under the FinIA. Rather, their licenses granted under the CISA continued to be valid under the FinIA.

In case of an insolvency of a Fund Management Company, unless a transfer of a Contractual Fund to a solvent Fund Management is deemed to be in the interest of the investors in such Contractual Fund and such transfer can be achieved, FINMA orders the dissolution and liquidation of the Contractual Funds managed by such Fund Management Company in accordance with Art. 20a BIO-FINMA. Where a Contractual Fund is liquidated, the creditors participating in such liquidation are solely the creditors of the particular Contractual Fund, or in case of a sub-fund the respective sub-fund. 124

As mentioned above, a Contractual Fund has no legal personality of its own and neither the CISA nor the FinIA grant a Contractual Fund capacity to act or to seek Insolvency Proceedings against the Contractual Fund. Hence, in our view enforcement would have to be sought against the Fund Management Company and would ultimately result in Insolvency Proceedings directed against the Fund Management Company that are governed by Art. 67 FinIA, and by reference therein, the Insolvency Proceedings applicable to Banks. We recommend that, the documentation for transactions with Contractual Funds make it clear that an event of default (including with respect to Insolvency) is triggered if the relevant event arises with respect to either the Contractual Fund itself or with respect to the applicable Fund Management Company. 125

2. Enforceability of Close-out Netting

2.1 Termination and Close-out Netting absent Insolvency

2.1.1 Termination of EFET General Agreement and Individual Contracts

The EFET General Agreement and thereby the termination provisions of §10 are governed by either English or German law or in the context of the discussion of close-out netting any other law. Such choice of law is valid under Art. 116 PILA. The termination provisions of §10 are, where the EFET General Agreement is governed by a law other than Swiss law, subject to being valid, binding and enforceable under such law, enforceable against Party A as a matter of Swiss law. 126

While the Material Reasons comprised in the termination for material reasons as per §10 of the EFET General Agreement seem quite comprehensive, the stipulated exhaustive character of the term "Material Reasons" (§10.5) may not be enforceable in the event a party wants to terminate the Agreement outside such contractually stipulated Material Reason and a court concludes that such reason properly evidenced by the terminating party constitutes a material reason (*wichtiger Grund*) at law, i.e. where the insistence of the non terminating party on continuance of the EFET General Agreement would need to be viewed as an outright abuse of law in the specific circumstances. 127

2.1.2 Close-out Netting / Set-off under Swiss substantive law

Close-out netting is neither a clear-cut concept nor specifically addressed in Swiss substantive law. It can, in particular, not be clearly distinguished from a contractual set-off arrangement. Subject to limitations of general principles of law, parties are free, however, to determine the conditions for and the effects of any termination of their contracts. 128

Under Swiss substantive law, the termination of an agreement and the determination of one single lump-sum termination amount in lieu of all amounts otherwise owed under various transactions entered into thereunder (which are the characteristic elements of what is generally referred to as close-out netting) would in our view be treated as a pre-agreed contractual liquidation of all such transactions in certain circumstances agreed upon by the parties. Under Swiss substantive law, the procedure of liquidating contractual claims can be agreed upon in advance and a close-out netting provision would, hence, be recognized under Swiss law. 129

As a matter of Swiss substantive law, the parties may also by contract stipulate a set-off of mutual claims and thereby deviate from the requirements that would otherwise apply to a unilateral right of set-off under Swiss substantive law. Such requirements that would, in the absence of a contractual agreement to the contrary, apply to a unilateral right of set-off are: 130

(i) the parties have to be each others' mutual creditor and debtor (mutuality requirement); 131

(ii) the mutual claims must be of the same kind (e.g. monetary claims)[35]; 132

(iii) the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid); and 133

(iv) the counterclaim must be due. 134

2.1.3 Netting / Set-off under Swiss conflict of laws rules

Art. 148 of the PILA deals with set-off in an international context and addresses both the unilateral right of set-off and the contractual set-off. 135

In respect of the unilateral right of set-off, it is first to be noted that the PILA regards such right as a substantive right as opposed to a mere procedural right. Hence, it is not the *lex fori* that applies, but pursuant to Art. 148 para. 2 PILA the law applicable to the claim owed by the party having first declared the set-off. Such claim is referred to as the main claim (*Hauptforderung*), whereas the other claim is referred to as the set-off claim 136

35 Monetary claims expressed in different currencies are treated as being of the same kind if the currencies are freely convertible and unless the parties specifically agreed or it is customary that an obligation must be effectively discharged in the agreed currency (effective clause). Even if there is such an effective clause, the parties may agree that different currencies may be set-off and this latter agreement would for the purposes of set-off prevail over the effective clause (BGE 130 II 318).

(*Verrechnungsforderung*) and the law applicable to the unilateral set-off pursuant to Art. 148 PILA is referred to as the set-off statute (*Verrechnungsstatut*).

Pursuant to Art. 148 para. 2 PILA, the set-off statute determines, *inter alia*, (i) the requirements of a unilateral right of set-off (e.g. whether reciprocity/mutuality is required and what constitutes reciprocity/mutuality), (ii) how the right of set-off is exercised, and (iii) its effects. 137

Still, it is the law that governs the main claim and the set-off claim respectively (the contract statute) which determines whether the claim satisfies such requirements (e.g. whether a claim is due if that is required and it is also the contract statute that determines who is the creditor/debtor of the respective claims). We are further of the view that the question whether a claim may be subject to set-off at all is also governed by the contract statutes of the respective claims and not the set-off statute. 138

There is some controversy in Swiss legal doctrine as to whether the set-off statute governs the effects of the set-off on the main claim only or whether it also governs the effects on the set-off claim, i.e. whether it is also applicable as to the question of extinction of the latter. The prevailing view seems to be that it applies to both, unless the law applicable to the set-off claim does not know the concept of set-off at all. 139

Art. 148 para. 3 PILA, by reference to Art. 116 PILA, provides that a contractual right of set-off is governed by the law chosen by the parties in the set-off agreement. In the absence of a choice of law, a Swiss court would need to determine and apply the law of such jurisdiction that is most closely related to such agreement. Again, such law would determine the requirements for set-off, but also the extent to which such requirements may be freely agreed between the parties and the effects on the respective claims. 140

A Swiss court would, hence, look to the laws governing the EFET General Agreement to determine the requirements for set-off. However, once the Swiss court has established such requirements, it may then well have to look to another law that may be applicable to the question as to whether a particular claim satisfies such requirements. It is important to note that such other laws would again be determined by the Swiss conflict of laws rules and not any conflict rules of the laws governing the EFET General Agreement (as the set-off statute) may further direct. 141

The application of the chosen law would, however, be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. We have not on the face of the EFET General Agreement identified any provisions that we would view as contrary to the general principles of Swiss public policy (*ordre public*). 142

In our view, the Close-out Netting Provisions are best analyzed not as a mere modification of a unilateral right of set-off, but as a comprehensive contractual set-off arrangement and, hence, as a close-out netting mechanism. 143

The calculation of the Termination Amount by the terminating party and the calculation method (including the abstract calculation method provided as an alternative) are also valid, albeit subject to judicial review if the amount so calculated is being contested as erroneous. 144

This Opinion is based on our understanding that a negative Termination Amount would be payable to the terminating party (or in the case of Automatic Termination, the party which has not triggered such termination), while a positive Termination Amount would be payable to the terminated party. The Parties may consider to clarify the afore stated principle, which in the light of the term "damages" used in § 10.3(b) of the EFET General Agreement with respect to the Delivery and Acceptance of Electricity is otherwise not entirely clear, e.g. by bringing it in line with § 10.3(b) of EFET General Agreement with respect to the Delivery and Acceptance of Natural Gas. 145

2.1.4 Close-out Netting / Set-off under the EFET General Agreement prior to Insolvency – Conclusions

It is our understanding of the EFET General Agreement , and we have for purposes of this Opinion assumed, that (i) all amounts to be set-off or netted pursuant to the EFET General Agreement and (ii) any calculations in respect of Transactions to arrive at a Termination Amount (as contemplated by the Close-out Netting Provisions) are expressed as monetary claims. 146

Based on the above, we are of the view that the Close-out Netting Provisions would be recognized and be enforceable against a Party A prior to Insolvency. 147

2.2 Termination and Close-out Netting in case of Insolvency

Our Opinion is based on the following additional assumption:

After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Switzerland and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty. 148

2.2.1 Termination and Step-in Right in general

Insolvency does not as a rule *per se* result in a termination of all bankrupt party's contracts unless the applicable substantive contractual law governing a specific contract provides otherwise. Subject to the Step-in Right (as defined and discussed below), though, all non- 149 monetary claims against the bankrupt party are converted into monetary claims in case of a declaration of bankruptcy (*Konkurseröffnung*) or a ratification of a composition agreement with assignment of assets (*Bestätigung des Nachlassvertrages mit Vermögensabtretung*) (each an "**Insolvency Event**") or, in case of a moratorium (*Nachlassstundung*), upon notification of such conversion by the administrator to the counterparty pursuant to Art. 297 para. 9 SDEBA. In turn, parties are pursuant to the almost unanimous view among legal scholars free to stipulate in their contract that an Insolvency shall give rise to a termination of such contract, be it automatically or, subject to certain limitations discussed below, by notice.[36]

In a bankruptcy, the receiver in bankruptcy may pursuant to Art. 211 para. 2 SDEBA request 150
the fulfilment of any undischarged obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfils its obligations under the relevant contract (the "**Step-in Right**"). The Step-in Right is by analogy available to the liquidator in case of a composition agreement with assignment of assets. Any obligation resulting from a contract for which the relevant Insolvency Representative exercised the Step-in Right becomes a direct and own obligation of the relevant Insolvency estate (*Massaverbindlichkeit*) and must be satisfied from such Insolvency estate ahead of other creditors. This is *inter alia* the reason why an Insolvency Representative will only exercise the Step-in Right with respect to obligations that it views as critical or beneficial for an orderly and favorable liquidation of an insolvent person and thereby as benefitting all creditors. Insofar as long term agreements (*Dauerschuldverhältnisse*) are concerned, though, the consequence of obligations becoming obligations of the Insolvency estate only applies to obligations which come into existence after the occurrence of the Insolvency Event and for as long as the receiver in bankruptcy exercises the Step-in Right (Art. 211a para. 2 SDEBA; the "**Partial Step-in**"). It is not further specified in the SDEBA what types of agreement would qualify as long term agreement. Typical examples include rental contracts, employment contracts, license agreements and similar. In the context of the EFET General Agreement , it is noteworthy that some authors take the view that swap contracts may also qualify as long term agreements in the broader sense and there is one author that seems to suggest that swaps may therefore fall under Art. 211a SDEBA unless the relevant swap contracts do meet the definition of Qualifying Contracts (as defined and discussed in paragraph D.II.2.2.3 below) where the Step-in Right is excluded.

36 There is one recent dissenting view in Swiss legal doctrine that holds that any contractual termination right, whether optional or automatic, would be void and the same consequence is also proposed as a rule for contractual liquidation provisions due to an alleged violation of the principle of equal treatment of creditors. On this basis, the author further states that close-out netting would not be enforceable in a bankruptcy, unless protected by a particular netting safeguard provision, including where transactions qualify as Qualify Transactions within the meaning of Art. 211 para. 2^{bis} SDEBA (see paragraph D.II.2.2.3 below). It is a singular view with which we disagree, in that we deem it to be contrary to the legislative intention and history and contrary to the predominant view in Swiss legal doctrine.

Exercising the Step-in Right presupposes that the relevant contract has not been terminated as confirmed by a recent precedent of the Swiss Federal Supreme Court.[37] 151

2.2.2 Step-in Right and contractual termination arrangements

There are no court precedents to date as to whether the statutory Step-in Right could interfere with or preclude contractual termination arrangements of the parties. 152

According to the predominant view in Swiss legal doctrine, and supported by decisions of the Swiss Federal Supreme Court[38], the Step-in Right is held to constitute a mere procedural provision rather than a substantive law rule. As per the legislative history, the introduction of the Statutory Close-out (as defined and discussed in paragraphs D.II.2.2.3 and D.II.2.2.4 below) of Art. 211 para. 2^bis SDEBA did not aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision. 153

Based on such qualification as a procedural provision and the reference in Art. 211 para. 3 SDEBA which reserves termination provisions under substantive law, the almost unanimous view in Swiss legal doctrine holds that the Step-in Right does not preclude a termination arrangement validly agreed by the parties prior to the commencement of an Insolvency Procedure. Many authors when discussing the Step-in Right highlight the fact that Art. 211 para. 2 SDEBA only grants the Insolvency Representative a Step-in Right into contractual obligations as the same were agreed between the Parties and as they stand as per the occurrence of an Insolvency Event, i.e. the Insolvency Representative cannot claim any more rights than the Insolvent party could have claimed, or disregard any rights that the non-defaulting party has under the respective contract. 154

The foregoing view is expressed in connection with both automatic and optional termination rights. We note, though, that one statement in doctrine could be read to imply that unless an optional termination right has been exercised before the occurrence of an Insolvency Event such exercise would not be possible any longer due to the Step-in Right. The statement is not entirely clear, though and would be a singular view whereas the clear majority of scholars accepts that optional termination rights may be exercised also after the occurrence of an Insolvency Event. That said, certain additional requirements are being discussed in doctrine for the exercise of the relevant optional termination to be admissible. On the one hand, it is proposed by some authors that such termination rights should be exercised shortly after the occurrence of the relevant termination event. While some scholars argue this on the basis of Swiss substantive contract law and the principle of good faith, others appear to draw this 155

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37 The Swiss Federal Supreme Court has ruled on November 5, 2018 (4A_203/2018) that the Step-in Right cannot be exercised for contracts that are already terminated due to bankruptcy. Although the precedent was about a mandate agreement that terminated by operation of law in the event of bankruptcy, we are of the view that the same logic should apply to a contractual termination.

38 BGE 104 III 84 S. 94 of October 26, 1978, confirmed by 5A_823/2015 of September 7, 2015.

conclusion directly on the basis of the SDEBA (in which case it would apply irrespective of the law governing the relevant contract). Other authors suggest that, under optional termination, notice will have to be given with (retroactive) effect as per the occurrence of the Insolvency Event (and not with effect as of a date thereafter). We note in this respect that the master agreements may not accept the concept of a retroactive termination. Finally, one author appears to suggest that an optional termination right cannot be invoked any longer where the Insolvency Representative has exercised its Step-in Right in the interim. The statement lacks clarity and is not widely discussed in doctrine but we are aware of at least two statements which come to the opposite result.[39]

On the basis of the foregoing, it is our view, that the Step-in Right does not preclude a 156
contractual termination arrangement and that the Step-in Right could not any longer be exercised upon the effectiveness of any such termination. The calculation of one single amount pursuant to a close-out netting provision under such circumstances is in our view also generally valid and binding (subject to the discussion as outlined in more detail in paragraph 2.2.6 below).

We note, though, that no court precedents are available on this very point and we further refer 157
to the controversial discussion on certain additional requirements which are being discussed in doctrine on the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly.

2.2.3 Statutory Close-out

Art. 211 para. 2bis SDEBA excludes the Step-in Right in respect of certain types of agreements, 158
i.e. (i) fixed term agreements (*Fixgeschäfte*) within the meaning of Art. 108 CO[40], and (ii) certain financial derivative transactions, including financial swaps, forward agreements and options (each, a "**Qualifying Contract**") and in turn provides for automatic termination of such contracts in case of bankruptcy[41] and the abstract calculation of a liquidation amount based on market or exchange quoted prices as compared to the contractual value (the

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39 If this author were correct, a further question would arise as to whether the Step-in Right could be validly exercised for some (but not all) transactions (cherry picking) (which does not appear to be discussed in doctrine).

40 Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other party were to specifically agree to it, qualifies as such fixed term agreement (*Fixgeschäft*). Furthermore, the predominant view is that the exclusion of the Step-in Right pursuant to Art. 211 para. 2bis SDEBA applies to all fixed term agreements rather than to financial agreements only.

41 And again by analogy in case of a confirmation of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*).

"**Statutory Close-out**"). Such calculation does not as per its wording, however, take into account any further damages or costs of either party.

The Statutory Close-out as per its terms applies to individual Qualifying Contracts. The calculation examples given in the legislative materials appear to suggest, though, that in case of multiple Qualifying Contracts between the same parties the liquidation amounts with respect to each liquidated Qualifying Contracts will be subject to a statutory netting (i.e. not dependent on a specific declaration of set-off by either party or a set-off or netting agreement). We note, though, that the statutory netting is not really discussed as such in the legislative materials and that the wording of Art. 211 para. 2bis SDEBA does not mention such netting. There is no further guidance available in court precedents or legal doctrine on the topic. If the Statutory Close-out does not result in a statutory netting of liquidation amounts under multiple Qualifying Contracts, it is our view that set-off would generally be available (subject to the discussion under paragraph D.II.2.2.6 below). 159

2.2.4 Statutory Close-out and contractual termination arrangements

There are no court precedents to date as to whether the Statutory Close-out could interfere with or preclude contractual termination arrangements of the parties. 160

Art. 211 para. 2bis SDEBA was introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in an Insolvency Proceeding. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2bis SDEBA, which, as outlined above, does not limit itself to excluding the Step-in Right of Art. 211 para. 2 SDEBA, but establishes a Statutory Close-out in that it provides that the relevant contracts are automatically terminated and lays down an abstract calculation of a liquidation amount, which is similar but not identical to typical close-out netting provisions and may therefore be more restrictive as to e.g. further costs and damages. It was also stated in the report of the expert commission addressed to the Federal Office of Justice that the entire Art. 211 SDEBA is procedural (rather than substantive) law in nature. 161

This raises the question whether Art. 211 para. 2bis SDEBA may be modified, most noteworthy as to the automatic character of a termination / liquidation of underlying contracts and the calculation method of the amount to be paid following such termination. While there are various nuances among the growing number of legal scholars discussing this point, it is our view that the prevailing view accepts (within certain limitations as discussed under paragraph 2.2.6 below) contractually agreed deviations from the abstract calculation of a liquidation amount as set out in Art. 211 para. 2bis SDEBA whereas termination provisions are accepted by a majority view, provided that they are triggered by an event which occurs not later than the occurrence of an Insolvency Event. Accordingly, Art. 211 para. 2bis SDEBA is not generally viewed as mandatory law in its entirety. That said, there is more controversy as to 162 whether an optional termination taking place after the occurrence of an Insolvency Event should be effective or replaced by the automatic termination upon the opening of bankruptcy in the light of Art. 211 para. 2^{bis} SDEBA than as to the dispositive nature of the calculation method.

Insofar as the validity of a contractual termination as such is concerned, this is predominantly discussed in the context of optional early termination but does not typically give rise to much debate where automatic early termination is agreed. An important number of scholarly opinions holds that in the absence of a termination by (or, as proposed by some authors, with effect as per) the occurrence of an Insolvency Event, the liquidation of contracts ordered under the Statutory Close-out becomes mandatory. This is sometimes (but not always) argued on the basis of the alleged substantive law nature of Art. 211 para. 2^{bis} SDEBA. That said, a qualification as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, which view is also supported by scholarly opinions. A number of authors, thus, concludes that an optional early termination would trump the Statutory Close-out. The enforceability of optional termination for Qualifying Contracts is further challenged by some authors based on concerns of a violation of the equal treatment of creditors in Insolvency Proceedings. While discussed in the context of the Step-in Right, the argument is made on the basis that optional termination may allow a counterparty to speculate against the Insolvency estate and to the detriment of other creditors of the Insolvent debtor. In the absence of a pre-agreed short notice period, it should, therefore, be disregarded according to some scholars. It is further held in this respect that if the termination notice provides for an effective date which is later than the date of the occurrence of an Insolvency Event, then notwithstanding any designation of another date, all calculations may need to be made as of such date. To address this concern, some authors hold that the optional termination must be declared with retroactive effect as of the occurrence of the Insolvency Event. It is unclear, though, whether this truly means that the termination as such would need to have a retroactive effect as of such date, which seems a somewhat fictitious concept, or whether this is not rather meant to require a calculation of the single net amount as of such date, which would be sufficient to satisfy the rationale of equal treatment of creditors. 163

Certain authors further suggest that the calculation method set out by Art. 211 para. 2^{bis} SDEBA is mandatory. Some authors consider that the calculation rules under the Statutory Close-out are applicable to contracts that provide for automatic early termination, but do not provide for close-out netting provisions. The mandatory nature of the statutory calculation method is more prominently discussed for optional early termination but, also here, we consider it the majority view that the contractual calculation method should prevail subject to the limitations discussed in paragraph D.II.2.2.6 below. Some scholars come to this view even if they challenge the effectiveness of the optional termination as such because the relevant termination right has not been exercised by (or with effect as per) the occurrence of an Insolvency Event. 164

2.2.5 Optional Early Termination and Automatic Early Termination – Conclusions and recommendation to apply Automatic Early Termination

While optional early termination ("**Optional Early Termination**") is valid and binding on the Parties prior to an Insolvency, the effectiveness of Optional Early Termination is more questionable in case of the occurrence of an Insolvency Event. 165

In connection with the Step-in Right, we refer to the controversial discussion in legal doctrine on certain additional requirements in relation to the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly (see the discussion under paragraph D.II.2.2.2 above). 166

Further, the Statutory Close-out for Qualifying Contracts, if and to the extent viewed as mandatory for contract termination, could overrule the optional termination chosen by the Parties pursuant to their close-out netting provisions if such optional termination has not been exercised at the latest on (or with effect as per) the occurrence of the Insolvency Event. 167

As highlighted above (see paragraph D.II.1.8), Art. 27 para. 1 of the Banking Act gives in our view a strong argument to allow Optional Early Termination for Banks Securities Firms and Fund Management Companies, but there is to date no precedent or authoritative guidance that would support this view. 168

By contrast, it is largely uncontested, that Automatic Early Termination (as contemplated in the EFET General Agreement) ("**Automatic Early Termination**") is valid and binding under Swiss law and would be upheld in an Insolvency. 169

In the light of the uncertainties discussed with respect to Optional Early Termination upon the occurrence of an Insolvency Event we strongly recommend to elect Automatic Early Termination rather than to provide for a short term period within which Optional Early Termination would need to be declared.[42] 170

2.2.6 Determination of Termination Amount

The close-out netting by means of calculating a Termination Amount (as contemplated by the Close-out Netting Provisions) constitutes a valid pre-agreed contractual liquidation of all transactions. Such close-out netting would be upheld in an Insolvency. We refer, though, to the discussion of termination and close-out netting under paragraph D.II.2.2 above and the 171

[42] As mentioned above (see Footnote 36) there is one author that holds that close-out netting would be null and void where it violates equal treatment of creditors and under such circumstances also views a termination, be it optional or automatic, that facilitates such close-out netting, as null and void.

views expressed in legal doctrine as to the potential mandatory nature of the calculation of the liquidation amount under the rules on Statutory Close-out namely where termination of Qualifying Contracts does not otherwise occur at the latest on (or with effect as per) the date on which an Insolvency Event is being declared.

Pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see paragraph D.II.1.2 and D.II.1.3 above). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the Insolvency and were mutual between the Insolvent and the counterparty prior to the Insolvency and are of the same kind (as to the latter see paragraph D.II.2.1.1). We have, for purposes of this Opinion, assumed the satisfaction of the above requirements and, in particular, that the claims are mutual (i.e. no intermediate assignment or inclusion of affiliate claims). 172

As mentioned above (see paragraph D.II.2.1.1), the Close-out Netting Provisions are best analyzed as a comprehensive contractual set-off arrangement and, hence, as a close-out netting mechanism. This question, which eventually would have to be decided under the law governing the EFET General Agreement, has, however, no impact in our view that the determination of a Termination Amount is enforceable following the occurrence of the Insolvency Event against the background of the discussion under paragraph D.II.2.2.6 above. 173

2.2.7 Currency of filing

Claims in a foreign currency against an insolvent party initially remain unaffected by the institution of Insolvency Proceedings. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A claim of Party B under the EFET General Agreement for a Termination Amount denominated in a currency other than Swiss Francs against Party A would thus only be enforceable in an Insolvency Proceeding of Party A if converted into Swiss Francs as of the date of the occurrence of the Insolvency Event. 174

2.2.8 Date

The calculations to be made in determining the Termination Amount may have to be made as of the date of the occurrence of the Insolvency Event in order to ascertain equal treatment of all creditors of the insolvent debtor. 175

2.2.9 Accrual of Interest

Unless a claim is secured by collateral, interest stops to accrue following the adjudication of bankruptcy or the grant of a moratorium. Any interest element would, hence, under such premises be disallowed for purposes of calculating the Termination Amount or applying a set-off and no interest would be allowed on the Termination Amount. In case of secured claims, only an excess of the realization of the collateral over the principal amount may be applied 176 against interest and any uncovered interest amount would be disregarded.

2.2.10 Close-out Netting after Insolvency – Conclusions with respect to the Close-out Netting Provisions of the EFET General Agreement

Close-out netting as provided for in the Close-out Netting Provisions of the EFET General Agreement is in our view available after the occurrence of an Insolvency Event, subject to the following: 177

While we are of the view that this holds true both in case of an Optional Early Termination or an Automatic Early Termination, for the reasons set out above (see paragraph D.II.2.2and our recommendation in paragraph D.II.2.2.5), we strongly recommend to have Automatic Early Termination apply in respect of such Insolvency Proceedings. The calculation of the Termination Amount may need to be made as of the date of the occurrence of the Insolvency Event and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the Insolvent thereafter would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. A claim of the solvent party for a Termination Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the occurrence of the Insolvency Event. With respect to Banks, Securities Firms and Fund Management Companies, close-out netting under the Close-out Netting Provisions may be subject to the stay of Art. 30a BA (see paragraph D.II.1.8). 178

3. Further set-off/netting related issues

3.1 Set-off/netting and Single Agreement Concept

While the single agreement concept, i.e. the linking of various agreements in respect of multiple transactions so as to be treated as one agreement for purposes of termination, close-out netting and calculation of one Termination Amount etc., is not specifically regulated under Swiss substantive law, such linking is, within the general limits of applicable Swiss law, valid and the particular aspects of such treatment as one agreement do not, as discussed below, violate Swiss substantive law or the Swiss *ordre public*. 179

Under the laws of Switzerland it is not necessary that the obligations to be netted form part of a single agreement in order for netting and close out provisions to be effective. It is sufficient that the different obligations are covered by the respective netting and close out provisions contractually agreed among the parties (even if such netting and close out provisions form part of a separate agreement). 180

The agreement to include pre-existing contracts as part of the EFET General Agreement as Individual Contracts constitutes an amendment of such pre-existing contracts and might be subject to further prerequisites stipulated in such pre-existing contracts. 181

Under Swiss law, and where the EFET General Agreement is governed by a law other than Swiss law, subject to being legal, valid, binding and enforceable under such law, the "Single Agreement" would be recognized both prior to the occurrence of an Insolvency Event and as per the discussion of close-out netting and the limitations thereof in case of Insolvency Proceedings in this Opinion (see paragraph D.II.2.2) also in case of the occurrence of an Insolvency Event in respect of Party A. 182

3.2 Set-off/netting of Termination Amount with claims outside the EFET General Agreement

If contractually provided for in an amendment to the EFET General Agreement, a Termination Amount may be set-off against any other claim that did not arise under the EFET General Agreement which is mutual as between Party A and Party B prior to the occurrence of an Insolvency Event with respect to Party A (see paragraph D.II.2.1 and, within the limits discussed for set-off in this Opinion and in particular that the respective claim has not been acquired in violation of Art. 213 and 214 SDEB (see paragraph D.II.1.2 and D.II.1.3) also following the occurrence of an Insolvency Event in respect of Party A. 183

3.3 Cross Set-off/netting with claims of Affiliates and Credit Support Providers

If contractually provided for in an amendment to the EFET General Agreement, we understand that set-off/netting could be agreed to be applicable between claims of Affiliates or Credit Support Providers of Party A and Party B. We understand that this could be based on either (i) an arrangement whereby an Affiliate or Credit Support Provider would issue a guarantee or other payment undertaking with respect to Party A' s obligation and allowing Party B to set-off/net its claim under such undertaking with any claim owed by Party B to such Affiliate or Credit Support Provider or (ii) an outright agreement to waive the mutuality requirement, i.e. a direct acceptance of set-off/netting by Party B of a claim owed by or to it by Party A with a claim owed by it or to it by an Affiliate or a Credit Support Provider. 184

Under scenario (i) we understand that mutuality is present and such set-off/netting would in principle be recognized as a matter of Swiss law against a Swiss party. Having said this, where the respective undertaking has been given by a Swiss Affiliate in favor of Party A and where such Swiss Affiliate is not the direct/indirect parent of Party A, corporate law limitations and pre-requisites would apply that may severally limit enforceability of such undertaking and in case of an insolvency of such Swiss Affiliate become unenforceable and, thus, frustrate the purpose of such undertaking and the set-off/netting contemplated. 185

Scenario (ii) would in our view amount to a waiver of the mutuality requirement which is a pre-condition to set-off or netting under Swiss substantive law. Assuming such set-off and netting is valid under the laws governing (i) the respective claims to be set-off and (ii) the set-off/netting provision, such set-off/netting would in our view in principle be recognized as a matter of Swiss law and outside Insolvency Proceedings (as it could also in principle be agreed 186 under Swiss substantive law outside Insolvency Proceedings as the mutuality requirement can be waived outside it would not either violate the Swiss ordre public, provided that the respective claims to be set-off/netted are objectively determined). However, such arrangement would in the case of a Swiss Affiliate that is not the parent of Party A again result in an undertaking that would be subject to corporate law restrictions as set out under scenario (i). Also in case of Insolvency Proceedings in our view the mutuality requirement becomes mandatory and, hence, set-off/netting would not be available any longer where Party A, the Affiliate or Credit Support Provider would become subject to Swiss Insolvency Proceedings.

III. Multibranch Parties/Assets located in Switzerland

1. Swiss Multibranch Party

Our Opinion is based on the following additional assumption:

– Party A has entered into Individual Contracts under the EFET General Agreement through offices in Switzerland 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 Switzerland. 187

The close-out netting mechanism provided for in the EFET General Agreement is valid and enforceable under Swiss law (see paragraph D.II). This conclusion would not be affected if the Swiss Party entered into the EFET General Agreement and Transactions thereunder through a branch established in a jurisdiction other than Switzerland, provided that the laws applicable to such foreign branch characterise the branch as being legally part of the Swiss Party and hence recognise that the branch is not a separate legal entity. In this case, the requirement of reciprocity allowing the set-off of claims is met. A different question is whether the laws of such foreign jurisdiction recognize multibranch close-out netting for purposes of insolvency proceedings in such foreign jurisdiction. This question is answered under Swiss conflict of laws rules by the applicable foreign law to which the PILA refers. 188

2. Foreign Multibranch Party

Our Opinion is based on the following additional assumptions:

– A corporation, a bank or a securities firm ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Switzerland 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 189

Switzerland (the "**Swiss Branch**").

– After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H. 190

The first question is whether there would be a separate proceeding in Switzerland with respect to the assets and liabilities of the Swiss Branch and at the start of the insolvency proceeding for Party F in Country H. The Swiss Branch of the insolvent Party F is neither automatically subject to the insolvency proceedings initiated against Party F in Country H nor automatically subject to separate insolvency proceedings in Switzerland. The creditors and the receiver of Party F are, however, entitled to start separate insolvency proceedings in Switzerland. 191

Two proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA and (ii) the ancillary insolvency proceeding (*Hilfskonkur*s) pursuant to Art. 166 et seq. PILA. 192

If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this debtor can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note in this context that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch. 193

Art. 166 et seq. PILA, on the other hand, provide for the so-called ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor, (ii) it is enforceable in the state where it was rendered, (iii) there is no ground to deny recognition based on formal and material principles of Swiss *ordre public*, and (iv) if the state where the decision was rendered grants reciprocity. The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA). 194

If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss 195 insolvency law (Art. 170 PILA), including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA).

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency proceeding, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, and (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) may directly file claims in such ancillary insolvency proceeding. If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors. 196

A branch insolvency can be opened after an ancillary insolvency proceeding has been declared, but only until the ancillary insolvency proceeding reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*), and if opened would then take precedent over the ancillary insolvency proceeding, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 197

The second question is whether the Swiss authorities would defer to the proceedings in Country H so that the assets and liabilities of the Swiss Branch would be handled as part of the proceeding for Party F in Country H. The Swiss authorities would not as a rule, other than with respect to Swiss branches of foreign banks and securities firms (see below for the latter), defer to the proceedings in Country H, except to the extent provided in case of an ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA. If the decree is recognized pursuant to Art. 166 et seq., the competent Swiss authorities will open ancillary bankruptcy proceedings covering all assets located in Switzerland in accordance with Swiss insolvency laws (Art. 170 PILA). Any excess of the bankruptcy estate of the Swiss Branch is transferred to the foreign bankruptcy in Country H as soon as the collocation plan is recognized by the Swiss judge pursuant to Art. 166 PILA. Based on an amendment of the PILA that entered into force in 2019, the foreign insolvency receiver may request not to open an ancillary insolvency proceeding if there are no creditors in Switzerland the claims of which are privileged or secured by a pledge and the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in the foreign proceedings and such creditors were granted an opportunity to be heard. In such a case, the foreign receiver in bankruptcy may carry out all actions in Switzerland to which it is authorized pursuant to the applicable foreign law and which are in compliance with Swiss law, including e.g. the transfer of assets 198 of a foreign debtor located in Switzerland to the foreign insolvency estate (Art. 174a PILA).

With respect to Swiss branches of foreign banks and securities firms, FINMA has (based on Art. 37f and 37g of the Banking Act, in conjunction with Art. 67 FinIA) the competence to recognize foreign insolvency decisions (whether rendered in the country of such foreign entity's legal or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors. 199

The third question is whether legal creditors of the Swiss Branch could initiate a separate proceeding in Switzerland even if the relevant authorities in Switzerland did not so. In this respect, please note that claims against the Swiss Branch can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). A branch insolvency can be opened against the Swiss Branch, but in case ancillary bankruptcy procedures have been requested only until the ancillary insolvency proceeding reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*). If opened, the bankruptcy of the Swiss Branch will take precedence over the ancillary insolvency proceeding, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 200

In both scenarios (i) the branch insolvency (*Zweigniederlassungskonkurs*) and (ii) the ancillary insolvency proceeding (*Hilfskonkurs*), a Swiss receiver would be bound by the set-off and netting rights of the counterparty of the Swiss Branch under the EFET General Agreement , whether entered into on a multibranch basis or not. The ability of the counterparty to set-off its claims against the claim of the Swiss Branch would thus extinguish the latter's claim, provided the counterparty's claim exceeds such claim. Accordingly, there would be no asset of the Swiss Branch available to the Swiss receiver after close-out netting under the EFET General Agreement entered into on a multibranch basis. 201

Furthermore, a Swiss court, or a Swiss receiver or liquidator, would be bound by the principles on which the EFET General Agreement is based as a matter of substantive law, including the "Single Agreement" concept. We are thus of the opinion that a Swiss court would give effect to the "Single Agreement" concept on which the EFET General Agreement is based. We also note that this recognition would be in line with the principle of the universality which applies in the context of any Insolvency in Switzerland as well as based on the principle that, to the extent Art. 211 para. 2 SDEBA is of a mere procedural nature, a Swiss court or a liquidator or receiver would be bound by the contractual arrangements entered into by the parties prior to bankruptcy. In sum, separate insolvency proceedings with respect to the Swiss Branch would 202 not in our view and as a matter of Swiss law adversely affect the multibranch close-out netting.

3. Assets of Party F located in Switzerland without branch in Switzerland

Where Party F has no branch in Switzerland, but assets located in Switzerland, the ancillary insolvency proceedings in accordance with Art. 166 et seq. PILA as discussed under paragraph D.III.3 would be available subject to the pre-requisites described in such paragraph.

IV. Collateral

Our Opinion is based on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times the collateral provider and Party B is at all times the collateral taker under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral. 203
- The counterparties agree that Eligible Credit Support will consist solely of Cash and/or Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency. 204
- Collateral in the form of Cash will not be remitted physically and any disposition of Cash will be conducted by way of wire-transfer. 205
- Collateral in the form of Letters of Credit will be provided by having a duly licensed bank ("**Issuing Bank**") issue such Letter of Credit directly in favor of the Transferee, but that Party B is not a party to the agreement between Party A and the Issuing Bank based on which the Issuing Bank issues the Letter of Credit to Party B. The Issuing Bank issues the Letter of Credit as part of its ordinary banking business and on customary terms and conditions. In the context of close-out-netting, the Letter of Credit is accounted for with the full nominal value of the un-drawn amount of the Letter of Credit. 206

1. EFET Credit Support Annex

The agreement in the EFET General Agreement and the EFET Credit Support Annex to provide Eligible Collateral in the form of Cash or a Letter of Credit is a valid undertaking under Swiss law and the choice of German or English law to govern the EFET Credit Support 207

Annex and the undertaking by Party A to provide Cash collateral or a Letter of Credit to Party B is a valid choice of law in accordance with Art. 116 PILA and would have to be applied to any claim under the EFET Credit Support Annex by a Swiss court.

1.1 Cash Collateral

Based on the assumption that Cash will not be remitted physically, but that any disposition of Cash will be conducted by way of wire-transfer, neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the collateral arrangement does not consist of assigning or pledging a claim that Party A holds as against its bank, but rather of a wire-transfer resulting in a debit on Party A's bank account, i.e. in the discharge of Party A's bank from paying the respective amount, and in a credit on the bank account of Party B. Thus, in our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the Parties, only a claim that is governed by the EFET Credit Support Annex remains and Party B's rights to claim the transfer of Cash and to use the Cash as collateral will be governed by German or English law (as applicable) as the law applicable to the EFET Credit Support Annex (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer). 208

It is our view, that the Parties may as a matter of Swiss law subject Cash provided as collateral to the provision of close-out-netting as provided for under the EFET General Agreement in connection with the EFET Credit Support Annex in accordance with § 11 of the EFET Credit Support Annex and that Party B may as part of such close-out-netting and in terms of realizing such Cash collateral for purposes of the EFET General Agreement and the EFET Credit Support Annex merely account for the Cash as part of "other amounts payable" owed by Party B. 209

The occurrence of an Insolvency Event with respect to Party A does not, in principle, affect the realization of Cash collateral provided to Party B, provided that following such occurrence of an Insolvency Event, Party A would not any longer have the capacity to provide further Cash collateral to Party B (see paragraph D.II.1.2D.II.1.3) and (as discussed in further detail in paragraph D.II.1.5.3), a transfer of Cash collateral could become subject to avoidance in accordance with Art 288 SDEBA, notwithstanding the fact that the pertaining obligation to provide such Cash collateral was in existence when the obligation to be collateralized came into existence. Such transfer could also be avoided in accordance with Art. 287 SDEBA, where an obligation that was not to be collateralized is subsequently agreed to be collateralized or the collateralization is increased from the initial agreement (see paragraph D.II.1.5.2). The substitution of existing Cash collateral by the same quantum of substitute collateral does not in our view create any damages to other creditors of the insolvent Party A and, hence, would not be subject to avoidance (see paragraph D.II.1.5) 210

Finally, Party B would have to account for and remit any excess Cash collateral upon realization thereof. 211

1.2 Letters of Credit

Based on the assumption that a Letter of Credit is issued directly to Party B and while the Letter of Credit is by agreement of the parties to the EFET Credit Support Annex treated as Eligible Credit Support and is to be provided when and as required by the EFET Credit Support Annex, notwithstanding any terminology used in the EFET Credit Support Annex to the contrary, Party B is legally speaking not a mere transferee of the Letter of Credit as otherwise contemplated by the EFET Credit Support Annex, but the sole and original beneficiary of the Letter of Credit. 212

It is our view that the Parties may as a matter of Swiss law subject a Letter of Credit that has been provided as Eligible Credit Support to the provision of close-out-netting as provided for under the EFET General Agreement in connection with § 11 of the 2002 Version of the EFET Credit Support Annex, i.e. that Party B (as Valuation Agent) as part of such close-out-netting and in terms of realizing the Letter of Credit for purposes of the General Agreement and the 2002 Version of the EFET Credit Support Annex shall account for the full undrawn nominal amount of the Letter of Credit as part of "other amounts payable" owed by Party B and that Party B then draws such amount under the Letter of Credit on its own, subject only to such Letter of Credit's terms and conditions, prior to and following the occurrence of an Insolvency Event. 213

It is our view that the Parties may as a matter of Swiss law agree to disregard the value of the undrawn amount of a Letter of Credit that has been provided as Eligible Credit Support when applying the provision of close-out-netting as provided for under the EFET General Agreement in connection with § 11 of the 2010 and the 2021 Version of the EFET Credit Support Annex, but to apply any amount drawn by Party B under such Letter of Credit to any balance of the Termination Amount owed to Party B as a result of such close-out-netting and in reduction of such amount owed by Party A on account of such Termination Amount to Party B as permitted by the Letter of Credit's terms and conditions, prior to and following the occurrence of an Insolvency Event with respect to Party A. 214

In our view, there is not either any reasonable basis in Swiss law for an Insolvency Representative of Party A to request that any amount having been paid to Party B under the Letter of Credit be paid over by Party B to the Insolvency Representative of Party A so as to be shared with Party A's other creditors. 215

1.3 Parent Company Guarantee

To address each Party's risk relating to the other Party's creditworthiness, the Parties may agree on entering into a guarantee document wherein a parent company undertakes to pay when and if the guaranteed party fails to pay any amounts when due pursuant to the terms of the EFET General Agreement ("**Parent Company Guarantee**"). With regards to such Parent Company Guarantee, our Opinion is based on the following assumptions: 216

– The non-defaulting party, i.e. the beneficiary under the guarantee, may demand payment from the guarantor of any such outstanding amount immediately upon the defaulting party's failure to pay without having to first take any action against the defaulting party, in particular, without having to: 217

  - make any demand to the defaulting party, other than issuing the initial invoice in accordance with the terms of the EFET General Agreement ;

  - take any legal action against the defaulting party; or

  - file any claim in the defaulting party's insolvency.

– Upon the receipt of the beneficiary's demand, a copy of the unpaid invoice and any breakdown of any additional outstanding amounts due to the beneficiary, such as late payment interest, the guarantor shall promptly pay the amount specified in the demand to the beneficiary. 218

– The liability of the guarantor under the Parent Company Guarantee is limited to that of the defaulting party under the EFET General Agreement and any cap set out in such Parent Company Guarantee. 219

– The Parent Company Guarantee is provided in the form of a written document signed by an authorized representative of the guarantor. 220

– The Parent Company Guarantee is governed by Swiss law and any disputes in connection with or claims under such Parent Company Guarantee are to be referred to and resolved by the courts of Switzerland. 221

– The guarantor has provided an address that the guarantor can be served at in Switzerland but is not necessarily established in Switzerland. 222

Under Swiss law, such Parent Company Guarantee may take alternative legal forms, the most important ones being the guarantee of performance by third party pursuant to Art. 111 CO (*Vertrag zu Lasten eines Dritten*) ("**Guarantee**") and the contract of surety pursuant to Art. 492 et seq. CO (*Bürgschaft*), based on the assumptions set-out above the latter would need 223 to be in the form of a joint and several surety pursuant to Art. 496 CO (*Solidarbürgschaft*) ("**Joint Surety**").

The Guarantee is of a non-accessory nature, (i.e. not dependent on the validity of the guaranteed obligation and the beneficiary need not necessarily be identical with the creditor of the guaranteed obligation) and constitutes an independent and principal undertaking (thus not allowing the defaulting party to raise the defenses under the guaranteed obligations) of the guarantor to indemnify the beneficiary in case of non-performance by the defaulting party. It is not subject to particular formal requirements, but in practice is typically in writing. The Joint Surety is of an accessory nature, i.e. it presupposes the existence of a valid primary obligation being thereby secured and the beneficiary of the Joint Surety must be identical with the creditor of such primary obligation (Art. 492 para. 2 CO). Strict statutory formalities must be complied with (that depend on the person of the surety) and in the case of a corporate surety calls for a written instrument that must set out the maximum amount for which the surety is liable (Art. 493 para. 1 CO) and in case of a Joint Surety must specifically mention that fact by terms specifically expressing such joint and several liability to clearly distinguish it from a simple surety. Only if the surety is a Joint Surety it will allow the beneficiary to enforce it against the surety without first having recourse against the defaulting party. 224

As the Guarantee and the Joint Surety may be alternatively used, but the Joint Surety is only valid if it adheres to the strict formalities set out above, it is crucial that the Parties clearly specify the nature of the instrument, i.e. whether they intend to create a Guarantee or a Joint Surety, and that it complies with the respective statutory requirements so as to avoid that a Swiss court would qualify such instrument differently, e.g. as a Joint Surety rather than as a Guarantee (which in the absence of a maximum amount being contained in the instrument would render the instrument invalid altogether or if there is a maximum amount may be qualified as a simple surety failing to specify the joint and several liability of the surety). If the Parties intend to create a Guarantee, it is recommendable to include a clear statement to the effect that the instrument constitutes the non-accessory, independent and primary obligation of the Guarantee and in particular including an explicit reference that it is an instrument governed by Art. 111 CO and is not meant to constitute a mere surety pursuant to Art. 492 et seq. CO. 225

V. General Enforceability of certain Terms of the EFET General Agreement

1. (§7) Force Majeure

– *Would this provision be enforceable under the law of Switzerland?*

The Force Majeure provision contained in the EFET General Agreement is, as a matter of Swiss substantive law enforceable in accordance with its own terms and does not violate the Swiss ordre public. 226

We, however, note that under Swiss substantive law the term "release" in respect of an obligation would connote a permanent release (*Aufhebung*), whereas in case of a mere temporary character the term suspension (*Aufschub*) would typically be used. As the main consequence of a release of one party due to force majeure, namely the release of the other party's corresponding obligations is described in sufficient detail, such terminology does, however, not pose any difficulty so long as such force majeure lasts and the EFET General Agreement is not terminated pursuant to § 7.5. It is unclear to us, however, whether once the force majeure is terminated, any released obligation under an Individual Contract would be reinstated, and hence, in the absence of a termination of the EFET General Agreement as mentioned above, would merely constitute a temporary suspension, or whether such obligations and the concerned Individual Contract have been terminated. This point should be clarified in order to avoid any uncertainty be it as to performance under such Individual Contracts or as to whether such Individual Contracts would need to be taken into consideration for purposes of calculating a Termination Amount under § 11 in case of a termination subsequent to the end of a force majeure event. This applies mutatis mutandis to other paragraphs that specifically stipulate that a certain obligation is released and not merely suspended (see in particular: § 7.2 / 9 / 10.3 (b) of the EFET General Agreement); 227

– *Are there relevant principles of law in your jurisdiction which might expand a Party's rights to claim and be excused by force majeure or a similar legal concept (e.g. commercial impracticability, impossibility, etc.)?*

Swiss substantive law in that context provides basically for two concepts:

If the fulfillment of its obligations validly entered into under an agreement has become impossible for one party for reasons that are beyond that party's control, the respective party is released from its obligations at law. The other party is then also released from its obligations and is entitled, as a rule, to claim back any pre-payments made to the defaulting party. 228

If the facts and circumstances surrounding a transaction materially change in a way that could not reasonably have been foreseen by a party and if such changes would lead to a situation where the mutual rights and obligations would become clearly disproportionate to the detriment of one party, the judge may amend the respective terms of the agreement. Swiss courts are rather reluctant in applying that so called concept of *clausula rebus sic stantibus* in general, and especially where the parties entering into an agreement were seasoned market participants which specifically intended to conclude an agreement that deals with uncertain future developments (such as price changes, etc.). 229

2. (§8) Remedies for Non-Performance

As a matter of Swiss substantive law, the parties are free to determine the consequences of non-performance within the limits of mandatory law. The remedy of damages as such as well as the alternative calculation methods of §8 of the EFET General Agreement are valid and binding to the extent that §8 of the EFET General Agreement is aimed at calculating the immediate damages resulting from such failure to deliver or to accept only and in the light of §11 of the EFET General Agreement is not meant and may not be interpreted as limiting compensation for any further damages suffered by the other party, other than as contemplated by §11. 230

3. (§12) Limitation of Liability

– *General Enforceability of Exclusion of Liability (§ 12.2)*

As a matter of mandatory Swiss substantive law, liability cannot be validly excluded for willful misconduct (*Absicht*) and gross negligence (*grobe Fahrlässigkeit*). In case of an entity holding a government license to carry out its activity, which in particular includes Banks, Securities Firms, Fund Management Companies and Insurance Companies and Swiss branches of foreign banks, securities firms and insurance companies, even an advance waiver of liability for simple or slight negligence may not be enforceable upon the court's discretion. 231

While there are no pertinent court precedents and this question has not to our knowledge been discussed in Swiss legal doctrine, we cannot rule out that the above rules could be deemed as being part of the Swiss ordre public. 232

– *Enforceability of Limitation of Consequential Damages and similar types of liabilities (§ 12.3, § 12.4)*

The limitation of exclusion of liability mentioned under no. 231 above, also applies with regard to consequential damages and similar types of liabilities. 233

– *Enforceability of Duty to Mitigate (§ 12.5)*

Under Swiss substantive law, a party has a duty to mitigate already at law. 234

– *Possibility of expanding or strengthening the limitations and exclusions under this provision*

There is no such possibility, as the restrictions described under no. 231 above exist as a matter of mandatory law. 235

VI. Confirmation Practices

Our Opinion is based on the following additional assumptions:

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

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

1. Binding Individual Contract

1.1 Requirements relating to applicable procedural formalities in the formation of legally binding Individual Contracts

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

The Transactions and thereby the respective Individual Contract contemplated by the EFET General Agreement do not call for any particular mandatory form as a matter of Swiss substantive law. Based thereon an oral or even implicit agreement or an agreement transmitted by electronic means is acceptable and no wet ink or electronic signature is required as a matter of Swiss substantive law. 236

We note, that in the context of cross-border transactions, a Swiss court will determine the law which applies under the relevant Swiss conflicts of law rules as to the form of a contract governed by a foreign law in accordance with the rules set out in Article 124 PILA. Article 124 para. 1 PILA provides that a contract is valid as to form if it conforms to (a) the law applicable to the contract or (b) the law of the place where it is concluded. If the parties are located in different States when executing the contract, the contract is valid as to form if it conforms to the law of either of those States (Article 124 para. 2 PILA). Article 124 PILA is based on the principle that the most favourable law shall apply to the question of the applicable law as to the form of a contract, provided that where the law applicable to the contract provides for a particular form with the aim of protecting a party, the validity as to form is exclusively governed by the law applicable to the contract, unless that law permits the application of 237 another law (Article 124 para. 3 PILA).

– *At what point in time does an Individual Contract agreed upon orally become legally enforceable?* 238

The Individual Contract becomes legally enforceable at the moment the duly authorized representatives of the Parties reached an agreement on all essential terms of the transaction orally. 239

Please note in that context that while an Individual Contract is validly concluded when the essential terms are agreed orally, the specific terms agreed may be difficult to prove (see paragraph D.VI.2 for means of evidence other than writings). 240

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

Notwithstanding the oral conclusion of an Individual Contract, any terms of a written Confirmation which are inconsistent with the oral understanding, but have not been timely rejected, as specifically required by § 3.3 of the EFET General Agreement, by the addressee of the Confirmation would override the terms of the previous oral agreement, provided that the inconsistency is not such, that the confirming party could not (by objective measure) legitimately expect the addressee thereof to agree with the inconsistent part. In turn, due fulfillment of an Individual Contract in strict compliance with an inconsistent Confirmation by the addressee thereof would constitute irrevocable acceptance of the terms laid down in such Confirmation. 241

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

Where parties have previously entered into an EFET General Agreement, the question whether a particular Individual Contract has been validly subjected to the EFET General Agreement is in our view a question governed by the laws governing the EFET General Agreement. As a matter of Swiss law, we think that the oral agreement on an Individual Contract would under such circumstances implicitly comprise such subjection to the EFET General Agreement, unless there is truly an ambiguity because there are several master agreements in place under which a particular Transaction could be concluded. We also refer to the need to reject a Confirmation that is deemed not to be consistent with the oral agreement as set-out above. 242

2. Means of Evidence

Under the Swiss Civil Procedure Act, besides written evidence (be it a document signed wet ink or an electronic writing), witness statements and hearings of witnesses and parties are typically acceptable means of evidence of the conclusion and the contents of an agreement. Tapes that have been recorded legally, in particular with consent of the participants of the taped conversation, could also be introduced in a court proceeding. Please note that in order to be effective under Swiss law, the consent to the recording of telephone conversation not only needs to be given by the parties, but also by the physical persons acting on behalf of the parties. It is, however, sufficient that the respective physical persons are made aware of such recording, be it when initiating a telephone call or be it by having the persons acting for a party generally agreeing to such recording. 243

Note though, that the assessment of any evidence remains in the discretion of the court and the court is not bound by any agreement of the parties as to the permissibility and the conclusiveness of any particular means of evidence. 244

Please note that in the context of debt enforcement procedures, the special summary procedure (*Rechtsöffnungsverfahren*) discussed under paragraph D.II.1 is only available if the debt acknowledgment is in writing and wet ink signed or by qualified electronic signature within the meaning of the Swiss Act on Certification Services in Relation with Electronic Signature and other Digital Certificates of 2016, ("**SESA**")[43] by the debtor. 245

VII. Core Provisions

1. Core Provisions, Modifications and Amendments

We regard all of the provisions dealing with the close-out netting aspects (in particular §§ 10.3(a), 10.3(b) (second sentence), 10.3(d), 10.5(c)(iv) and 11 of the EFET General Agreement) as core provisions of the EFET General Agreement. A material alteration thereof could affect the conclusions reached in Paragraph D of this Opinion. We further emphasize our strong recommendation to have Automatic Early Termination apply in accordance with § 10.4 of the EFET General Agreement (see also our suggested modification thereof that aims at clarifying the events that should trigger an Automatic Early Termination with respect to Party A). 246

Further please note that our Opinion is given on the basis of the EFET General Agreement (including Annexes, Schedules and the Allowances Appendixes and elections thereunder) only. Any modification to any provision of the EFET General Agreement (including a 247

[43] Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate, SR 943.03.

modification to the wording suggested for § 10.4 of the Election Sheet (Automatic Termination) and § 14.9 of the EFET General Agreement (Tax Gross-up) or any additional provision could affect the conclusions reached in this Opinion in respect of such specific clauses.

2. Inclusion of EFET General Agreement in other EFET Documentation

The inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) would not, to the extent that it does not modify or affect the Core Provisions dealing with close-out netting as set out above, adversely affect the conclusions reached in Paragraph D of our Opinion.[44] 248

VIII. Governing Law and Arbitration, jurisdiction clause for England (and other jurisdictions that are not a member of the Lugano Convention)

1. Governing Law and Arbitration

– *Would the Parties' agreement on the governing law and submission to arbitration (§ 22 of the EFET General Agreement) be upheld in Switzerland, and what would be the consequence if it were not?*

Our Opinion is based on the following additional assumption:

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

To the extent legal, valid, binding and enforceable under the laws governing the EFET General Agreement and thereby its §22, such choice of law and submission to arbitration would be upheld by a Swiss court. 249

We note with respect to the choice of law that such choice would be subject to the Swiss ordre public as defined in Art. 17 and Art. 18 PILA. Furthermore a Swiss court could based on Art. 19 PILA hold that provisions of a law other than the law chosen by the parties are applicable 250

[44] See also memorandum of law on the validity and enforceability under the laws of Switzerland of close-out netting provisions and collateral arrangements under the EFET Master Netting Agreement and the Credit Support Annex thereto and the TBMA Cross Product Master Agreement and the Cross Product Credit Support Annex thereto dated December 15, 2020.

if important reasons call for such applicability and if the facts are closely linked to such other law. .Finally a Swiss court could based on Art. 16 PILA request that the Parties establish the contents of a foreign law.

The EFET General Agreement provides for an arbitration court having its seat in London, 251
England, if Option A is chosen (or if no Option is chosen), or in Germany if Option B is chosen. An award of an English or a German arbitration court, as the case may be, against Party A would be enforced in Switzerland in accordance with the 1958 New York (United Nations) Convention, which provides for acknowledgement and enforcement in the absence of a cause for refusal pursuant to Art. V of said Convention.

2. Jurisdiction clause for England (and other jurisdictions that are not a member of the Lugano Convention)

In stipulating that English courts should have jurisdiction in respect of the EFET General Agreement or an Individual Contract, from a Swiss law perspective the venue should be further defined than the courts of England [and Wales] by e.g. adding "sitting in London".

Following Brexit, England and Wales are not any longer a member of the multilateral Convention of October 30, 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "**Lugano Convention**"). Hence, the recognition of a submission to jurisdiction by a Swiss court is now governed by Art. 5 PILA and it is held in Swiss legal doctrine and jurisprudence that the required level of determinability of the venue is governed by said Art. 5 PILA and based on Swiss legal doctrine a designation of a country rather than a more specific venue may contrary to Art. 23 of the Lugano Convention not be sufficient. As a consequence it cannot be ruled out that the designation of the courts of England [and Wales] may not be deemed sufficient for purposes of Art. 5 PILA, if one does not further specify the venue.

As a further consequence, one cannot rule out that if a party to the EFET General Agreement or an Individual Contract timely objected to the English courts having jurisdiction based on Art. 5 PILA they could raise the same defense against the recognition of such English court decision and that a Swiss court could reject recognition and enforcement of such English court decision on that basis.

The same would apply to the designation by the parties of courts of jurisdictions that are not parties to the Lugano Convention.

IX. Regulatory Regime

– *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?*

1. Exchange or currency control rules, embargo and sanctions legislation (Electricity and Gas)

There are no *exchange or currency control rules* in force under present Swiss law, which would today affect the EFET General Agreement in Switzerland. 252

We note that embargo/sanctions legislation as implemented from time to time by the Swiss Confederation remain reserved. 253

2. License requirements, regulation of trading (Electricity and Gas)

2.1 Physical spot transactions (Electricity and Gas) 254

The import, export and spot transactions in physical electricity or physical gas are not subject to a license. 255

Swiss energy law stipulates certain duties to provide information under Chapter 4a of the Electricity Supply Ordinance.[45] These duties correspond to those of the REMIT. However, these provisions do only apply for individuals and corporations domiciled in Switzerland, and, moreover, they do not stipulate any licensing requirements either. 256

2.2 Over-the- Counter Derivative transactions (Electricity and Gas)

Derivative transactions are generally subject to the rules of the FMIA governing trading in derivatives (*Derivate*) and in particular impose certain clearing requirements and risk mitigating measures for a Swiss counterparty. In line with the European MiFID II, Art. 2 para. 3 of the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading ("**FMIO**")[46] stipulates, that derivatives transactions relating to electricity and gas are not deemed to be derivatives (*Derivate*) within the meaning of Art. 2 lit. b FMIA if such derivatives are traded on an organized trading facility, physically delivered, and cannot be settled in cash at a party's discretion. Furthermore, over-the-counter financial derivatives do not typically satisfy the requirement of suitability for mass-trading and, hence, would not qualify as securities (*Effekten*) within the meaning of the FMIA and, hence, would not either be subject to the rules of the FMIA governing trading in securities. 257

[45] Stromversorgungsverordnung, SR 734.71

[46] Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel, SR 958.11

The FinIA that supersedes the former SESTA in this respect provides for licensing requirements, inter alia, for securities firms (*Wertpapierhäuser*), who correspond to the former securities dealers under the SESTA. Unless the derivatives qualify as securities (*Effekten*), no license as a securities firm is required for trading in derivatives. As over-the-counter financial derivatives would typically not satisfy the requirement of suitability for mass-trading, and thereby not qualify as such securities within the meaning of the FinIA and under such circumstances, trading in such over-the-counter financial derivatives would, hence, not be subject to the licensing requirements as a securities firm (*Wertpapierhaus*) under the FinIA. 258

The Financial Services Act ("**FINSA**")[47] introduced in 2020 provides for rules on providing financial services to customers. Financial services are broadly defined as services in the context of the trading in securities (*Effekten*) and financial instruments (*Finanzinstrumente*) as well as the portfolio management of, investment advice on and granting loans for finance transaction involving such instruments. While over-the-counter financial derivatives do not typically satisfy the requirement of suitability for mass-trading and would thereby not qualify as securities (*Effekten*) within the meaning of the FINSA, such over-the-counter financial derivatives are captured by the notion of financial instruments (*Finanzinstrumente*). As long as the parties, however, only trade in such securities or financial instruments as counterparties for their respective own account and without providing services to the other counterparty, they do not qualify as financial service providers (*Finanzdienstleister)* within the meaning of the FINSA, and, hence, such proprietary trading is not subject to the rules of conduct under the FINSA either. 259

3. License requirements, regulation of trading (CO_2 Allowances) 260

3.1 Derivative transactions in CO_2 Allowances 261

What has been said with respect to over-the-counter derivatives in electricity and gas (see paragraph D.IX.1 and D.IX.2.2 also applies to over-the-counter derivatives in CO_2 Allowances. 262

3.2 Spot transactions in CO_2 Allowances 263

Where the parties trade directly in spot CO_2 Allowances, that do not qualify as derivatives, though, the question arises whether CO_2 Allowances could qualify as financial instruments and if apt for mass trading, securities (*Effekten*), that could give rise to licensing requirements or regulations applicable to trading in such CO_2 Allowances.

Swiss law does still not provide for a qualification of CO_2 Allowances. In particular neither the FMIA nor the FINSA provide for such qualification. In turn, the definition of financial instruments (*Finanzinsrumente*), which ultimately also underpins the definition of securities 264

[47] Bundesgesetz über Finanzdienstleistungen, SR 950.1.

(*Effekten*) of the FINSA, refers to a list of instruments that in our view does not comprise instruments such as CO_2 Allowances. Such financial instruments comprise financial instruments or securities respectively which entitle the holder to monetary, shareholder or similar rights, whereas a CO_2 Allowance under Swiss law each represents the right to emit one ton of carbon dioxide or equivalent during a specified period, which is in our view not comparable to the afore stated financial instruments. We are, therefore, of the view that CO_2 Allowance do not as such qualify as financial instruments (*Finanzinstrumente*) or securities (*Effekten*) within the meaning of the FMIA or the FINSA and thereby do not either qualify as securities (*Effekten*) within the meaning of the FinIA, but constitute rights *sui generis*. Hence, the trading in CO_2 Allowances is – in our view – not regulated under the FMIA or the FINSA nor subject to a license under the FinIA. Were the CO_2 Allowances to be qualified as securities (*Effekten*) within the meaning of the FinIA, entities which trade CO_2 Allowances in a professional capacity, on the secondary market, either for their own account with the intent of reselling them within a short period of time or for the account of third parties, or make public offers on the primary market, or create derivatives and offer them to the public and were thus to be qualified as security firm (*Wertpapierhaus*) would be subject to authorization by FINMA in its capacity as Supervisory Authority.

4. Electricity Exchanges

We note, that pursuant to the Financial Market Infrastructure Act (FMIA), exchanges on which electricity may be traded are exchanges within the meaning of Art. 2 lit. a FMIA and Art. 47 FMIA, which stipulates that the Federal Council may adopt provisions regarding power exchanges and trading on such exchanges, which deviate from the FMIA rules on exchanges in order to take account of the specific features of the electricity market with a view of safeguarding the public interest in a secure power supply. The Federal Council has not, however, so far enacted such implementing ordinance. Foreign exchanges and multilateral facilities must seek recognition by the Swiss Financial Market Supervisory Authority FINMA prior to granting access to Swiss regulated participants.[48]. 265

X. Other Provisions

We have the following remarks and suggestions with regard to specific provisions:

– *Tax Gross-up (§14.9).*

In view of Art. 14 of the Swiss Federal Withholding Tax Act the undertaking of the Obligor to make all payments without deduction of Swiss withholding tax (*Verrechnungssteuer*) and 266

48 The previous FINMA practice to impose on the foreign exchange to restrict such access to Swiss FINMA regulated entities only, has been lifted.

to gross-up its payments accordingly, may be considered unenforceable in the case that at any time such payments should become subject to any Swiss withholding tax. The Swiss Federal Tax Administration published in 1990 guidelines stating that a gross-up provision would not need to be generally qualified as a circumvention of said Art. 14 if (i) the gross-up is not worded as an obligation to pay an additional amount to compensate for such withholding in a tax clause, but is rather addressed through a minimum interest provision which in case of any withholding provides for the necessary increase, (ii) the corresponding amount of withholding tax (based on the increased amount) is actually remitted to the tax authority, (iii) the borrower agrees to furnish to the lender such certificates and other documents as shall be necessary to claim a refund or reduction of the withholding tax and (iv) the parties in good faith had assumed that no withholding tax was applicable.[49]

– *Calculation of Floating Contract Prices (§15).*

The appointment of one party as the Calculation Agent for determination of the Settlement Price is valid. The criteria and methods stipulated by the agreement both during and outside a Market Disruption if followed satisfies the requirement that a determination by a contract party be made using objective criteria and acting commercially reasonable. The appointment of Dealers pursuant to §15.3 (c) constitutes the appointment of experts (*Schiedsgutachter*) and the respective Dealers will be subject to the same standard of independence applicable to judges and arbitrators and it is not free from doubt whether legal entities are eligible or only physical persons. The determination of the Settlement Price of such Dealers is binding (i) in the absence of a manifest error, as specifically reserved in §15.3 (c) and if (ii) it has been reached in a proper procedure and none of the Dealer was subject to exclusion or rejection on grounds of lack of independence. 267

– *Deemed receipt of notices (§23.2 (b)).*

A notice made to Party A in Switzerland and which is not actually received by it, may, notwithstanding the fiction stipulated in the Agreement, not constitute a valid notification to Party A and, hence not be binding on it. 268

– *Amendments in writing (§23.3).*

Notwithstanding the formal requirement stipulated for amendments to the Agreement, one cannot rule out that a party to the Agreement could successfully argue (being understood that it would carry the burden of proof therefor) that this particular formal requirement has been overruled by an amendment of this clause by the parties agreed in another form. We, therefore, usually recommend to specifically include in such clauses that the formal requirements also 269

49 We note that interest payable by a Swiss Bank on Cash Collateral would be subject to Swiss withholding tax and test (iv) would not be regarded as satisfied in respect of such interest payments.

apply to amendments of that particular clause.

– *Partial Invalidity (§23.4).*

The provision on partial invalidity is subject to the scope of and reason for the invalidity. It 270
may in particular not be effective if (i) the illegal provision constitutes an essential (by objective measure) part of the overall agreement which is indispensable for the valid conclusion of such agreement and failing agreement of the parties on an alternative provision - the obligation to agree on such alternative being a mere obligation of negotiating in good faith - would therefore void the entire agreement or (ii) where the reason for such invalidity lies in the legal effect that the parties wanted to achieve with the particular provision, in which case any alternative provision aiming at the same effect would be invalid as well.

E. Adressees, Governing Law, Jurisdiction

This Opinion is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions (including this Opinion), is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's and our prior written approval.

This Opinion and all conclusions expressed herein relate solely to matters of the laws of Switzerland as in force at the date hereof and do not consider, except as expressly stated, the impact of any laws (including insolvency laws and conflict of laws rules) other than the laws of Switzerland, even in the case where, under the laws of Switzerland, any foreign law falls to be applied.

It is to be noted that the meaning and sense of certain concepts of the laws of Switzerland and expressions which are used herein and on which this Opinion is based do not necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the Addendum are to be understood in accordance with their plain meaning and without regard of any import which they may have under German or English law.

This Opinion is governed by and construed in accordance with Swiss law and the ordinary courts of Zurich, Canton of Zurich, Switzerland shall have exclusive jurisdiction in case of any dispute in respect of this Opinion.

Yours sincerely

LENZ & STAEHELIN

Patrick Hünerwadel

Appendix A

Drafting proposal for Automatic Termination in respect of Swiss Parties:

Amendment to § 10.4 of the EFET Agreement if parties wish to restrict Automatic Termination for a Swiss counterparty for purposes of triggering Automatic Termination, insert after the reference to §10.5(c)(Winding-up/Insolvency/Attachment):

",provided that in respect of an insolvency proceeding governed by Swiss law, Automatic Termination shall be triggered only by (i) the filing for a request for a stay (Gesuch um Nachlassstundung and (ii) the filing by the respective entity of a request to be declared bankrupt (Antrag auf Konkurseröffnung), (iii) the grant of a stay (Gewährung der Nachlassstundung), (iv) the formal declaration of bankruptcy (Konkurseröffnung) or (v) where applicable, the withdrawal of its license and liquidation under (i) Article 66 of the Financial Institutions Act (SR 954.1) or Article 23quinquies of the Banking Act (SR 952.0) or (ii) Article 33 of the Banking Act (SR 952.0) (as such laws may be amended or re-enacted from time to time)."

The parties may consider adding the following Material Reasons for Banks, Securities Firms, Special Insolvency Regime Swiss Branches and Fund Management Companies to § 10.5(c) when dealing with such Swiss counterparties:

*"in respect of a Swiss bank or a Swiss branch of a bank licensed under the Swiss Federal Act on Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen) (the "**Banking Act**"), or a Swiss securities firm or Swiss branch of a securities firm or a fund management company licensed under the Financial Institution Act, it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory Authority, (i) protective measures (Schutzmassnahmen) under Article 26 para. 1 lit. e, f, g or h of or other protective measures establishing a payment moratorium of general applicability or ordering the termination of its business operations or, (ii) restructuring procedures (Sanierungsverfahren) under Articles 28-32 of the Banking Act."*

Appendix B

Transactions under the EFET General Agreement

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

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

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

“Commodity” means electricity, natural gas, emissions allowances, (green) certificates or capacity rights.