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MEMORANDUM OF LAW

on the

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

dated
21 August 2023

prepared for

European Federation of Energy Traders

T A B L E O F C O N T E N T S

1 Introduction

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

1.2 The EFET General Agreement may be used together with:

1.2.1 For Electricity:

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

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

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

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

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

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

[1] In the Version 2.1(a), published on 21 September 2007.
[2] In the Version 2.0(a), published on 11 May 2007.
[3] In the Version 3.1, published on 4 November 2021.

11 September 2009);

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

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

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

1.2.2 For Natural Gas:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xxvii) the EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version

1.0, published 4 December 2017);

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

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

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

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

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

1.2.3 For electricity and Natural Gas:

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

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

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

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

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

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

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

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

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

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

2 Opinion limited to Slovak law as at date of Opinion

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

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

3 Interpretation and construction

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

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

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

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

4 No opinion of fact

We express no opinion as to matters of fact.

5 Assumptions

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

5.1.1 General assumptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.1.6.2 Parties may or may not (i) use the EFET Electronic

Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement.

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

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

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

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

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

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

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

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

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

5.2.5 No transactions contemplated under the EFET General Agreement or any Individual Contract thereunder are carried out in the context of (i) a regulated market within the meaning of Article 4 (1) no 21 Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") or (ii) a system within the meaning of § 45 (1) of the Act No. 492/2009 Coll. on Payment Services, as amended (implementing Article 2 lit a of Directive 98/26/EC on settlement finality in payment and securities settlement systems).

6 Executive Summary

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

What types of counterparty are covered by this Opinion?	Please see Appendix ./A
What types of transaction are eligible for close-out netting?	Please see Appendix ./B
Does the Opinion require or recommend that Automatic Termination applies to Party A?	We believe that the question, whether Party B should select Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement or not, is, ultimately, a commercial one. From a mere legal perspective, Automatic Termination does not constitute a prerequisite for a positive statement on the enforceability of the Close-out Netting Provisions (see at 8.1.1.1 below for further details). We provide for a short overview of aspects that the parties may want to consider when deciding whether or not to elect Automatic Termination (see at 8.1.1.2 below for further details).
Is the early termination provision of the agreement enforceable in Slovakia?	Yes (subject to the limitations and qualifications set out in this Opinion).
Are the Close-out Netting Provisions[4] enforceable in a local	Within the scope of the Governing Law Netting Exception (as defined at 7.4.1.1 below), the enforceability of the EFET

[4] As defined at I.7.1 of this Opinion.

insolvency?	Close-out Netting Provisions in the event of opening of insolvency proceedings over the assets of Party A is, subject to the limitations and qualifications set out in this Opinion, to be determined in accordance with the laws governing the relevant EFET General Agreement (including substantive insolvency law), i.e. primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement. Where the Governing Law Netting Exception does not apply and, hence, Slovak substantive insolvency law will be decisive, we believe that, based on the reasoning and subject to the limitations outlined at 7.5 and 7.6 below, the EFET Close-out Netting Provisions will be enforceable in the event of opening of local insolvency proceedings over the assets of Party A to the extent that they benefit from the Slovak substantive netting privilege.
Would the laws of Slovakia characterize the transfer of Eligible Credit Support as effecting an unconditional transfer of ownership or is there a risk of recharacterizing such transfer as creating a security interest?	In case Slovak substantive law was determined as the law applicable to the relevant Eligible Credit Support in accordance with Slovak conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 above), the following applies: Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title is substituted by entitlement to a claim against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit

	(*akreditív*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Based on general Slovak law principles, we do not believe that a Slovak court would not recognize and not uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive accordingly, full entitlement to a claim against the relevant third-party (see at 8.3.2.2 below for further details).
Is any action required to ensure that ownership title continues to rest with Party B?	No actions or steps other than those required under the law determined as the law applicable to the Eligible Credit Support in accordance with Slovak conflict of laws rules (see at 8.3.1.2.1 and 8.3.1.3.1 below) need to be taken and maintained. In case Slovak substantive law was to apply, once Party B has validly received full entitlement to the claim against the relevant third-party (see at 8.3.1.2.2 and 8.3.1.3.2 below), no further actions or steps are required to ensure that full entitlement to such claim continues to remain with Party B.
Are there any recommended amendments to the standard documents?	Please see our recommendations at 8.1.1.3, 8.1.2.2.2, 8.3.6.2, 8.4.1.4 and 8.5.1.1 below.
Does the Opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in	Each Party should carefully scrutinize whether the other Party has all the requisite capacity, powers and authorities to enter into and perform

Slovakia?	the EFET General Agreement and any Individual Contracts thereunder[5]. This holds, in particular, true in case the other Party is a Municipality where certain limitations apply (please see 8.5.1.1.1 and 8.5.1.1.2 below). Parties should be aware that the applicability of the Safe Harbour Provisions is limited also with respect to some regulated entities (such as re-inurance or pension funds). Parties should review and consider incorporating amendments to the standard documents proposed (see above).

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

7.1 Scope of analysis of the provisions of the EFET General Agreement

This Section 7 sets out an analysis, from the perspective of the applicable Slovak legal framework, of the specific provisions of the EFET General Agreement governing:

(A) early termination – *i.e.*, the Early Termination right of Party B or Automatic Termination (if elected by the Parties) due to **an insolvency-related Material Reason** occurring in respect of Party A (§ 10 (5) c) of the EFET General Agreement) ("**EFET Termination Provisions**"); and

(B) netting – *i.e.*, provisions whereby several mutual obligations/exposures between Party A and Party B are, as a consequence of application of Termination Provisions, replaced with a single Termination Amount (§ 11 of EFET General Agreement) ("**EFET Netting Provisions**");

(EFET Termination Provisions and EFET Netting Provisions together, the "**EFET Close-out Netting Provisions**").

7.2 Insolvency-related Material Reasons under the EFET General Agreement from Slovak law perspective

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

Slovak law proceedings to which a Party A could be subject to that could qualify as an event constituing Winding-up, Insolvency or Attachment as defined in §10.5(c) of the EFET General Agreement are the following:

(i) in respect of a Slovak Insurance Company, Slovak Re-Insurance Company and a Slovak Management Company: (i) bankruptcy (in Slovak: *konkurz*), (ii) involuntary administration (in Slovak: *nútená správa*), and (iii) liquidation (in Slovak: *likvidácia*);

(ii) In respect of a Slovak Bank and a Slovak Investment Firm: bankruptcy, involuntary administration, resolution proceedings and liquidation;

(iii) In respect of a Slovak Corporate: bankruptcy, restructuring, preventive restructuring (in Slovak: *preventívna reštrukturalizácia*) and liquidation; and

(iv) In respect of a Slovak Municipality and Slovak Region: involuntary administration.

We provide for a brief overview of these different types of Slovak proceedings in Appendix ./D.

We note that some of the proceedings mentioned above (e.g. restructuring or involuntary administration) are <u>not</u> insolvency proceedings by law but they do fall under §10.5 (c) of the EFET General Agreement and they may affect creditors rights. In some cases, the Slovak close-out netting laws even apply fully to both insolvency (bankruptcy) proceedings as well as other, by definition not-insolvency proceedings (such as restructuring). We therefore address them in this chapter together.

We note that the Material Reasons under § 10/5/c point (i) (dissolution without a legal successor), point (v) (with respect to solvent liquidation) and point (vii) alone are neither insolvency nor insolvency related reasons from the perspective of Slovak laws and conclusions in clause 7.8 pertaining to termination for non-insolvency related Material Reasons would apply.

7.3 Agreement on close-out netting within the meaning of the Slovak Insolvency Act

The primary source of Slovak law rules for close-out netting agreement is the Slovak Act No. 7/2005 Coll. on bankruptcy and restructuring, as amended (the "**Slovak Insolvency Act**"). It provides for definition of the close-out netting agreement, the close-out netting (i.e. the calculation of the single net amount) as well as for the majority of provisions referred herein as the Safe Harbour Provisions (see at 7.4).

A "*close-out netting agreement*" (*zmluva o záverečnom vyrovnaní ziskov a strát*) is defined as:

(i) an agreement governed by Slovak or foreign law,

(ii) entered into between the parties listed in clause 7.3.1 of this Opinion,

(iii) in relation to one or more transactions described in clause 7.3.2 of this Opinion,

(iv) that stipulates the calculation of one single obligation in relation to the actual or estimated losses or actual or estimated profits, resulting from the termination or cancellation of one or more trades entered into in relation with such an agreement or under such agreement.

In order for an agreement to qualify as a close-out netting agreement, <u>all of the above elements must be fulfilled</u>.

Please see clause 7.3.1 below for an analysis regarding qualifying parties, clause 7.3.2 below for an analysis regarding qualifying transactions and clause 7.3.3 for an assessment of whether the EFET General Agreement qualifies as a netting arrangement from the perspective of the Slovak Insolvency Act.

7.3.1 Entities benefiting from the Slovak netting privilege

Pursuant to Article 180 (5) of the Slovak Insolvency Act, the entities that, subject to fulfilment of other elements of the close-out netting agreement definition (see clause 7.3 above), can benefit from the Slovak netting privilege (the "**Qualified Parties**") are the following:

a) public authorities of EU and EEA Member States;

b) NBS or a central bank of other state, European Central Bank International Monetary Fund, European Investment Bank, International Bank for Reconstruction and Development, Bank for International Settlements;

c) a Slovak bank, a Slovak branch of a foreign bank, a foreign bank, Slovak securities broker, foreign securities broker, Slovak insurance company, foreign insurance company, an insurance company from another EU country, Slovak asset management company, foreign asset management company, Slovak electronic money institution, foreign electronic money institution, Slovak collective investment entity, foreign collective investment entity;

d) any other person different from the persons set out in point c) above, which is subject to prudent supervision and is carrying out as its main business activity one of the activities that may be carried out by a

Slovak bank or a Slovak branch of a foreign bank as well as a person with registred seat outside Slovakia, which conducts similar business activity;

e) any other person different from the persons set out in point c) above, which is subject to prudent supervision and is carrying out as its main business activity the acquisition of shareholdings (in Slovak *nadobúdanie podielov na majetku*) or a person with registered seat outside Slovakia, which conducts similar business activity; and

f) central depositary of securities payment system operator, settlement agent, foreign clearing house, joint representative (trustee) of bond holders or other debt securities holders, or the persons with registered seat in foreign country, which conducts similar business activity including a person whose business activity is the settlement and clearing of transactions in financial instruments or activities of a central counterparty (even if it is not a foreign central depositary).

In addition, the Slovak netting privilege applies also to any other Slovak entity (including Slovak Corporate) if the other party to the EFET General Agreement is one of the Qualified Parties listed under lit. a) to d) and f) above[6].

Based on the above, in case of insolvency of Party A, the EFET General Agfreement would, subject to fulfilment of other elements of the close out netting agreement definition (see clause 7.3 above), benefit from the Slovak netting privilege if either Party A is a Qualified Party or Party B is a Qualified Party (or both of them).

In case the EFET General Agreement was entered into between two non-Qualified Parties (<u>in particular between two corporates</u>) there is significant risk that the EFET Close-out Netting Provisions would not be enforceable as envisaged by the EFET General Agreement and would not be able to benefit from the Slovak netting privilege.

We note that not only corporates but also some of the regulated entities do not qualify as a Qualified Party, such as a re-insurance company or a pension fund.

7.3.2 Transactions benefiting from Slovak netting privilege

Pursuant to Article 180 (1) of the Slovak Insolvency Act, the transactions

[6] For the purposes of simplification, we use the term Qualified Party throughout this Opinion when we refer to an EFET General Agreement entered into between a non-Qualified Party (mostly a corporate) and a Qualified Party – without specifically mentioning in each case that Qualified Party under lit. e) is not covered.

that, subject to fulfilment of other elements of the close out netting agreement definition (see clause 7.3 above), can benefit from the Slovak netting privilege are the following:

(i) derivative trades – derivatives are under Slovak law defined with reference to the CRR and MiFID II definitions and thus include financial instruments defined in point (44)(c) of Article 4(1) of MiFID II and referred to in Annex I, Section C (4) to (10) thereto,

(ii) trades on the transfer of securities with reverse transfer,

(iii) trades with financial instruments, which are under Slovak securities law defined in line with Annex I, Section C of MiFID II with one exception that they also include share in collective investment undertaking (not only units),

(iv) securities lending,

(v) trades in foreign exchange values,

(vi) trades in hedging rights to financial instruments,

(vii) trades in commodities or emission quotas, and

(viii) other similar trade regardless of the nature of the underlying asset and regardless of whether these trades are settled in cash or physical delivery.

Based on the above we believe that, subject to fulfilment of other elements of the close out netting agreement definition (see clause 7.3 above), the transactions that are to be entered into under the Individual Contracts (as described in Appendix ./B) would benefit from the Slovak netting privilege.

This conclusion is based on the assessment below.

7.3.2.1 Commodity Forwards, Commodity Options, Commodity Swaps

In general, commodity forwards, commodity options and commodity swaps fall under category financial instruments based on the list provided in the Annex I, Section C of MiFID II (which is mirrored in the Slovak legislation) since they fall under below financial instruments included in this list:

"*(5) Options, futures, swaps, forwards and any other derivative* *contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event*",

"*(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products*[7] *traded on an OTF that must be physically settled*",

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

"(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF"; and

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

Commission Delegated Regulation (EU) 2017/565[8] provides for a definition of "commodities". Pursuant to Article 2 no 6 of Delegated Regulation 2017/565, "commodity means "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity".

Based on this definition, natural gas and electricity (latter even expressly) fall under commodity for the purpose of qualification

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[7] As defined in Article 2 no 4 of Regulation (EU) No 1227/2011.

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

of respective financial instruments. As to the green certificates and capacity rights, albeit unlikely "commodities" in the strict sense of the word based on point 10 of Section C of Annex I to MiFID II which covers other derivative contracts relating to "assets, rights, obligations, indices and measures" not otherwise mentioned in Section C of Annex I to MiFID II. Point 10 of Section C of Annex I to MiFID II is further specified by Article 8 of Delegated Regulation 2017/565. According to Article 8 of Delegated Regulation 2017/565, derivative contracts relating inter alia to following assets also fall under point 10 of Section C of Annex I to MiFID II (to the extent certain criteria are met):

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

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

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

Even if the trades with Green Certificates or Capacity Rights would not fall under financial instruments under MiFID II based on above, we believe that they should fall under "other similar trade regardless on the nature of the underlying asset and regardless of whether these trades are settled in cash or physical delivery" provided directly in the netting privilege under Slovak law. However, please note that there is no known practice on application of this rule to Green Certificates or Capacity Rights and thus we cannot fully exclude that a court would come to a different conclusion.

Thus Individual Contracts qualifying as derivatives (such as forwards, options or swaps) related to gas, electricity, emission allowances, green certificates and capacity rights should in our opinion in principle be able to benefit from the Slovak netting privilege.

7.3.2.2 Physical Commodity Transactions

We believe that Physical Commodity Transactions with electricity, natural gas, emissions allowances, (green) certificates or capacity rights fall under Slovak netting privileged as they fall under following categories of eligible trades:

(vii) trades in commodities or emission quotas or

(viii) other similar trade regardless on the nature of the underlying asset and regardless of whether these trades are settled in cash or physical delivery.

In case of Physical Commodity Transactions with electricity, natural gas or emissions allowances, qualification for netting privilege is expressly given under the Slovak legislation[9].

As to the Physical Commodity Transactions with Green Certificates or Capacity Rights, we believe that by systematic and linguistic interpretation of the point (viii) above and it can be concluded that such trades will be of similar nature to trades with commodities or emission quotas and thus also should also benefit from the netting privilege. However, please note that there is no known practice on application of this rule to Green Certificates or Capacity Rights and we cannot fully exclude that a court would come to a different conclusion.

7.3.3 Netting arrangement

We believe that the EFET Netting Provisions fulfil the requirements for the EFET General Agreement to qualify as a netting arrangement. The reason for this is that §11 of the EFET General Agreement, dealing with the calculation of a Termination Amount, provides certain rules for calculating the close out values of counterclaims (Settlement Amounts) and sets out rules whereby a single (net) Termination Amount is payable (following the establishment / calculcation of individual Settlement Amounts) by one Party

9 We believe that it is safe to assume that both electricity and gas fall under category of commodity, taking into consideration above discussed definition of commodities under Delegated Regulation 2017/565 or for instance definition of commodities under Slovak Act No. 92/2008 Coll. On Commodity Exchange, as amended, which defines commodity as "*tangible object and controllable natural force, especially product, energy and mineral raw material, including precious metals other than gold, which is traded or can be traded in the goods and services market*".

to the other, thereby meeting the requirements of point (iv) above.

On the basis of the above, we believe that the EFET General Agreement (in particular the EFET Netting Provisions) shall qualify as a close-out netting arrangement within the meaning of the Slovak Insolvency Act and thus the EFET General Agreement will benefit from the Slovak netting privilege provided it is entered into between qualifying parties and with respect to qualifying transactions (see 7.3.1 and 7.3.2).

7.4 Slovak substantive netting privilege (Safe Harbour Provisions)

If an agreement qualifies as a close-out netting agreement under the applicable Slovak laws, it can be benefit from the so called Safe Harbour Provisions (netting privilege), the main provisions of which we outline below.

7.4.1 Bankruptcy, Restructuring and Preventive Restructuring

Pursuant to § 180 (3) of the Slovak Insolvency Act the bankruptcy, restructuring and preventive restructuring proceedings shall have no effect on the close-out netting[10] agreed upon in an agreement that qualifies as a close-out netting agreement under the Slovak Insolvency Act (please see at 7.3 for details).

Furthermore, pursuant to Article 180 para 3 of the Slovak Insolvency Act, if the parties have entered into transactions under a close-out netting agreement or in connection with it, and if the transactions are terminated or cancelled, only one single net obligation shall be due, whose amount will be calculated under the terms as specified under the agreement. In cases where the debtor has a claim regarding such net obligation under the close-out netting agreement against the other party, the trustee then shall demand such net claim against the other party but only the amount which has been calculated at close-out netting. On the other hand, if such a claim in respect of a net obligation under the close-out netting is in favour of the non-defaulting party, the latter shall exercise such claim by its registration with the trustee only in respect of the amount as defined at close-out

[10] "Close-out netting" (*záverečné vyrovnanie ziskov a strát*) is in principle defined as a calculation of the single net amount by the Article 180 (2) of the Slovak Insolvency Act. The exact definitions is as follows: *calculation in accordance with the terms of a close-out netting agreement of the amount of a single net obligation in respect of any losses or gains occurred, whether actual or estimated, arising in connection with the termination or cancellation of one or more transactions under or in connection with that close-out netting agreement. The parties will agree on the method of calculation of that single net obligation in the close-out netting agreement, provided that the calculation shall be made by reference to any actual or estimated losses or gains of the parties relating to any payments or performances that would have been paid or made if the event giving rise to termination or cancellation of one or more of those transactions would not have occurred, including any costs or revenues incurred in connection with that termination or cancellation; the calculation may be based on quotations of interest rates, exchange rates or prices obtained from other participants of relevant financial markets in connection with those terminated or cancelled transactions*".

netting.

Withdrawal from an agreement, that contains a close-out netting agreement has no impact on the provisions regulating the close-out netting. Thus, generally speaking, in case of withdrawal from such an agreement, the above rules apply.

7.4.1.1 Governing Law Netting Exception

If a certain agreement qualifies as a close-out netting agreement and thus enjoys, in principle, the protection of the Safe Harbour Provisions, the treatment of such an agreement in bankruptcy will further depend on the regulatory status and jurisdiction of Party A.

The reason for this is that pursuant to Article 192 of the Slovak Insolvency Act (in connection with Article 194 of the Slovak Insolvency Act), in case of bankruptcy of a *Slovak financial institution*, the close-out netting shall be governed exclusively by the laws of the Member State[11] that govern the close-out netting agreement ("**Governing Law Netting Exception**").

7.4.1.1.1 Governing Law

The Governing Law Netting Exception does not apply to close-out netting agreements governed by laws of a state that is not a Member State (with UK law being of particularly relevant exemption).

7.4.1.1.2 Entities covered by the Governing Law Netting Exception

The Governing Law Netting Exception does not apply to an EFET General Agreement in case the Party A is not a Slovak financial institution.

Slovak financial institution is defined as a (Slovak) bank, electronic money institution, insurance and re-insurance undertaking[12]. Other regulated entities do not to fall under this definition and thus should not fall under the Governing Law Netting Exception. However, we believe that this may not have been the intention of the legislator. The reason for this is that for certain other insolvency matters (but not close-out netting), the Slovak Insolvency Act provides that the same rules as those that apply to a Slovak financial institution, apply also to other regulated entities, most notably a Slovak Investment Firm and a Slovak Management Company. We also understand that the competent regulator – National Bank of Slovakia – is

[11] We note that the definition of a "Member State" in the Slovak Insolvency Act includes both EU members as well as members of the European Economic Area, i.e. currently Iceland, Liechtenstein and Norway.

[12] Article 176 (1) of the Slovak Insolvency Act

of the view that this extensive approach should be applied[13]. There is, to our knowledge, no case where this would have been tested and we therefore cannot fully exclude that a bankruptcy trustee would attempt to apply a restricted approach.

It is unclear how the bankruptcy court / trustee would proceed with respect to a close-out netting agreement entered into by a (bankrupt) entity that is a Slovak financial institution but not a Qualified Party, such as a re-insurance undertaking. The reason for this that in order for an agreement to qualify as a close-out netting agreement under the Slovak Insolvency Act (and thus to benefit from the Slovak netting privilege), it is necessary that at least one of the parties to that agreement is a Qualified Party.

In case of an EFET General Agreement entered into between a reinsurance company and a Qualified Party, this would be fulfilled, and the Governing Law Netting Exception would apply.

In case of an EFET General Agreement between a re-insurance company and a non-Qualified Party (thus between two non-Qualified Parties), the EFET General Agreement would not qualify as a close-out netting agreement for the purposes of the Slovak Insolvency Act (see at 7.3 for details). This could be resolved in two ways: (i) on the one hand, it could be argued that the Governing Law Netting Exception shall apply as long as the EFET General Agreement qualifies as a netting arrangement under the law governing that EFET General Agreement (provided it is a law of a Member State) and (ii) on the other hand, an argument can be raised that the Governing Law Netting Exception applies only to agreements that qualify as a close-out netting agreement for the purposes of the Slovak Insolvency Act. This interpretation would result in the Governing Law Netting Exception not being applicable and the Slovak mandatory laws (including substantive insolvency laws) would apply, similarly as in a case of an EFET General Agreement entered into between two corporates. Without any available court or regulator practice in this respect (as well as, currently no re-insurance company having been incorporated in Slovakia), it is not possible to arrive at a final conclusion as to what the approach of the trustee would be.

The Governing Law Netting Exception will not apply to a Slovak Corporate.

7.4.1.1.3 Substantive scope of the Governing Law Netting Exception

[13] This opinion of NBS was not expressed specifically with respect to close-out netting but with respect to bankruptcy proceedings of some of the entities that do not fall under the Slovak financial institution definition. A different approach would mean that the bankruptcy of those – seemingly excluded – regulated entities, such as Slovak Investment Firm, would follow some of the standard bankruptcy rules applicable to corporates and not specific rules of bankruptcy proceedings applicable to financial institutions, which is certainly not the case.

The scope of the Governing Law Netting Exception is – at least *expresis verbis* – limited to the final calculcation only[14] and does not extend to other aspects of the close out netting agreement (such as termination). It is not clear whether this was the intention of the legislator but we believe this not to be the case. The reason for this is that we assume that the goal of the legislator was, inter alia, to implement the Article 25 of the WUCI Directive[15] that provides that the *netting agreements* (i.e. not only the close-out netting / final calculcation) shall be governed by the law governing the netting agreement.

There are therefore, two interpretations possible: first being that the Governing Law Netting Exception (if otherwise applicable) applies to the entire netting agreement – i.e. the enforceability of the entire EFET General Agreement would be governed by the laws governing the EFET General Agreement. Second interpretation being that the Governing Law Netting Exception applies to the close-out netting only – i.e. the final calculcation.

It could be argued that the provision should be interpreted in line with the directive, however, we believe that (if one cannot rely on direct effect of directive), this is true only if the wording of the laws allows several interpetations. We believe that in this particular case it would mean interpreting the law against its wording, which is not possible.

Without any available court or regulator practice in this respect, it is not possible to arrive at a final conclusion as to what the approach of the trustee would be.

7.4.1.1.4 Conclusion on the impact of the Governing Law Netting Exception

Based on the above, we believe that the following conclusions can be made:

(i) Where the Governing Law Netting Exception does apply, the enforceability of the EFET Close-Out Netting Provisions would be governed by the laws governing the EFET General Agreement

In case restrictive interpretation of the Governing Law Netting Exception prevails (see above at 7.4.1.1.3), this would be limited to the the close out netting as such (i.e. the final calculcation) only, while for the other aspects of the EFET Close-out Netting Provisions, the conclusion under (ii) would apply.

[14] The term "*close out netting*" used in the wording of the Governing Law Netting Exception is a defined term under the Slovak Insolvency Act and refers to calculcation of the termination amount only, not other aspects of the close out netting agreement.

[15] Directive 2001/24/EC on reorganization and winding-up of credit institutions.

(ii) Where the Governing Law Netting Exception does not apply or where the EFET General Agreement is governed by Slovak laws, the Slovak court / bankruptcy trustee dealing with insolvency of Party A would assess the EFET Close-Out Netting Provisions from the perspective of Slovak mandatory rules, even if the Parties have chosen foreign law as the law governing the EFET General Agreement.

This would be the case also in respect of aspects that do not fall under the Governing Law Netting Exception (should a restrictive interpretation of the exception prevail – see at 7.4.1.1.3 above for details).

7.4.2 Involuntary administration of a Slovak Insurance Company, a Slovak Bank and a Slovak Investment Firm

The laws regulating the involuntary administration of a Slovak Insurance Company[16], a Slovak Bank[17] and a Slovak Investment Firm[18], in each case where it has established a branch in another member state[19], contain a Governing Law Netting Exception by providing that the effects of the involuntary administration on *contracts on settlement or other similar agreements, the purpose of which is to cover or change the overall difference between the mutual claims and liabilities of the contracting parties into an aggregate mutual claim or liability for these parties*, shall be governed by laws governing such agreements.

There are a few notable differences between the Governing Law Netting Exception applicable in bankruptcy and Governing Law Netting Exception applicable in involuntary administration. Please see below for an overview:

(i) Governing law: assuming all other elements are fulfilled, the Governing Law Netting Exception applies regardless of whether the netting agreement is governed by a law of a Member State or a non-Member State. See at 7.4.1.1.1 for comparison of the bankruptcy regulation.

(ii) Entities: the (involuntary administration) laws do not refer to the definition of the close out netting agreement provided for in the Slovak Insolvency Act but contain a separate stand-alone definition – one allowing the agreements to benefit from this Governing Law Netting

[16] Article 153 (1) lit e) of the Slovak Act No. 39/2015 Coll. on insurance (and amending certain laws), as amended

[17] Article 59 (1) lit e) of the Slovak Act No. 483/2011 Coll. on banks (and amending certain laws), as amended

[18] Article 153 (1) lit e) of the Slovak Act on securities and investment services (the Securities Act), as amended

[19] We note that the definition of a "Member State" in the Slovak Act On Insurance and the Slovak Act on Banks includes both EU members as well as members of the European Economic Area, i.e. currently Iceland, Liechtenstein and Norway. However, under the Slovak Securities Act (relevant for involuntary administration Slovak Investment Firms), the term "member state" is limited to member states of the European Union only.

Exception even if they would not benefit from the netting privilege in bankruptcy (e.g. there is not a requirement for them to be entered into by Qualified Parties). See at 7.4.1.1.2 for comparison of the bankruptcy regulation.

(iii) Scope: the Governing Law Netting Exception explicitly covers the effects of the involuntary administration on the entire close-out netting agreement (and not only to the final calculation). See at 7.4.1.1.3 for comparison of the bankruptcy regulation.

The laws regulating the involuntary administration of a Slovak Insurance Company[20], of a Slovak Bank[21] and of a Slovak Investment Firm[22] further provide that the imposition of involuntary administration shall be without prejudice to the validity, effectiveness, and exercise of rights under a close-out netting agreement – we note that in this case, only provided it fulfils all elements of a close-out netting agreement required by the Slovak Insolvency Act (see clause 7.3 above).

7.4.3 Involuntary administration of a Slovak Municipality and a Slovak Region

A Slovak Municipality and a Slovak Region cannot be subject to insolvency proceedings, only involuntary administration that provides for restriction on their operation but does not modify the rights of creditors under the agreements they have entered into with the Slovak Municipality / Slovak Region.

7.5 EFET Netting Provisions from the perspective of Slovak Insolvency Act

7.5.1 Within the scope of the Governing Law Netting Exception

If follows from the above (please see at 7.4) that, within the scope of the Governing Law Netting Exception and subject to limitations outlined herein (see in particular 7.6.6), the EFET Netting Provisions should be recognized and given effect in accordance with the law chosen by the parties[23].

7.5.2 Beyond the scope of the Governing Law Netting Exception

It follows from the above that, where the Governing Law Netting Exception does not apply or the EFET General Agreement is governed by Slovak laws, the Slovak court (assessing the matter – e.g. in the context of insolvency

[20] Article 153 (8) of the Slovak Act No. 39/2015 Coll. on insurance (and amending certain laws), as amended
[21] Article 59 (9) of the Slovak Act No. 483/2011 Coll. on banks (and amending certain laws), as amended
[22] Article 153 (8) of the Slovak Act on securities and investment services (the Securities Act), as amended
[23] Given that the Governing Law Netting Exception applies to Qualified Parties only and the transactions under EFET General Agreement should, in principle, all qualify as transactions benefitting from the netting privilege, no further conditions need to be mentioned.

of Party A) will assess the EFET Netting Provisions from the perspective of Slovak mandatory rules, even if the Parties have chosen foreign law as the law governing the EFET General Agreement.

7.5.2.1 Transactions meeting the criteria of a "close out netting agreement"

In transactions where the EFET General Agreement meets the criteria for a close out netting agreement under the relevant Slovak laws, the EFET Netting Provisions will enjoy the protection of the Safe Harbour Provisions, subject to limitations described in clause 7.6.6 below.

In particular, as described in clause 7.4 above, the bankruptcy shall have no effect on the close-out netting rules agreed upon by the parties to the EFET General Agreement.

7.5.2.2 Other transactions

In transactions where the EFET General Agreement does not meet the criteria of a close-out netting agreement under the relevant Slovak laws and thus cannot enjoy the protection of the Safe Harbour Provisions (i.e. in particular in case of an EFET General Agreement entered into between two corporates), the EFET Netting Provisions will be subject to the general rules of the Slovak Insolvency Act and the statutory provisions of the Slovak Insolvency Act will prevail over the arrangements set out in the EFET General Agreement.

Slovak Insolvency Act does not explicitly allow close-out netting mechanisms to operate outside of the Safe Harbour Provisions and most importantly, there are rules regulating set off of mutual claims in bankruptcy that might, in our view, cause the EFET Netting Provisions to not work. Please see 7.6.5 for details.

In addition, the bankruptcy trustee of Party A would be entitled to use the extraordinary termination rights applicable to non fulfilled contracts in bankruptcy and might decide to do so on a selective basis ("cherry picking" risk, please see 7.6.4 for more details).

There is therefore substantial risk that the EFET Netting Provisions will not be enforceable as envisaged by the EFET General Agreement in this case.

7.6 EFET Termination Provisions from the perspective of Slovak Insolvency Act

It follows from the above (see at 7.4.1.1.3 and 7.4.1.1.4) that the Governing Law Netting Exception may not apply to termination of a close-out netting agreement (but only to the final calculcation). In such case, the Slovak court (assessing the matter – e.g. in the context of insolvency of Party A) will assess the EFET Termination Provisions from the perspective of Slovak mandatory rules, even if the Parties have chosen foreign law as the law governing the EFET General Agreement. Should the more extensive interpretation of the Governing Law Netting Exception prevail, we note that the enforceability of the EFET Termination Provisions should be assessed in accordance with the laws governing the EFET General Agreement (subject to limitations outlined here in at 7.6.6). Otherwise, the below applies:

7.6.1 Transactions meeting the criteria of a "close out netting agreement"

In transactions where the EFET General Agreement meets the criteria for a close-out netting agreement under the relevant Slovak laws (i.e. generally where at least one of the parties is a Qualified Party), the EFET Termination Provisions will enjoy the protection of the Safe Harbour Provisions, subject to limitations described in clause 7.6.6.

7.6.2 Other transactions

In transactions where the EFET General Agreement does not meet the criteria of a close-out netting agreement under the Slovak Insolvency Act and thus cannot enjoy the protection of the Safe Harbour Provisions, i.e. in particular if it was entered into between two corporates, the EFET Termination Provisions will be subject to the general rules of the Slovak Insolvency Act. In such case, the statutory provisions of the Slovak Insolvency Act will prevail over the arrangements set out in the EFET General Agreement, in particular:

(i) the termination rights will be susceptible to challenge on basis of general avoidance rules (please see Appendix ./E for details),

(ii) if early termination would not be effected prior to commencement of bankruptcy proceedings, the statutory terminations rights applicable during bankruptcy would take precedence. Please see clause 7.6.3 for details.

(iii) in the absence of the possibility to rely on the protection of the Safe Harbour Provisions, there is a risk that the bankruptcy trustee would exercise the right to terminate the agreements on a selective basis (i.e. with respect to some but not all Individual Contracts). Please see clause 7.6.4 for details on the cherry picking risk.

In addition, the limitations described in clause 7.6.6 below would also apply.

7.6.3 Termination rights in insolvency-related scenarios

7.6.3.1 Termination rights of the bankruptcy trustee of Party A

The Slovak Insolvency Act grants extraordinary termination rights to the bankruptcy trustee[24]. We analyse those that are of particular importance for the termination of the EFET General Agreement in the relevant section of this Opinion (see in particular 7.6.4 and 8.1.1).

7.6.3.2 Termination rights of Party B

As a general rule, Slovak Insolvency Act does not, subject to certain exemptions, restrict the contractual rights of Party B to an early termination of the contract, these are only to a certain extent modified by the mandatory laws on termination of contracts in insolvency.

Based on the above, we believe that both the notice of termination (under §10 (3) lit a) of the EFET General Agreement) as well as the Automatic Termination (§10 (4) of the EFET General Agreement) would be enforceable under Slovak law, subject to the exceptions described below and provided that, in each of the cases below, it is enforceable under the law governing the EFET General Agreement. Notable exceptions apply in case of termination for some of the insolvency-related Material Reasons pursuant to §10 (5) c) of the EFET General Agreement:

[24]If a debtor entered into an agreement on mutual performance before the declaration of bankruptcy,

(a) a debtor has already fulfilled, but the other party has not yet fulfilled the agreement or only partially, bankruptcy trustee may demand the fulfillment of an agreement or may withdraw from an agreement. If the other party has already partially fulfilled the agreement on mutual performance, the bankruptcy trustee may withdraw from the agreement only to the extent of obligations not yet fulfilled by the other party.

(b) which the other party has already fulfilled, but the debtor has not yet fulfilled or only partially, the other party may withdraw from the agreement to the extent of the debtor's unfulfilled obligations; however, the claims of the other party from the withdrawal from the agreement can only be applied in bankruptcy by application as a conditional claim.

(c) which neither the debtor nor the other party had yet fulfilled or only partially, the bankruptcy trustee and the other party may withdraw from the agreement to the extent of the obligations not yet fulfilled by each other; however, the claims of the other party from the withdrawal from the agreement can only be applied in bankruptcy by application as a conditional claim.

(d) the subject of which is a commitment to continuous or repeated activity, or a commitment to refrain from a certain activity or to tolerate a certain activity, the bankruptcy trustee can terminate the agreement within a two-months' notice period, unless the law or the agreement provides for a shorter termination period of such agreement; the bankruptcy trustee can terminate the agreement even if it was agreed upon for a certain period of time.

(i) Bankruptcy of a Slovak entity

Both the notice of termination and the Automatic Termination would be enforceable under Slovak law in the event of declaration of bankruptcy (*vyhlásenie konkurzu*) of a Slovak entity[25], subject to limitations set out in clause 7.6.2 and 7.6.6 below.

(ii) Restructuring and Preventive Restructuring of a Slovak Corporate

The notice of termination would be enforceable under Slovak law in case of restructuring and preventive restructuring of a Slovak Corporate in cases where the EFET Termination Provisions enjoy the protection of the Safe Harbour Provisions, i.e. in particular where Party B is a Qualified Party.

In case where the Slovak netting privilege does not apply, i.e. essentially in case of an EFET General Agreement entered into between two corporates, the notice of termination would not be enforceable as of the moment of the commencement of the restructuring proceedings (*začatie reštrukturalizačného konania*).

The reason for this is that pursuant to the Slovak Insolvency Act[26], upon commencement of restructuring proceedings (*začatie reštrukturalizačného konania*) any agreements allowing the counterparty to terminate the agreement due to restructuring or bankruptcy are ineffective. Further, the counterparty may not terminate or rescind the agreement due to a default of the insolvent party that has occurred before the commencement of the restructuring proceedings.

Similarly, in case of preventive restructuring of a Slovak Corporate where the Slovak netting privilege does not apply, the counterparty may not terminate or rescind the agreement due to a default of the insolvent party that has occurred before the preventive restructuring has been granted (*povolenie dočasnej ochrany*). This applies during the entire period of protection period (i.e. 3 months, which can be prolonged by additional up to 3 months with the consent of the creditors

[25] There is an exception to this otherwise generally applicable conclusion, namely transactions, which qualify as hedging derivatives included in a cover pool of Slovak Bank being an issuer of covered bonds, where the possibility to terminate and close out restricted (please see Appendix ./ E for details). This is applicable both to notice of termination as well as in cases where Automatic Termination was selected.

[26] Article 114 of the Slovak Insolvency Act

committee)[27].

As mentioned in the first two paragraphs of this section 7.6.3.2, the possibility of the party to terminate the agreement on other grounds (including other Material Reasons) is not restricted during restructuring and preventive restructuring.

We believe that the same would apply for Automatic Termination. The reason for this is that even if one could argue that the moratorium on termination rights applies only to an *act* of termination (i.e. Party B sending a termination notice) but not to terminations occurring automatically (i.e. without any action required by Party B), we believe that clear purpose of the relevant provision of the Slovak Insolvency Act was to protect the Slovak Corporate that is entering into restructuring proceedings. The Automatic Termination, if elected by the parties, would be clearly in conflict with this protection and thus the purpose of the relevant provision of the Slovak Insolvency Act. Pursuant to Article 39 of the Slovak Act No. 40/1964 Coll. Civil Code, as amended (the "**Slovak Civil Code**"), any transaction contents or purpose of which contradicts or circumvents the law or contravenes good morals, is invalid. The Automatic Termination would therefore be deemed invalid as a matter of Slovak law if its purpose was to circumvent the purpose of the moratorium. Given the nature and purpose of moratorium, this argument would be relevant irrespective of whether the Automatic Termination would occur upon or immediately preceding commencement of restructuring.

(iii) Liquidation of a Slovak Entity

From the perspective of Slovak laws, liquidation is a non-insolvency related termination reason, therefore, our conclusions under clause 7.8 apply.

(iv) Involuntary Administration and Resolution Proceedings of a Slovak Bank and Slovak Investment Firm

The notice of termination <u>would be enforceable</u> under Slovak law in case of commencement an involuntary administration (*zavedenie nútenej správy*) and commencement of the

[27] The law provides for an exception, when such termination is possible even during the protection period by allowing a termination if the other party to the contract, by continuing to perform the contract, could seriously jeopardise the operation of its business or if the performance to which the other party is obliged is not strictly necessary to maintain the operation of the debtor's business.

resolution proceeings (*začatie rezolučného konania*) in respect of a Slovak Bank, Slovak Investment Firm or Slovak Management Company, which is a selected institution under the Slovak Act No. 371/2014 Coll. on resolution in the financial market, amending and supplementing other acts, as amended (the "**Slovak Resolution Act**"), subject to the exceptions described below.

<u>Restriction of Termination Rights</u>

Pursuant to Section 10 of the Slovak Resolution Act, neither a crisis prevention nor crisis management measure, nor any event directly linked to the application of such a measure, is allowed to constitute a trigger for contractual termination, netting or set-offf rights or enforcement of security in relation to the institution in resolution or a member of its group on a cross-default basis provided that the substantive obligations under the agreement, including payment and delivery obligations, and provision of collateral continue to be performed.

A crisis prevention measure[28] includes, inter alia, the appointment of an involuntary administrator under the Act on Banks and Slovak Securities Act in respect of a Slovak Bank, Slovak Investment Firm or a Slovak Management Company and the appointment of a special administrator under the Slovak Resolution Act.

Therefore, the Slovak Resolution Act effectively prohibits termination for insolvency-related Material Reason referred to under §10 (5) lit. (v), (vi), (viii) and (ix) if the default that shall form the grounds for termination is imposition of involuntary administrator and / or appointment of involuntary administrator.

<u>Suspension of Termination Rights</u>

The Resolution Council[29] may suspend for the maximum of 48 hours the termination rights of any party to a contract with either (i) a Slovak Bank, a Slovak Investment Firm or a Slovak Management Company being subject to the resolution proceedings or (ii) a subsidiary of such institution, where such subsidiary's obligations are guaranteed or otherwise supported

[28] § 10(2) of the Resolution Act
[29] § 17 of the Resolution Act

by the institution and the relevant termination right is based solely on insolvency or financial condition of the institution in resolution.

We note that this suspension applies also if the Slovak Bank, a Slovak Investment Firm or a Slovak Management Company is in default with the fulfilment of their substantive obligations under the EFET General Agreement.

Further, if the Resolution Council effects a bail-in, the original termination right in respect of any original breach of the agreement is permanently overridden. However, the termination rights under the agreement are preserved in case of any new breach or other termination reason occurring after the bail-in.

The same would apply to Automatic Termination (i.e. it would be enforceable), except that it cannot circumvent the restrictions on termination rights applicable to a "standard" notice of termination. Similarly as in case of moratorium in restructuring (see last paragraph of point (ii) above), it could be argued that the relevant provisions do not specifically address situation where the termination occurs automatically, however, we believe that this argument would not hold given the purposes of these provisions, for the same reasons as outlined in the last paragraph of point (ii) above (invalidity of transactions circumventing the purpose of the law).

(v) Involuntary Administration of a Slovak Insurance Company and Slovak Re-Insurance Company.

The notice of termination would be enforceable under Slovak law in case of commencement an involuntary administration (*zavedenie nútenej správy*).

(vi) Involuntary Administration of a Slovak Municipality and a Slovak Region

The notice of termination would be enforceable under Slovak law in case of commencement an involuntary administration (*zavedenie nútenej správy*) over a Slovak Municipality or a Slovak Region.

7.6.3.3 Time limits for the exercise of termination right

Slovak (insolvency) law does not provide for any deadline during which Party B should exercise its termination right. Such deadline, however, indirectly follows from the laws regulating the bankruptcy proceedings.

Pursuant to Slovak law, any net claim resulting from the operation of a close-out netting mechanism (following termination) must be registered (applied for repayment) in the bankruptcy proceeding. Generally, no claim can be satisfied in bankruptcy that was not registered[30].

The standard deadline for registration is 45 days since the bankruptcy has been opened[31]. If a claim is not registered within this deadline, it does not mean it cannot be satisfied but the creditor of such claim (i) is not entitled to vote in the creditors meeting and (ii) can be satisfied only from the proceeds allocated in the distribution scheme (*rozvrh výťažku*) of the so-called general bankruptcy estate (*všeobecná podstata*)[32], the intent of which has been published in the Commercial Bulletin. This provides for a de-facto deadline because if the registration filing is delivered later, the claim cannot be satisfied.

Therefore, considering that the registration filing must quantify the exact amount of the claim (and thus the net claim resulting from the close-out netting must have been calculated when filed with the bankruptcy trustee) and there is a de-facto deadline for registration, the Slovak Insolvency Act indirectly provides also for the deadline during which the termination right shall be exercised.

Similarly, a claim that is not covered by the approved restructuring plan (*reštrukturalizačný plán*) cannot be enforced by the creditor. Consequently, such claim can also not be used for set-off (given that set off is possible only for enforceable claims). Therefore, in restructuring of a Slovak Corporate, the claims under the EFET General Agreement must be registered

30 This does not apply for so called claims against the bankruptcy estate, i.e. primarily claims that arise on basis of fulfillment provided to the insolvent debtor after bankruptcy was opened. Theoretically, this may be the case of fulfillment of some of the Individual Contracts, however, we believe that attempting to benefit from this provision (i.e. the possibility to have a claim against the estate) would contradict the single agreement concept and the close-out netting mechanism.

31 Different deadline applies to foreign creditors that need to be (in line with EU laws) notified of the bankruptcy proceedings and the necessity to register the claim – while this has not yet been finally settled by court, it is generally accepted that the 45 days registration period should commence with the receipt of notification only.

32 Note: even if it is a secured claim that otherwise could be satisfied from the separate bankruptcy estate (*oddelená podstata*).

in time for them to be included in the plan[33].

7.6.4 Cherry picking risk

In view of the risk that the EFET Netting Provisions would not be enforceable in a bankruptcy scenario in case of an EFET General Agreement being entered by Parties where none of them is a Qualified Party, we have examined the risk of "cherry picking" in such situation. In particular, we look at a situation where the bankruptcy trustee of Party A would seek to assume the profitable Individual Contracts and to reject the unprofitable ones. This further assumes that the EFET General Agreement has not been terminated before or upon opening bankruptcy and there are unfulfilled transactions between the Parties.

There is no explicit provision of the Slovak Insolvency Act that would deal with the effects of the rescission of the close out netting agreement outside of the Safe Harbour Provisions. Therefore, general insolvency rules relating to termination of contracts during bankruptcy would apply. Please see 7.6.3 for detailed overview of the termination rights. In this particular case, the provision of the Slovak Insolvency Act that provides that where an agreement has not yet been fully performed by either party, it may be rescinded by the party that has already fully performed (or in case neither party has performed all of its obligations, it can be rescinded by both of them) would be of importance. It follows that if there are outstanding obligations between the Parties to the EFET General Agreement, both the non-defaulting party (Party B) as well as the bankruptcy trustee of Party A could rescind the agreement.

Consequently, a question arises whether the bankruptcy trustee (or the non-defaulting party for that matter) could decide to terminate some of the Individual Contracts but not all of them, making the selection dependent on what is most favourable to the bankruptcy estate – i.e. whether the bankruptcy trustee can cherry pick the profitable Individual Contracts or whether he has to respect the single agreement concept (§1.1 of the EFET General Agreement). In other words, whether the contractually agreed close-out netting would survive the rescission of the EFET General Agreement.

With respect to an EFET General Agreement governed by foreign law, due to lack of any explicit provision in this respect, arguably, it would follow from the provisions of Section 9 and 11 of the Slovak Act on International Private and Procedural law as well as Section 12 of the Regulation (EC)

[33] We note that unlike bankruptcy, there is a "hard deadline" for registration of claims in restructuring. If this deadline is not observed, the claim will not be included in the plan. Please see Appendix ./D for details on the filings of claims in restructuring.

No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the "**Rome I Regulation**") that the law governing the EFET General Agreement should govern the effects of rescission. Given that this conclusion has - to our knowledge – not yet been tested with Slovak courts, we cannot fully exclude that the court would take a different approach (i.e. to apply Slovak mandatory laws).

Where the EFET General Agreement would be governed by Slovak laws (or where the Slovak court would decide to apply one), we believe that most likely the provisions of the Slovak Act No. 513/1991 Coll. Commercial Code, as amended (the "**Slovak Commercial Code**") (in particular §351) would apply / be applied. This would result in all unperformed rights and obligations being terminated. Slovak Commercial Code further provides that such rescission shall have no impact on the provisions of the contract that, either based on an agreement of the parties or by their nature, should survive the termination of the contract. This should, in our view, apply to the close-out netting mechanism.

We note that it is a right, not obligation, of the bankruptcy trustee to make use of the termination right – while he is obliged to make this decision with the aim to maximize the recovered amount (thus acting in a manner most beneficial to the bankruptcy estate).

With respect to the EFET General Agreement, this should mean that the bankruptcy trustee can decide whether he terminates the agreement (and all unperformed Individual Contracts) or not but he should not be entitled to approach the termination of the Individual Contracts selectively (i.e. to terminate some but not all) – please see also our response on the single agreement concept in this context (clause 8.1.3). The reason for this is that even in bankruptcy, the terms of the agreements entered into by the insolvent debtor shall be observed. It is indeed true, that these are modified to some extent (e.g. by granting the trustee extraordinary rights to terminate) but these do not entitle him to exercise the termination in a complete disregard of the terms of the agreement – i.e. if the EFET General Agreement provides that the agreements shall all be terminated (unless the parties explicitly agree otherwise), i.e. the single agreement concept, shall be observed by the parties. If the parties agree that termination of only some Individual Contracts is possible, the bankruptcy trustee would be entitled to proceed accordingly as well.

We note, however, that this conclusion is based on our interpretation of the applicable laws but there is to our knowledge no precedence to support it (or precedence speaking to the contrary for that matter). We cannot therefore exclude that the trustee would attempt to proceed differently.

7.6.5 Set-off in bankruptcy

As a general rule, rules of bankruptcy proceedings regarding set-off override any conflicting contractual clauses stipulated by the parties to the affected agreement. While the Safe Harbour Provisions provide for legal basis for exclusion of said general rules of insolvency proceedings, we believe that in situations where the EFET General Agreement does not enjoy the protection of the Safe Harbour Provisions, such explicit legal basis does not exist and the bankruptcy trustee would apply the general rules. This would likely result in the EFET Netting Provisions being unenforceable.

Please see of Appendix ./C for a detailed overview of the Slovak laws regulating set-off of claims in and outside of insolvency. In particular, we note that in cases where the Insolvency Regulation applies, the opening of bankruptcy proceedings shall not affect the rights of creditors to demand the set-off of their claims against the insolvent debtor, where such set-off is enforceable under the law applicable to the insolvent debtor's claim (Article 9 (1) of the Insolvency Regulation).

7.6.6 Public policy / overriding mandatory provisions

Notwithstanding the foregoing, Slovak courts could, in our view, refuse to recognise enforceability of EFET Termination Provisions and/or EFET Netting Provisions insofar as these (despite being enforceable under the applicable governing law) should be considered manifestly incompatible with the Slovak public policy (or override mandatory provisions of Slovak law). Selected issues are dealt with below.

This would be particularly applicable in cases where the EFET Close-out Netting Provisions are or are implemented contrary to requirements of good morals (*bonos mores*) and/or determinability of contractual subject matter (*určitosť a zrozumiteľnosť právnych úkonov*). Under Slovak Civil Code, any transactions that are, inter alia, against the law or good morals, circumvent the law or its purpose, are not certain (určité) or understandable (zrozumiteľné) are deemed invalid. In addition, any exercise of rights that contradicts the principles of fair business transactions (*zásady poctivého obchodného styku*) cannot enjoy legal protection.

Slovak court could also refuse to treat as conclusive those certificates and determinations which the EFET General Agreement states to be so treated – in particular, where one party is vested with a discretion or may determine a matter in its opinion, Slovak court may require that such discretion is (i) granted in respect of a sufficiently clearly defined matter and (ii) exercise reasonably or that such opinion is based on reasonable grounds.

With respect to the EFET General Agreement we believe that there is a risk of the right of Party B (the non defaulting party) to unilaterally determine the close-out amount could be considered to be against the above principles. While we believe that, in cases where such right is to be exercised in a commercially reasonable manner,[34] good arguments can be made that such provision does not fall foul of mandatory Slovak rules (and should be enforceable for as long as the relevant party does in fact exercise such right in a commercially reasonable manner); however, we cannot rule out that, in the event of a dispute, a Slovak court would take a different view.

Similarly, such risk could be seen in respect of those EFET Close-out Netting Provisions that could be viewed by the court as undeterminable (uncertain / not understandable). While we believe that overall the EFET Close-out Netting Provisions are sufficiently clear, there might be uncertainty in case of the effective time of the Automatic Termination (please see 8.1.1.2).

7.7 Preventive restructuring frameworks

The Slovak law preventive restructuring frameworks (both in and outside the scope of the European Restructuring Directive) are addressed in clauses 7.4 to 7.6 above.

7.8 Non insolvency-related Material Reasons

Subject to limitations imposed by overriding mandatory provisions of Slovak law (see 7.6.6 above), we believe that in non-insolvency scenarios the question whether the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable has – subject to the limitations and qualifications set out in this Opinion – to be answered according to the laws governing the relevant EFET General Agreement.

Where the EFET General Agreement is governed by Slovak law, we believe that, based on the reasoning and subject to the limitations outlined below, the right of Party B to terminate and close-out the EFET General Agreement in accordance with the Close-out Netting Provisions will be enforceable. For the sake of completeness we refer to the restrictions outlined at 7.6.6, 8.1.2.3 and 8.4.1.

8 Specific questions

8.1 Part I: Enforceability of Close-out Netting

8.1.1 *<u>Automatic Termination</u>: Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the*

[34] As is the case with § 11 EFET General Agreement – cf. para 2.

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

8.1.1.1 General remarks

As an introductory remark, we believe that from Slovak law perspective, the following insolvency and insolvency-related scenarios would, inter alia, qualify as a Material Reason described in § 10.5(c) of the EFET General Agreement:

(i) bankruptcy proceedings (*konkurzné konanie*);

(ii) restructuring proceedings (*reštrukturalizačné konanie*); as well as

(iii) preventive restructuring proceedings (*preventívna reštrukturalizácia*).

While bankruptcy and restructuring are clearly insolvency scenarios, the situation may be perhaps not so obvious for the preventive restructuring given that this is a proceeding that can be conducted only if the debtor is not yet materially insolvent. We nevertheless believe that it would trigger a Material Reason under § 10.5(c). The reasons for this are the following: (i) a preventive restructuring is not self-administered, it involves an appointment of an administrator (see point (vi) of § 10.5(c)), (ii) it involves or at least seeks to involve a composition with the creditors of the debtor (see point (iii) of § 10.5(c)) and (iii) it is, in our opinion, a proceeding outcome of which affects creditors rights in a similar way as a bankruptcy or, more dominantly, restructuring would (see point (iv) of § 10.5(c)). In addition, simply when considering the purpose of the termination for Material Reason, we believe it is intended to capture situations where the other party shall or would want to have the possibility to get out of the agreement. A preventive restructuring, the outcome of which can be a significant haircut and, in certain cases, a haircut without the consent of the creditor, is in our view a situation where the other party would like to have this option and, in case of doubt, the EFET General Agreement should be interpreted accordingly.

As regards the enforceability, our conclusions in respect of enforceability of Termination Provisions set out in Section 7 above apply equally in respect of Automatic Termination as well as (unilateral) Early Termination (applicable to the extent the Parties have not elected Automatic Termination).

We believe that the question, whether Party B should elect Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement or not, is, ultimately, a commercial one.

Nevertheless, we believe that the following should be considered by the Parties from a legal perspective when determining whether to select Automatic Termination or not. In addition, potential practical difficulties (e.g. in determining the Termination Amount in an Automatic Termination scenario because relevant amounts need to be calculated for the (historic) point in time when Automatic Termination became effective) should also be taken into account.

Based on the discussions in Section 7 above, we concluded that the Governing Law Netting Exception may not extend to termination events (see at 7.4.1.1.3 above) and in such case the Slovak substantive insolvency law will apply.

Further considerations depend also on whether the relevant EFET General Agreement enjoys the protection of the Safe Harbour Provisions or not.

Under Slovak substantive insolvency law, election of Automatic Termination is no prerequisite for enforceability of the EFET Termination Provisions in the event of opening of bankruptcy proceedings over Party A's assets. This is because the Safe Harbour Provisions (see at 7.4 above) apply irrespective of whether the parties to a contract have agreed that these contracts are automatically rescinded, <u>or</u> may be rescinded at the option of one party, in case of the institution of bankruptcy proceedings against the other party.

Moreover, election of Automatic Termination should also be no prerequisite for enforceability of the Close-out Netting

Provisions in the event of opening of restructuring (*reštrukturalizácia*), preventive restructuring, resolution proceedings or other regulatory measures.

Should the more extensive interpretation of the Governing Law Netting Exception prevail (see at 7.4.1.1.3 above), it would need to be assessed under the laws governing the EFET General Agreement whether the selection of Automatic Termination is a pre-requisite for, or recommended to secure, enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings, resolution proceedings or preventive restructuring proceedings over the assets of Party A or in the event of institution of any regulatory measures against Party A.

8.1.1.2 Early Termination right vs Automatic Termination

Apart from other aspects outlined in this chapter 8.1.1, the Parties may want to consider the following when making the choice between Automatic Termination and Early Termination:

(i) Automatic Termination could – from a practical perspective – reduce the risk of the Party B from losing out on the account of prior distribution of the Party A's bankruptcy estate;

(ii) Where purportedly not all Individual Contracts to be concluded under an EFET General Agreement would benefit from the Slovak substantive netting privilege, an agreement by the Parties on Automatic Termination (expressly stipulating, however, that such Automatic Termination shall be deemed to have taken effect <u>prior to</u> the opening of bankuptcy proceedings over the assets of one party) could mitigate the uncertainty that would otherwise exist as to whether claims under relevant Individual Contracts have vested in Party B prior to (in which case, these claims could, potentially, be set off against claims of Party A based on general insolvency laws (please see at 7.6.5 and Appendix ./C for further details)), or only after, the opening of bankruptcy proceedings over the assets of Party A.

(iii) There is slightly lower risk of Automatic Termination not being ineffective in case of termination reasons, where the Slovak law offers protection to debtors against termination solely on grounds of certain proceedings having been commenced (such as ineffectiveness of provisions allowing the party to terminate the agreement due to restructuring proceedings having been commenced, see clause 7.6.3.2 (ii) for details);

(iv) Early Termination is a legal act that is subject to avoidance rules (please see at Appendix ./E for an overview of Slovak avoidance rules), however, we deem the risk of a successful avoidance minimal.

(v) On the other hand, it could be argued that the wording of the §10.5 of the EFET General Agreement is not sufficiently clear in respect of when exactly some of the Material Reasons (thus the Automatic Termination) shall occur. In such a case, it could be argued that the provision allowing such – not clearly specified – Automatic Termination should be deemed invalid from the perspective of Slovak law[35]. Please note, however, that this would not impact the enforceability of the Close-Out Netting Provisions as such.

We see also practical constraints - for example, it seems not practically possible to exactly determine the moment when the party became insolvent or unable to pay its debt without any further clarification of those terms for a specific party / jurisdiction. Further, even if we assume that the parties would be able to exactly determine when, for example, inability to pay debts occurred, it could well be that this lasts only for a very short period of time without Party B ever noticing but the EFET General Agreement would already have been (automatically) terminated.

8.1.1.3 Application of Automatic Termination

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

We understand that pursuant to the Material Reason described

[35] Article 37 of the Slovak Civil Code provides that a legal act that is not certain and understandable is invalid. A Slovak court may apply this provision also in cases where the EFET General Agreement is governed by other than Slovak laws.

in § 10.5(c)(iv) of the EFET General Agreement, Automatic Termination (if elected to apply by the Parties pursuant to § 10.4 of the EFET General Agreement) would already be triggered upon filing for the (opening) of bankruptcy proceedings (*návrh na vyhlásenie konkurzu*) by the defaulting Party or any of its creditors (*veriteľ*). This is because § 10.5(c)(iv) of the EFET General Agreement refers to the defaulting Party or any of its creditors (as the case may be) "instituting" proceedings against the defaulting Party with the aim of "seeking" reliefs under insolvency or similar laws. We believe that this clause should not be interpreted as referring to the formal opening (by the competent court) of bankruptcy proceedings against the defaulting Party but rather to filing for the (opening) of bankruptcy proceedings (*návrh na vyhlásenie konkurzu*). While the Parties are requested to specify the Early Termination Date in such event in the Election Sheet, Automatic Termination may occur at a point in time when bankruptcy proceedings have not yet (formally) commenced[36]. The Parties may want to clarify this in the election sheet with Slovak counterparty (by providing specifically at which point in time the termination ocurrs and tying it to a specific stage of Slovak insolvency-related scenarios).

In this respect, Parties should consider that, by contrast to the formal commencement of bankruptcy proceedings, filings for opening of bankruptcy are not made public in Slovakia. In case of filings for the opening of bankruptcy proceedings by creditors of the defaulting Party, not even the defaulting Party itself may have knowledge of such filings.[37] There will therefore inevitably be a time gap between the filing for (*návrh na vyhlásenie*), commencement of (*začatie*) and the actual opening of (*vyhlásenie*), bankruptcy proceedings (if bankruptcy is opened at all). In case the filing of the creditor or the insolvent debtor is formally complete, this should not take more than 15 days since filing (plus time for publication), if it is not complete and is returned by the court to the creditor / insolvent debtor for correction, this time period can be even longer. Hence, there is a risk that Parties, not having knowledge of the occurrence of a Material Reason under §10.5(c) (iv) of the EFET General Agreement (i.e. filing for

[36] Please see 3.1 of Appendix E with respect to effectiveness of the commencement of the bankruptcy proceedings (*začiatok konkurzného konania*) and of the opening of bankruptcy (*vyhlásenie konkurzu*).

[37] After a filing for the commencement of bankruptcy proceedings is submitted to the court, the court must first review the filing on the fulfillment of formal requirements. If these are fulfilled, the court must decide within 15 days on the commencement of bankruptcy proceedings. The bankruptcy proceedings commence once this decision is published in the Commercial Bulletin and this is the time when the debtor may first learn about it.

opening of bankruptcy), continue to enter into Individual Contracts irrespective of the relevant EFET General Agreement already having been (automatically) terminated. Parties thus need to carefully scrutinize whether to apply Automatic Termination for such scenarios and, if they elect to do so, which point in time should be specified as Early Termination Date in the Election Sheet.

8.1.1.4 Non-application of Automatic Termination

For scenarios where the Parties have not selected Automatic Termination to apply upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement, it is recommended that Party B exercises its right of Early Termination within due course following the occurrence of such Material Reason – as discussed in detail under 7.6.3.3 above.

Furthermore, we believe that a termination notice given in accordance with the E-Notice Agreement should be recognized as a valid termination notice under Slovak law (please see clause 8.4.2 for details). Similarly, we have no reason to believe that the concept of deemed receipt of the termination notice established under 1 of Schedule 1 (*Amendments and E-mail Address Details*) to the E-Notice Agreement might be challenged by a Slovak court or bankruptcy trustee (*správca konkurznej podstaty*).

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

8.1.2.1 Within the scope of the Governing Law Netting Exception

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

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

8.1.2.2 Beyond the scope of Governing Law Netting Exception

Where the Governing Law Netting Exception does not apply or the EFET General Agreement is governed by Slovak laws, the enforceability of §11 of the EFET General Agreement will depend on whether the EFET General Agreement enjoys the protection of the Safe Harbour Provisions or not.

8.1.2.2.1 Agreements qualifying as a close out netting agreement

Where the EFET General Agreement (the EFET Netting Provisions) meets the elements of a close out netting agreement (in particular where at least one of the parties is a Qualified Party), the close-out netting envisaged by § 11 of the EFET General Agreement will enjoy the protection of the Safe Harbour Provisions and be upheld in accordance with its terms, subject to limitations set out at 8.1.2.3 below.

8.1.2.2.2 Agreements that do not qualify as a close out netting agreement

Where the EFET General Agreement (the EFET Netting Provisions) does not meet the elements of a close-out netting agreement and thus does not enjoy the protection of the Safe Harbour Provisions, there is a significant risk that the EFET Netting Provisions will not be enforceable as envisaged. Please see below for details.

Generally, even where the EFET General Agreement does not qualify from Slovak law perspective as a close-out netting agreement, it does not automatically mean that the mechanisms envisaged therein will not be enforceable at all. This may not necessarily be the case, but the Parties cannot fully rely on the protection of the Safe Harbour Provisions and need to expect / take into consideration the risk that the bankruptcy trustee or the court will assess and apply them differently then desired. We outline below the arguments and Slovak law aspects that might interfere.

We believe that in principle, the terms of the contract shall be respected also in bankruptcy pursuant to the principle of contractual freedom (*zmluvná voľnosť*). However, the statutory provisions of the Slovak Insolvency Act would also apply in such case, overriding provisions of the EFET General Agreement. In particular (as mentioned in detail in clause

7.6.3.3 and 7.6.5 above), rules of insolvency proceedings regarding set-off and the possibility of the bankruptcy trustee to unilaterally "cherry pick" (i.e. selectively terminate) unperformed contracts would be of relevance.

On the one hand, it could be argued that the § 10.3 (b) of the EFET General Agreement shall be treated as a novation – an agreement of the parties on basis of which they replace an existing obligation with another, new obligation, while the original obligation ceases to exist. The obligation to pay the Termination Amount would then be registered with the bankruptcy trustee. Novation is a concept that is in principle recognized by Slovak law (including bankruptcy law). If upheld, it would allow the EFET Netting Provisions to essentially work as envisaged, even if for different reason (and not due to relying on Safe Harbour).

On the other hand, it could be argued that the calculation of the Termination Amount is, in its essence, essentially a set off (at least partially). The reason for this is that both present values of future payments obligations as well as actually existing claims (such as any unpaid amounts for already consumed transactions, costs already incurred etc) are being netted.

When amounts that are indeed due and unpaid obligations owed by one party to the other party are then deducted from / netted against other obligations, this is from Slovak law point of view actually a set-off. As a result, the bankruptcy trustee / court could conclude that the rules relating to set-off in bankruptcy apply to the calculation of the Termination Amount, which might cause the bankruptcy trustee to challenge the calculation of Termination Amount. This would occur primarily on the grounds of Slovak Insolvency Act prohibiting the set-off of selected obligations (please see Appendix ./D for a detailed overview). Given that outside of these restrictions, the set off is possible also during bankruptcy, this conclusion might be not so problematic in practice in cases where the valuation aspect of the calculation is not present and where the Termination Amount is the result of set off of obligations that could otherwise all be registered as existing claims in bankruptcy. However, for any transaction with valuation aspect / any calculations involving future amounts, this would cause the EFET Netting Provisions being not enforceable.

Another aspect that needs to be considered in this respect is that only a registered claim can be set-off and such claim (i.e. obligation to pay) must exist. Some elements of the Termination Amount calculation are not (yet – at the time of calculcation) independent existing due obligations. This might also effect the enforceability of the calculcation.

No case law exists on whether the bankruptcy trustee (*správca konkurznej podstaty*) can challenge or otherwise dispute the methods of calculating the Settlement Amounts and, on basis of thereof, the Termination Amount. However, there are certain claims that are – pursuant to the Slovak Insolvency Act either subordinated or not recognized at all in bankruptcy proceedings of Party A. This is the case of (i) any claims for payment of contractual penalty (subordinated), (ii) any related party[38] claims (subordinated) or (iii) claims for payment of accessory (*príslušenstva*) asserted after the bankruptcy has been opened – i.e. any claims for payment of interest, default interest or costs incurred in connection with the enforcement of a claim. These are excluded from satisfaction in bankruptcy proceedings.

Given the lack of court decisions on this topic and uncertainty, the Parties may want to consider modifying the EFET General Agreement (where there is one Slovak counterparty) so that (i) the interpretation supporting the position of Termination Amount being a novation and not a set-off is strengthened and (ii) broadening the possibilities of contractual set-off as much as possible (to cater for improving the position of the Parties in case the novation concept is challenged). This will not ensure / guarantee the enforceability but it should decrease the risk of recharacterization. Please find below a language proposal:

Ad (i) above: add a new clause 3 in § 11 that would provide for the following: "*Should for any reason the agreement of the Parties expressed in this Article 10 (together with Article 11) not qualify under the applicable laws as a close-out netting agreement, the replacement of rights and obligations of the Parties envisaged under § 10.3 (b) shall be a novation of the relevant rights and obligations of the Parties.*"

Ad (ii) above: add a new clause in § 23 that would provide for the following: "*In light of Article 364 of the Slovak Act No.*

513/1991 Coll. Commercial Code, as amended, the Parties have agreed that any mutual claims of the Parties arising under or in connection with this Agreement can be set-off (also unilaterally by one of the Parties)" Should this be too far reaching, it is possible to revise as follows: *In light of Article 364 of the Slovak Act No. 513/1991 Coll. Commercial Code, as amended, the Parties have agreed that in case of a Material Reason occurring with respect to one Party, the other Party is entitled to unilaterally set off any mutual claims of the Parties arising under or in connection with this Agreement."*

Please see also limitations set out at 8.1.2.3 below.

8.1.2.3 Additional limitations

Slovak law provides for certain overriding mandatory principles as regards damages and the calculation of damages, respectively, which may not be derogated from by the Parties and which, although not directly geared at commodities derivatives business, might be relevant in regard to the Termination Amount calculations and related payments foreseen in the EFET General Agreement. For instance, such mandatory principle would be that no contractual limitation or exclusion of damages is possible in advance (please see for our conclusions in 8.4.1.4 of this Opinion in detail).

In addition (and notwithstanding the foregoing), if an individual EFET General Agreement was governed by Slovak laws (or a court would apply Slovak laws on the basis of article 3 (3) of Rome I Regulation) we cannot rule out the risk that the EFET Netting Provisions in so far they provide for a right of Party B to unilaterally calculate the Termination Amount may not be fully enforceable. We would deem this risk lower in case such discretion were to be exercised reasonably and such determination were to be adequate and not arbitrary under the then prevailing circumstances (e.g. if the Party B can document or otherwise support the amounts of gains and losses applied in the calculation of the Termination).

In the event that the Termination Amount calculations and relevant payment obligations foreseen in the EFET General Agreement would yield results that would be incompatible with the foregoing, these would be superseded by Slovak substantive law. Whereas it is difficult to quantify this risk from the language of the EFET General Agreement without reference to the facts of specific Individual Contracts, we understand that generally the relevant clauses have been drafted aiming at commercially balanced results, so that this risk should probably be small.

8.1.3 <u>*Single agreement concept*</u>*: Do the laws of Slovakia recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party?*

Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount?

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

In accordance with the general principle of contractual autonomy, we believe that EFET General Agreement and Individual Contracts entered into on its basis would – consistently with the will of the parties – be viewed by a Slovak court as forming a single agreement (see § 1 (1) of the EFET General Agreement). Provisions on close-out netting in §§ 10 to 11 of the EFET General Agreement would generally apply to all Individual Contracts concluded under the relevant EFET General Agreement.

The single agreement concept is not explicitly required by law to preserve the enforceability of the termination right and the ability to calculate a net amount [39], however we believe that it is important because it supports the assessment of the EFET General Agreement as a netting arrangement and prevents or at least minimizes the cherry picking risk even in cases where the EFET Close-Out Netting Provisions are not enforceable. Please see clause 7.6.4 for an assessment of the cherry picking risk.

8.1.4 <u>*Currency conversion*</u>*: Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between*

[39] Please see the definition of the close-out netting agreement in clause I.7.3 above pursuant to which it is an agreement … (iv) *that stipulates the calculation of one single obligation in relation to the actual or estimated losses or actual or estimated profits, resulting from the termination or cancellation of* <u>*one or more trades*</u> *entered into in relation with such an agreement or under such agreement.*

the Parties in the Election Sheet) enforceable under the laws of Slovakia or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?

Pursuant to the Slovak Insolvency Act, claims shall be registered in insolvency proceedings in Euros. If the claim is registered in any other currency, the amount of the claim will be converted into Euro by the bankruptcy trustee at the exchange rate published by the European Central Bank or NBS as at the date of the opening of the insolvency proceedings. If that claim is registered in a currency for which the European Central Bank or NBS does not publish its exchange rate, the amount of the claim will be converted into euro by the bankruptcy trustee with due care.

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

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

Yes, the status of the parties to the EFET General Agreement can impact the enforceability of the EFET Close-out Netting Provisions. Please see above in clause 7.3.1 which provides for an overview of entities that can benefit from the Slovak netting privilige.

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

8.1.6.1 Within the scope of the Governing Law Netting Exception

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

8.1.6.2 Beyond the scope of the Governing Law Netting Exception

Where the Governing Law Netting Exception does not apply or the EFET General Agreement is governed by Slovak law, we believe that the conclusions reached unter this 8.1 would not change to the extent all Individual Contracts under the relevant EFET General Agreement would benefit from the Slovak netting privilege (see clause 7.3 and 7.4 above for details).

If there were, however, also Individual Contracts not falling under the Slovak netting privilege, there is a risk that this would negatively impact on the enforceability of the Close-out Netting Provisions in the event of opening of local insolvency proceedings over the assets of Party A. The Slovak courts are yet to address such a scenario and we cannot exclude the risk that they would consider such Individual Contracts as separate transactions, falling outside the protection of the Safe Harbour Provisions, triggering a risk of 'cherry picking' by the bankruptcy trustee. We believe that the question to what extent the close-out netting mechanism provided for under the Close-out Netting Provision remains enforceable in such a scenario, would, however, not only need to be assessed under applicable Slovak substantive insolvency law but also under the laws governing the EFET General Agreement / EFET Credit Support Annex (*e.g.*, English or German law).

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

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

Please see above in clause 7.3 which provides for an overview of entities and transaction that can benefit from the Slovak netting privilege and to what extent the enforceability of the EFET Netting Provisions may be limited. Applicable restrictions to the enforceability of the EFET Termination Provisions are outlined in clause 7.5 above.

The Slovak Safe Harbour Provisions apply only if Party A is a Qualified Party or, if the Slovak Party is a Slovak corporate or other non-Qualified Party, the other party to the EFET General Agreement is a Qualified Party. If the Slovak Safe Harbour Provisions do not apply, the right to terminate and close-out would likely not be enforceable as envisaged by the EFET General Agreement (please see 7.5 and 7.6 above for details).

8.2 Part II: Multibranch Parties

8.2.1 Slovak Multibranch Party

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

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

The reason for this is that from Slovak law perspective, a branch does not constitute a separate legal entity, but forms part of the company having established the branch (its 'parent' company). The establishing company is the holder of rights and obligations and is as such liable for the operation of the branch. Therefore, any transactions entered into by a branch of Party A are – from legal perspective – considered transactions made by Party A. Consequently, Individual Contracts carried out through branch offices of Party A create rights and obligations of Party A which have to be enforced in the Slovak insolvency proceeding of Party A.

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

If Slovak bankruptcy proceedings are opened against Party A, and provided that the relevant branch(es) of Party A are established in a country(-ies) where Party A and the branch are treated as one single entity, the Slovak bankruptcy trustee should treat the EFET General Agreement and all Individual Contracts thereunder as single, unified agreement with respect to Party A and Slovak Branches of Party A regardless of the enforceability of the close-out netting in the country where a branch of Party A is located.

On the other hand, with respect to branches of Party A in countries that treat the branch as separate legal entity, we see a risk that the Slovak bankruptcy trustee would not recognize the inclusion of Individual Contracts concluded by such branch into the close-out netting of Party A as they would be perceived to be entered into by another entity.

8.2.2 Foreign Multibranch Party

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

We understand that in this scenario Party F is subject to insolvency proceedings in Country H, where it has its COMI Slovak Branch is not a separate legal entity and the holder of its rights and obligations, assets and liabilities is the parent company (please also see our considerations under 8.2.1 above).

The possibility to open separate proceedings with respect to the Slovak branch would depend on whether the Country H is a Member State or not.

Member States

If Country H is an EU Member State, Insolvency Regulation[40] generally applies and jurisdiction to open insolvency proceedings (*i.e.*, main insolvency proceedings) primarily lies with the courts of the Member State within the territory of which the debtor's COMI is situated, which we understand to be the Country H. The COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see Article 3 of the Insolvency Regulation). The law applicable to insolvency

[40] Council Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings (recast)

proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (Article 7 of the Regulation). The effects of main insolvency proceedings generally encompass all of the debtor's assets located in the EU where the Regulation is applicable (Denmark thus excluded). Pursuant to Articles 19 and 20 of the Regulation, any judgement opening insolvency proceedings by the courts of Member State within the territory of which the debtor has its COMI shall be recognized in in all other Member States from the moment that it becomes effective in State of the opening of proceedings (Country H) and shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings. Therefore, the effects of the opening or commencement of insolvency proceedings in another Member State are not subject to a special procedure for recognition of those insolvency proceedings in Slovakia. This shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court (Article 32 (1) of the Regulation).

Slovak courts may have jurisdiction to open insolvency proceedings pursuant to Article 3 (2) of the Insolvency Regulation, if Party F has an establishment within the territory of Slovakia, with the effects of such proceedings limited to the assets of Party F situated in the territory of Slovakia, provided that main insolvency proceedings pursuant to Article 3 (1) of the Insolvency Regulation have not yet been opened. Pursuant to Article 34 of the Insolvency Regulation, secondary insolvency proceedings may be opened in Slovakia, after the opening of the main insolvency proceedings, if the debtor has an establishment in Slovakia. In this case the debtor's insolvency shall not be re-examined and the effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of Slovakia.

With respect to legal entities set up in a Member State that have similar subject matter of business as a Slovak financial institutions (i.e. banks, insurance companies etc.) (the "**European Financial Institution**"), Slovak court has no jurisdiction to open (any) insolvency proceedings with respect to the assets of such an entity in Slovakia[41].

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[41] Article 181 (2) of the Slovak Insolvency Act

Non-Member States

If Country H is not an EU Member State, then separate bankruptcy proceedings with respect to the assets and liabilities of the Slovak Branch can be initiated in the territory of the Slovak Republic under the Slovak Insolvency Act. This statement is based on the following:

Generally, the jurisdiction of a Slovak court with respect to any bankruptcy proceedings under the Slovak Insolvency Act is given in cases where any debtor's assets are situated in the territory of the Slovak Republic[42].

The bankruptcy proceedings in respect of a Slovak Branch of a foreign financial institution[43] can only be started on the basis of the petition of the relevant regulator (in Slovakia this would be the National Bank of Slovakia ("**NBS**") as a competent regulator for banks, investment firms, management companies as well as insurance and re-insurance undertakings) or, subject to a prior consent of the NBS, the administrator under the involuntary administration of the Slovak Branch.

Unless any international treaty binding on the Slovak Republic and relating to any satisfaction of creditors of an insolvent debtor applies (and we are not aware of any such treaty), any foreign decisions relating to insolvency proceedings shall be recognised in the Slovak Republic if there is reciprocity between the Slovak Republic and Country H[44].

If any insolvency proceedings have started in Country H, then the effects of those foreign insolvency proceedings shall be recognised in the territory of the Slovak Republic upon the petition of a foreign administrator subject to: (A) reciprocity between Country H and the Slovak Republic; and (B) the foreign administrator having proved at the start of those proceedings, his appointment and his legal interest in the recognition of the effects of those proceedings in the territory of the Slovak Republic. However, the foreign insolvency proceedings shall not be recognised, if, in respect of Party F or the Slovak Branch: (A) any other foreign insolvency proceedings have been already recognised in the territory of the Slovak Republic; or (B) any bankruptcy or restructuring

[42] Article 174 of the Slovak Insolvency Act
[43] Article 176 (2) of the Slovak Insolvency Act
[44] Article 173 of the Slovak Insolvency Act

proceedings have been instituted in the Slovak Republic[45].

The Slovak court may, based on its own initiative, decide that some effects of the insolvency proceedings in respect of Party F in Country H shall not be recognised in the territory of the Slovak Republic.

The fact that the Slovak court has recognised the insolvency proceedings in Country H in respect of Party F does not prevent the institution of the bankruptcy proceedings in respect of Party F or a Slovak Branch under the Slovak Insolvency Act. In such case, as of the moment of the institution of the bankruptcy proceedings in respect of party F or the Slovak Branch under the Slovak Insolvency Act, the recognition of the insolvency proceedings in Country H shall cease.

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

We understand that insolvency proceedings for Party F have been instituted in Country H and that separate proceedings have been initiated in Slovakia with respect to assets and liabilities of a Slovak Branch.

Under Slovak law, branches do not represent a separate legal

[45] Article 175 of the Slovak Insolvency Act

entity, but merely form part of the company which has established the branch ('parent' company) and act in its name and for its account (as discussed under 8.2.1.1 above). Therefore, from the perspective of Slovak law, the Slovak Branch and Party F would form a single legal entity and we assume that the laws of Party F apply the same approach to the Slovak Branch.

<u>Member States</u>

In cases where the Insolvency Regulation applies, the Slovak courts could open secondary proceedings in Slovakia in relation to the Slovak Branch. These would be limited to the assets situated in Slovakia.

Under the Insolvency Regulation, claims of insolvent party (being its assets) are deemed to be situated in the Member State within the territory of which the third party required to meet them has its COMI. Hence, claims of the Slovak Branch under the EFET General Agreement would most likely be considered to be situated in the country of COMI of the Other Party to the EFET General Agreement

In the event that the Other Party has its COMI outside Slovakia, we believe that it can be argued that the mark-to-market value shall not fall within the scope of the secondary proceedings. However, please note that this approach has not yet been tested with Slovak courts and we cannot exclude that the court would take a different approach.

In the event that the Other Party has its COMI in Slovakia, there is a risk that the claims of the Slovak Branch would fall within the scope of the secondary proceedings and that the Slovak bankruptcy trustee would request the Other Party to pay the mark-to-market value of the Individual Contracts. Hence, there is a risk that secondary proceedings in this particular case would impact the close-out netting envisaged by the EFET General Agreement. However, we believe that this risk should not extend to situation where the Safe Harbour Provisions apply. The reason for this is that the purpose of the Safe Harbour Provisions is to protect the close-out netting. Together with the Slovak Branch not being a separate legal entity, we believe that the close-out netting agreement should not be terminated separately, and the Termination Amount should not be divided into an amount payable to the Slovak

Branch and the amount payable to Party F under the same EFET General Agreement and the Slovak bankruptcy trustee would include Party F's position under the EFET General Agreement as a whole. However, as mentioned above, this approach has not yet been tested with Slovak courts and we thus cannot exclude a different view.

If the Party F is a European Financial Institution, there would be no separate proceedings in Slovakia possible.

Non-Member States

If country F is not a Member State, then separate proceedings with respect to the assets of the Slovak Branch are possible (for corporations as well as foreign financial institution). The Slovak Insolvency Act does not set out any rules for such (non-EU) ancillary proceedings. In the absence of any statutory provisions in this respect, it is not possible to arrive at any definitive view as to what approach the Slovak bankruptcy administrator / Slovak courts would take.

If any transactions under the Individual Contracts are conducted through the Slovak Branch, then the mark-to-market value of those (if negative number) could form an asset of the Slovak Branch. There is no provision in respect of the location of such asset equivalent to Article 9 of the Insolvency Regulation. However, pursuant to Article 174 (2) of the Slovak Insolvency Act, if bankruptcy was declared by a Slovak court, it extends also to assets situated outside of Slovakia if this is permissible by foreign laws. Therefore, there is a risk that the bankruptcy trustee would require the counterparty to pay the mark-to-market value considering that his must generally always be to maximize the recovered amount. This would negatively impact the close-out netting envisaged by the EFET General Agreement.

However, we believe that where the Safe Harbour Provisions apply, the integrity of close-out netting shall be preserved (and prevail over the above, please see the reasoning of a similar conclusion reached above). In cases where the Safe Harbour Provisions do not apply one could argue that the Slovak Branch is not a separate entity and any transactions under the Individual Contracts (and a mark-to-market value resulting from netting) are acts made by and the assets of Party F and thus there should be no splitting of the Termination Amount.

The position in this case is however not so strong. In any case, the conclusions in this chapter have not yet been tested by Slovak court and especially given the lack of any specific regulation in this respect, we cannot exclude that Slovak courts would take a different view.

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

There would not be any change in our conclusions reached under 8.2.2.1 above.

8.3 Part III: Collateral

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

8.3.1.1 General remarks

The Slovak Act on the International Private and Procedural Law (*zákon o medzinárdnom práve súkromnom a procesnom*) and the Rome I Regulation recognize a contractual choice of law governing the obligation to transfer title (*titulus*).

While the contractual choice of law is, subject to the limitations on choice of law set out at 9.5.5 below, valid as concerns the parties' obligations under the Opinion Documents (i.e. questions in regard to determining the parties' obligations, interpretation and remedies for breach of the agreement), the creation of rights *in rem* in any Eligible Credit Support as well as other issues concerning rights *in rem* (such as the establishment, acquisition, types, contents, effects, protection, transfer and loss of rights *in rem*) will be determined in accordance with Slovak conflict of laws rules.

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

8.3.1.2 Eligible Credit Support in the form of Cash

8.3.1.2.1 Relevant conflict of laws rules

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

From a Slovak law perspective, money credited on an account qualifies as receivable due from the account bank to the account holder (Article 5 lit. a) of the Slovak Act on Banks).

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

8.3.1.2.2 Slovak substantive law

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

Pursuant to Slovak law (Article 5 lit. a) of the Slovak Act on Banks), cash deposited to a bank account (*vklad*) is defined as entrusted funds or other repayable funds received from the public, representing an obligation of the bank towards the depositor to repay them. Therefore, from Slovak law perspective, the funds deposited to an account are not in the ownership of the depositer but become the ownership of the account bank while the depositor holds a claim (receivable) against the account bank.

Therefore, any contractual obligation to transfer ownership in cash collateral (other than notes and coins) must be interpreted into an obligation of the collateral provider to provide the collateral taker with the claim of the collateral taker against its own account bank.

In case of transfer of money deposited on the account, the discharging effect (*splnenie dlhu*) of the transfer and the transfer of perils (*prechod nebezpečenstva*) would occur only once the funds are credited to the account of the recipient (i.e. not at a point where the order is given to the account bank by the collateral provider)[46].

On the basis of the above, we believe that the collateral taker will acquire a claim (*pohľadávka*) against his account bank once the amount in question is credited to his bank account.

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

8.3.1.3.1 Relevant conflict of laws rules

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

To the extent that the law applicable to the Letter of Credit / Parent Company Guarantee has not been chosen in accordance with Article 3 of Rome I Regulation[47], the law of the country where the issuing bank / guaranteeing bank / parent company has its habitual residence (*obvyklý pobyt*)[48] shall be decisive (Article 4 (1)(b) of Rome I Regulation).

8.3.1.3.2 Slovak substantive law

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

(i) Standby letters of credit

[46] Article 339 of the Slovak Commercial Code

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

[48] For the purposes of Rome I Regulation, the habitual residence (*obvyklý pobyt*) of companies shall be the place of central administration (*miesto ústredia*).

From a Slovak law perspective, a standby letter of credit (*akreditív*) constitutes an abstract obligation (*abstraktný záväzok*) of a the issuing bank vis-à-vis a third-party (the beneficiary (*oprávnený*)) assumed by the issuing bank in an agreement with the principal (*príkazca*) pursuant to which the issuing bank undertakes to provide upon the request of the principal a certain fulfillment (*plnenie*)[49] on behalf of the principal to the beneficiary, subject to the fulfillment of pre-agreed conditions by the beneficiary within an agreed period of time (typically, but not necessarily, timely presentation of a pre-agreed set of documents by the beneficiary to the issuing bank[50]).

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

For purposes of this Opinion, we have assumed that (i) there is no bank other than the issuing bank involved in the provision of the relevant standby letter of credit by Party A (*i.e.*, in particular, no confirming bank within the meaning of Article 687 of the Slovak Commercial Code) and (ii) the standby letter of credit is provided to Party B for security purposes only and, hence, does not serve fulfillment of any payment or other performance obligations of Party A.

(ii) Bank guarantees

From a Slovak law perspective, a bank guarantee (*banková záruka*) is an abstract obligation of the bank vis-à-vis a third-party (the beneficiary, referred to in the wording of the Slovak Commercial Code as the creditor (*veritel'*)) assumed by the issuing bank in written declaration of such issuing bank that it will fulfill the financial claim of the creditor up to a certain amount if the principal (the debtor) does not fulfill its specific

[49] Although not used in practice, it is thereotically possible to use the stand by letters of creditor also provide different forms of fulfillment to the beneficiary, the fulfillment does not necessarily have to take the form of payment of certain amount. It would, however, be very unusual for a bank to accept such obligation.

[50] Articles 682 - 691 of the Slovak Commercial Code

obligation or if other conditions agreed upon in the bank guarantee are fulfilled[51].

In case of such abstract (*abstraktná*) and independent (*nezávislá)* bank guarantee, the guaranteeing bank may not raise any defences or objections which may arise from the legal relationship between (i) the principal and the beneficiary and (ii) the principal and itself either, unless this was specifically agreed in the terms of the bank guarantee[52].

(iii) Parent Company Guarantees

We note that parent guarantees (or any other non-bank guarantees) are not explicitly regulated under Slovak law. Therefore their legal nature is always assessed on a case by case basis, depending on the wording of such guarantee. Typically, parent guarantees are given in two forms, as a comfort letter, which typically tends to be a not enforceable undertaking of the parent and is not perceived as "regular" security or as a surety (*ručenie*) which is considered a security. Surety is, from Slovak law perspective, an accessory and secondary obligation (*akcesorický a subsidiárny*) of the surety provider (*ručiteľ*) towards the beneficiary to satisfy the claim of the creditor if it is not fulfilled by the debtor[53]. Slovak law does not recognize abstract form of surety / guarantee (other than a bank guarantee).

Given the accessory nature of a surety, the surety provider is entitled to raise any claims against the beneficiary (in addition to its own), which could be raised by the debtor as well as to use any claims of the debtor for the set off against the claim of a beneficiary if the debtor would be entitled to use them.

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

[51] Articles 313 – 322 of the Slovak Commercial Code
[52] Article 316 (1) of the Slovak Commercial Code
[53] Theoretically, the surety provider may undertake to fulfill any type of obligation, not necessarily only monetary claims.

guaranteeing bank / parent company (in the form of surety).

Therefore, from the perspective of Slovak law, we believe that 'transfer of title' should be construed as establishment of an entitlement to a claim (of the collateral taker/Party B) against the relevant issuing / guaranteeing bank or a parent company.

Pursuant to Slovak law, Party B will receive a claim against the relevant issuing bank when it has received notification of the issuing bank that it has opened the standby letter of credit[54] or once it received the bank guarantee document (*záručná listina*) or the surety document (*písomné vyhlásenie ručiteľa*) issued by the parent company.

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

8.3.2.1 General remarks

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

Due to the legal nature of the Eligible Credit Support (*i.e.*, Cash, Letters of Credit or Parent Company Guarantees), from the perspective of Slovak law, strictly speaking, no "transfer of ownership title" in the Eligible Credit Support will occur under the EFET Credit Support Annex. Rather, the *in rem* ownership title should be construed as entitlement to a claim against (i) in respect of Cash, the relevant account bank, (ii) in respect of a Letter of Credit in the form of a standby letter of credit (*akreditív*), the relevant issuing bank, (iii) in respect of a Letter of Credit in the form of a bank guarantee, the relevant guaranteeing bank or (iv) in respect of a Parent Company Guarantee, the relevant parent company. Please see above.

Accordingly, Party B will, in lieu of an *in rem* ownership title in the Eligible Credit Support, receive a claim (*pohľadávka*)

[54] Article 686 (3) of the Slovak Commercial Code

against the relevant third party.

8.3.2.2 Re-characterization risk

Under Slovak law, any declaration of will (including contractual arrangements) shall be interpreted in accordance with the intention of the party, if such intention was known or must have been known to the addressee. [55]

In cases where this is not possible, it shall be interpreted in accordance with the meaning that would be typically understood under such declaration of will by a person on the position of the addressee. Further, terms that are used in commercial relations shall be interpreted in accordance with the typical understanding of these terms in such commercial relations.[56]

Finally, all relevant circumstances of such declaration of will and past practice of the parties and the behaviour of the parties after the conclusion of the agreement must also be considered.[57]

In case there are different interpretations of a certain term possible and there is doubt about the meaning, it shall be intererprted to the burden of the party that used that term in negotiations first. [58]

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

Based on the above, we believe that a Slovak court should recognize and uphold the Parties' agreement that, under the circumstances set forth by § 3 (2) of the EFET Credit Support Annex, Party A shall provide, and Party B shall receive

[55] Article 266 (1) of the Slovak Commercial Code. We note that the interpretation rules applicable to private (not commercial) relationships may differ.
[56] Article 266 (2) of the Slovak Commercial Code
[57] Article 266 (3) of the Slovak Commercial Code
[58] Article 266 (4) of the Slovak Commercial Code

accordingly, full entitlement to a claim against a third-party; however, in the absence of any jurisprudence on the issue, we cannot exclude the risk that a Slovak court would adopt a different view.

We believe that there is no risk (or absolutely limited) with respect to Letters of Credit. However, some uncertainty remains with respect to the credit support provided in the form of Cash. The reason for this is that the Credit Support Annex envisages that this shall ocurr in the form of an outright transfer of cash from the account of the provider to the account of the beneficiary – thus, strictly from Slovak law perspective, the owner of the funds becomes the account bank of the beneficiary and the beneficiary receives a claim against its account bank as a result. At the same time, the Credit Support Annex (§7 (3) of the Credit Support Annex) provides that the credit support shall not create any form of security interest over such cash.

Pursuant to Slovak law, apart from creation of security interest in the form of a pledge (*záložné právo*) – with respect to cash held on an account this would be a pledge over account receivables – Slovak law recognizes also a security transfer (*zabezpečovací prevod práva*), where the actual ownership is transferred by the security provider to the creditor. It could be argued that providing credit support in the form of cash should be interpreted as a security transfer if it could be at the same time argued that this was the actual intention of the parties. However, according to the prevailing opinion, a security transfer is possible only with respect to individually determined assets (i.e. in case of cash only with respect to coins and notes), but not with respect to generic assets (such as account receivable) and therefore, it can be argued that if cash is transferred to the account of the beneficiary it falls outside of the scope of security transfer.

Further, the Cash collateral arrangement – as contemplated by the EFET Credit Support Annex – could (from the perspective of Slovak law) be construed as a *sui generis* arrangement akin to an advance payment on the account of a secured obligation. This could be based on an argument that the Slovak Civil Code recognizes the term *zábezpeka*[59] (security) and further provides that the obligation to provide it can be fulfilled primarily – but not only – by granting a pledge or with a surety.

[59] Article 555 of the Slovak Civil Code

However, other forms of security, such as tangible assets or other rights (including cash / account receivable), can also serve as security if so agreed by the parties. There is, however, no case law available to support this (but there is also none to the contrary).

In terms of risk mitigation, the risk of any re-characterization appears to be best mitigated by omitting any conduct evidencing any intention of the Parties contrary to what is stipulated in § 3 (2) in conjunction with § 7 (1) and (3) of the EFET Credit Support Annex. In addition, parties may consider to prefer Letters of Credit as a form of credit support.

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

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

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

Enforcement of the claim acquired by Party B under a Letter of Credit may, however, be subject to satisfaction of further conditions set out in the relevant Letter of Credit (*e.g.*, in respect of standby letters of credit (*akreditív*), timely presentation of a pre-agreed set of documents to the issuing bank).

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

8.3.4.1 Effect of substitution

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

8.3.4.2 Consent of Party B

The presence or absence of Party B's consent to such substitution does, in general, not have any impact on the conclusions reached at 8.3.4.1 above.

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

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

As a general remark, we would like to note that the Financial Collateral Directive was not implemented into Slovak laws by one single statute (in many countries there is one law dealing with financial collaterals). In Slovakia the implementation is scattered throughout several laws. In addition, it focuses on security collateral arrangements (not title transfer collateral arrangements).

The treatment of collateral when calculating the net amount payable will be dependent on whether or not it is covered by the Slovak Safe Harbour Provisions (in case of insolvency scenarios). There is no specific regulation dealing with title transfer financial collateral arrangements in non-insolvency scenarios (only with the right of pledge, which is not envisaged by the Credit Support Annex).

In case of insolvency of Party A and within the scope of the Slovak Safe Harbour Provisions, the following applies:

Since the Close-out Netting Provisions should qualify as close-out netting provision within the meaning of the Slovak Insolvency Act (please see at 7.3 for details), we believe that, within the scope of the Slovak Safe Harbour Provisions, § 11 of the EFET Credit Support Annex should be valid to the extent that it provides for the value of the collateral provided and not yet retransferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "*other amounts payable*". We base such belief on the following reasons:

Close-out netting is expressly recognized by the Slovak Insolvency Act. As mentioned in clause 7.4 above, the commencement of bankruptcy (as well as other proceedings effecting creditors rights as described therein) shall have no impact on the close out netting agreed upon in the close out netting agreement.

The Slovak Insolvency Act explicitly recognizes the contractual freedom of the parties to the close out netting agreement to determine the calculcation of the net amount payable[60] by providing that it shall be specified in the agreement.

Further, the Slovak Insolvency Act explicitly provides that the calculation of the net amount payable may reflect contractually agreed value of cash collateral (including account receivable) provided in order to secure or otherwise cover the obligations resulting under the close-out netting agreement[61].

60 Article 180 (1) last sentence of the Slovak Insolvency Act
61 Article 180 (4) last sentence of the Slovak Insolvency Act, implementing the Financial Collateral Directive

However, we have no reason to believe that the Parties' agreement, according to which Eligible Credit Support in the form of a Letter of Credit shall not be considered by the Valuation Agent when determining such "*other amounts payable*", except where Party B has drawn under any such Letter of Credit, would not be recognized by a Slovak court / bankruptcy trustee. This conclusion is based on the following arguments:

(i) specific provision of the Slovak Insolvency Act providing that the calculation of the net amount payable shall be determined by the parties,

(ii) given that the claim (*pohľadávka*) of Party B under a Letter of Credit / Parent Company Guarantee provided by Party A under the EFET Credit Support Annex against the relevant issuing bank / guaranteeing bank / parent company (as the case may be) will not be subject to the insolvent estate (*konkurzná podstata*) of Party A and

(iii) while a power of attorney granted or an instruction or order given by a Slovak entity will, generally, automatically terminate upon the opening of bankruptcy proceedings over the relevant entity's assets[62], this should not be the case for the instruction given by Party A prior to the opening of bankruptcy proceedings to the relevant third-party (*i.e.*, the issuing bank, guaranteeing bank or parent company, as the case may be) to issue a Letter of Credit / Parent Company Guarantee to the extent the relevant third-party has already complied with such instruction. This means that, to the extent the relevant third-party has already issued the Letter of Credit / Parent Company Guarantee, the instruction given by Party A and, therefore, the respective Letter of Credit / Parent Company Guarantee will remain valid irrespective of the opening of bankruptcy proceedings over the assets of Party A.

For purposes of this chapter, we have assumed that the term "*draws*" in the second sentence of § 11 of the EFET Credit Support Annex is, under the laws applicable to the EFET Credit Support Annex, to be understood as requesting and actually receiving payment under the relevant Letter of Credit / Parent Company Guarantee (at which point in time, the Eligible Credit Support will consist of Cash).

Limitations on the above may arise in respect of Slovak Banks. As noted under 3.4 of Appendix ./D, if derivatives or other financial contracts are subject to a close-out netting arrangement, the National Bank of Slovakia

[62] Article 52 of the Slovak Insolvency Act

(or the independent valuer appointed by the resolution authority) will, as a basis for application of the bail-in tool, calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (Article 63 (2) of the Slovak Resolution Act). However, the value of liabilities arising from the transactions must be determined by the resolution authority in accordance with § 63 (3) of the Slovak Resolution Act and, possibly, also the Commission Delegated Regulation (see at 3.4 of Appendix ./D).

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

Generally, the Credit Support Annex relies for its effectiveness on the close-out netting provisions of the EFET General Agreement. Consequently, should the close-out netting provisions of the EFET Generall Agreement not be enforceable, then the rights of Party B under the EFET Credit Support Annex would also be affected.

Further, as mentioned above (see at 8.3.5 above), the implementation of the Financial Collateral Directive into Slovak laws is rather scattered throughout several laws and incomplete. Therefore, the enforceability of the EFET Close-Out Netting Provisions is dependent on the applicability of the Slovak Safe Harbour Provisions (with the regulation being partially overlapping with the requirements of the Financial Collateral Directive but not fully).

8.3.6.1 Within the scope of the Safe Harbour Provisions

We believe that the rights of Party B under the EFET General Agreement and the EFET Credit Support Annex should, within the scope of the Safe Harbour Provisions (see at 7.3 and 7.4 above), be enforceable in accordance with their terms even in the event of opening of insolvency proceedings over the assets of Party A, subject to limitations set out herein. The reasons for this are as follows:

As noted under 7.4 and 8.3.5 above, the Slovak Insolvency Act stipulates that commencement of bankruptcy (as well as certain other proceedings effecting creditors rights as described therein) shall have no impact on the close out netting agreed upon in the close out netting agreement.

The Slovak Insolvency Act explicitly provides that the calculcation of the Termination Amount may reflect the value (determined in accordance with the close-out netting agreement) the collateral in the form of cash (including account receivable), securities or credit claims, the purpose of which is to cover or otherwise secure the performance of obligations.

8.3.6.2 Beyond the scope of the Safe Harbour Provisions

We believe that the rights of Party B under the EFET General Agreement and the EFET Credit Support Annex should, subject to the limitations set out in this Opinion, be enforceable in accordance with their terms in the event of opening of Slovak insolvency proceedings over the assets of Party A, even where the close out netting agreement does not enjoy the protection of the Safe Harbour Provisions. The main argument would be that the title to collateral has been transferred and the bankruptcy trustee has limited possibility to claim it bank (other than the possibility to challenge the transaction as such). However, this has not yet been tested at a Slovak court and we cannot fully exclude that the bankruptcy trustee would proceed differently, in particular to attempt to re-characterize it as security interest. However, in such case Party B would have to be perceived as secured creditor and the cash collateral should not be used to satisfy other creditors.

As mentioned above (see at 7.6.6 and 8.1.2.3), special considerations however apply regarding constellations providing the right of Party B to unilaterally calculate the amounts owing to it by Party A (which may not be fully enforceable). In respect of § 11 of the EFET Credit Support Annex, this risk should be alleviated if the Parties elect an (independent) third party as the Valuation Agent.

8.3.7 <u>*Suspect period*</u>*: Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency?*

If so, how long before the insolvency does the suspect period begin?

If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing?

Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an *antecedent or pre-existing obligation or for some other reason?*

8.3.7.1 Recovery of Eligible Credit Support provided

The transfer of collateral by Party A can be challenged by Party A's bankruptcy trustee or its creditors under certain circumstances. The grounds for avoidance are set out:

(i) in the Slovak Civil Code (§§ 42a and 42b) – these rules apply to creditors of any Slovak entity in non-insolvency scenario, including (by a specific reference) in the event of an involuntary administration of a a Slovak Insurance Company[63], Slovak Reinsurance Company64, Slovak Management Company[65] [66],Slovak Investment Firm[67] and Slovak Bank[68]

(ii) In the Slovak Insolvency Act (§§57 – 66) – these rules can be applied by the bankruptcy trustee or the creditors of registered claims in case of bankruptcy of a Slovak entity. The Slovak Insolvency Act will apply to the extent insolvency proceedings are commenced in Slovakia (*lex fori concursus*).

There are no specific provisions dealing with avoidance in respect of close out netting agreements (subject to those we mention below), therefore these general rules apply also to transactions entered into under the EFET General Agreement, including transfer of collateral, substitution of collateral and collateral top-up.

Please see Appendix ./E for an overview of Slovak avoidance rules but generally the following applies:

- In order for a transaction to be capable of being challenged / voided it needs to be detrimental to creditors in one of the forms envisaged by the Slovak Civil Code / Slovak Insolvency Act. These include undervalue transaction / transaction carried out without adequate consideration, waivers of right, preferential transactions,

63 § 153 (3) of the Slovak Insurance Act
64 § 153 (3) of the Slovak Insurance Act
65 Please note that in case of a Slovak Management Company, these rules apply only in case the Slovak Management Company is authorized to carry out investment services under the Slovak Securities Act
66 § 153(3) of the Slovak Securities Act
67 Article 153 (3) of the Slovak Securities Act
68 Article 59 (3) and (4) of the Slovak Act on Banks

transactions curtailing the rights of other creditors etc).

- Knowledge and intent is required only in some cases. As a general rule, in a non bankruptcy scenario, both intent of the debtor and the knowledge of such (actual or one that the beneficiary must have had) must be proven. During bankruptcy, fulfillment of objective criterion is sufficient (i.e. the transaction is deemed detrimental, eg. it was entered into without adequate consideration and at the same time, it either causes (material) insolvency of the debtor or is carried out during (material) insolvency of the debtor. An exception in bankruptcy form transactions curtailing the creditors if made with the intention to do so and, at the same time, if the counterparty knew of this intention.

- The transactions can be challenged only during suspect periods defined by law (see 8.3.7.2 below).

For the sake of completeness, these rules do not apply to Letters of Credit in case of insolvency of Party A.

Slovak law provides for certain excepions to the generally applicable avoidance rules that are or may be relevant for transactions entered into under the EFET General Agreement.

8.3.7.1.1 Exceptions under the governing law of another Member State

Under the Slovak Insolvency Act[69], in case of bankruptcy of a Slovak financial institution[70], transactions governed by law of another Member State cannot be challenged if the beneficiary of the otherwise potentially voidable act can prove that (i) the transaction is governed by the law of another Member State and (ii) the law of such another Member State does not allow the transaction to be challenged / avoided.

Substantially the same exception follows also from Article 16 of the Insolvency Regulation, pursuant to which Slovak avoidance rules do not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State (other than Slovak law); and (b) the law of that Member State does not allow any means of challenging that act in the relevant case. This would apply in case of insolvency of a Slovak Corporate.

[69] Article 192 (4) of the Slovak Insolvency Act

[70] Please see at 0 for the definition of the term "Slovak financial institution" as well as related uncertainties regarding the scope of this definition.

However, these exceptions do not apply in case the transaction is governed by laws of a state that is not a Member State, most relevant in the case of EFET General Agreement being the UK law.

8.3.7.1.2 Exceptions for transactions between Qualified Parties

In line with the Financial Collateral Directive, the Slovak Insolvency Act provides that with respect to transactions between Qualified Parties or, where at least one of the parties is a Qualified Party (e.g. in case of bankruptcy / restructuring of a Slovak Corporate, in case the beneficiary of the collateral is a Qualified Party - see clause 7.3.1 above for details):

(i) collateral[71] in the form of cash or account receivable granted on the day bankruptcy over the assets of the debtor was opened or restructuring permitted is deemed to have been validly granted if the beneficiary proves that he did not know or could not have known of this;

(ii) collateral[72] in the form of cash or account receivable granted in a transaction between these entities cannot be challenged solely on the grounds of such collateral being granted after (later than) the primary obligation has been established.

Same rules apply to substitution, exchange or and provision of additional collateral (see clause 8.3.7.3 below).

However, the above does not exclude the possibility that the transfer, substitution or amendment are contested on other grounds (if the statutory conditions are fulfilled).

In addition, we would like to note that there seems to be a discrepancy between the scope of this exception envisaged by the Financial Collateral Directive and the Slovak implementing legislation. The Financial Collateral Directive defines a title transfer financial collateral arrangement as an arrangement, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of *securing or otherwise covering* the performance of relevant financial obligations.

The implementation into Slovak law seems to cover only collateral *securing* the performance but not *otherwise covering* the performance of relevant obligations. This results from the language used in the Slovak

[71] Applies not only to cash collateral and account receivables, state bonds, transferable securities or claims under credits provided. We do not mention this specifically due to the Credit Support Annex envisaging either cash (i.e. account receivable from Slovak law perspective) and Letters of Credit as Eligible Credit Support.

[72] See above

implementing legislation where the collaterals are addressed as *securing* the obligations of the collateral provider[73]. The term "otherwise covering" is not used in the provisions implementing these exceptions[74]. It could be argued that the Eligible Credit Support required under the EFET General Agreement and the EFET Credit Support Annex (in particular with a view to its § 7) is being provided in order to *otherwise cover* (as opposed to secure) the performance. We see therefore a risk that a bankruptcy trustee might attempt to argue in case of insolvency of Party A that the above exceptions do not apply to the Eligible Credit Support.

However, given they were introduced into Slovak law as transposition of the relevant articles of the Financial Collateral Directive, without any indication of intention to exclude *otherwise covering* arrangements, and the obligation to interpret national laws in line with the directives (if possible), we believe that good arguments can be made in favour of the application of these exemption to the Eligible Credit Support provided in the form of cash.

In addition to the above reasoning (based on EU law), this position could be supported by an argument that the Slovak Civil Code recognizes the term *zábezpeka*[75] (security) and further provides that the obligation to provide it can be fulfilled primarily – but not only – by granting a pledge or with a surety. However, other forms of security, such as tangible assets or other rights, can also serve as security if so agreed by the parties. We therefore believe that the conclusion that the exemptions described above should apply to the Eligible Credit Support also by arguing that it is a specific form of security and thus covered by the exemption.

8.3.7.2 Time limits applicable

There are time limits applicable during which a certain transaction can be challenged.

Generally, any challenge pursuant to the Slovak Civil Code would be excluded after the lapse of three (3) years.

Any challenge pursuant to the Slovak Insolvency Act would be excluded if the transfer of Eligible Credit Support took place more than one (1) year before the commencment of

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73 The Slovak language version of the Financial Collateral Directive clearly differentiates between securing or otherwise covering (... s cieľom *zabezpečenia* alebo *iného krytia)* while the laws implementing the directive use only the term *securing* (*zabezpečenie*).

74 For the sake of completeness, the provisions of the Slovak Insolvency Act which deal with the calculation of the net amount and inclusion of the value of the provided collateral refer both to collateral provided to secure as well as otherwise cover.

75 Article 555 of the Slovak Civil Code

bankruptcy proceedings over the assets of Party A for preferential legal acts and legal acts without adequate consideration and more than five (5) years before the commencment of bankruptcy proceedings over the assets of Party A for any legal acts curtailing the creditors (with an intent to do so and the knowledge of the counterparty).

Longer periods apply in case of related party transactions. Please see also Appendix ./E for details.

8.3.7.3 Substitution of Eligible Credit Support and Provision of Additional Eligible Credit Support

Any substitution of Eligible Credit Support or provision of additional Eligible Credit Support by Party A (see § 6 of the EFET Credit Support Annex) is a separate (and potentially voidable) transaction that can be, in general, challenged under the same rules as the (initial) transfer of collateral – please see clause 8.3.7.1 above for details. The same applies to provision of additional Eligible Credit Support.

In terms of time limits (see clause 8.3.7.2), any substitution or provision of additional collateral is a separate transaction, which triggers a commencement of new suspect period.

As mentioned above (see clause 8.3.7.1 above), in case of transactions where at least one of the parties is a Qualified Party (see clause 7.3.1 for details), the substitution of collateral, exchange of collateral or top-up of collateral required by the agreement cannot be challenged solely on the grounds of having been provided later than the primary obligation was established.

However, the above does not exclude the possibility that the transfer, substitution or amendment are contested on other grounds (if the statutory conditions are fulfilled).

In particular, in case the exception mentioned above does not apply (e.g. in case the EFET General Agreement is entered into between two corporates), any provision of collateral by the debtor that secures a claim that was established before such collateral is provided, is deemed a preferential legal act and, if carried out during (material) insolvency of the debtor, can be challenged.

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

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

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

Once Party B has received full entitlement to the claim against the relevant third-party, there are no (other) general formal requirements under Slovak law that would need to be observed by Party B in order to continue to hold such interest in the relevant claim against the third-party.

However, it may be that the Eligible Credit Support as such (*e.g.*, the terms and conditions of Letters of Credit)) provides for specific formal requirements to be observed in order for the relevant claim (*pohľadávka*) to remain valid.

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

We do not have any other (specific) recommendations in terms of the collateral arrangements established under the EFET Credit Support Annex.

8.4 Part IV: General Enforceability

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

8.4.1.1 General remarks

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

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

(ii) Do any terms of the EFET General Agreement violate Slovak public policy (*ordre public*)?

Prima facie, we have no reason to believe that any provisions of the EFET General Agreement (other than the provisions specifically discussed in this Opinion) might be challenged by an Slovak court as being manifestly incompatible with overriding mandatory provisions of Slovak law, which are applicable irrespective of the choice of law, or Slovak public policy (*ordre public*)- please see also our comments at 7.6.6 and 8.1.2.3 above.

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

8.4.1.2 Non-performance due to Force Majeure

While not specifically referring to the term "Force Majeure" (*vyššia moc*), the Slovak Commercial Code provides for definition of circumstances excluding the liability of a party for damages caused by a breach of its contractual obligation. The statutory definition of these circumstances is almost identically to the definition of "Force Majeure" in the EFET General

Agreement[76]. Further, under Slovak law the parties may agree upon a different definition of a force majeure event or even agree that not even a force majeure event shall limit the liability of the parties.

Based on the above, we do not see any reason why a Slovak court would come to conclude that § 7 of the EFET General Agreement is incompatible with overriding mandatory provisions of Slovak law, which are applicable irrespective of the choice of law, or Slovak public policy (*ordre public*).

8.4.1.3 Remedies for non-performance

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

8.4.1.4 Damages and Limitation of liability

Generally under the Slovak law, a party that breaches its obligation under a contractual relationship is obliged to compensate the damage incurred by the other party.

This liability is limited or excluded by law by the force majeure clause (analysed in clause 8.4.1.2 above) and also if the damage and/or contractual breach is a result of certain specific circumstances[77].

The question of the possibility of contractual limitation of liability has not been resolved in the Slovak legal practice yet (there are contradicting opinions on this issue both in the legal theory as well as in judicial practice). The reason for this

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[76] A circumstance excluding liability of party is *a circumstance that has occurred independently from the will of the obliged party and which hinders the party in the fulfillment of its obligation in case it cannot be reasonably expected that (i) the obliged party could avoid or overcome this obstacle or its consequences and further, that (ii) it would have foreseen such obstacle at the time it entered into the obligation*.

[77] Such circumstances include, for example, (a) if the contractual breach was caused by the conduct of the damaged party or by a lack of the cooperation which the damaged party was obliged to provide, (b) if the damage was fully or partially incurred by the damaged party failing to observe its statutory obligation to undertake actions necessary for prevention of damage (if possible in a particular case), (c) if the damaged party withdrew from an agreement due to the breach of the other and then incurred damage because it failed to make use of an (available) opportunity to conclude another (substitute) agreement with a third party for the delivery of the fulfilment that the breaching party was initially obliged to or (d) damage that exceeds the amount of damage that the breaching party has foreseen at the time of the conclusion of the agreement or that could have been foreseen considering the circumstances of the case when acting with due care, is the breaching party not obliged to compensate.

uncertainty is different view on the interpretation of the provisions of the Slovak Civil Code and the Slovak Commercial Code regulating the possibility of waiver of rights in advance. The Slovak Civil Code provides that "an agreement by which a person waives his/her rights that may arise in the future is void." and the Slovak Commercial Code provides that "A claim to compensation of damage may not be waived before breach of the obligation from which damage may arise."

Essentially, it is undisputed that a complete waiver of right (i.e. a provision under which a party would not be entitled to damages at all) is prohibited under Slovak law. However, there is a dispute regarding the the permissibility of a partial waiver of rights, i.e. permissibility of provisions that do not exclude the right for damages completely, but provide for the limitation of its extent (e.g. whether it is permissible to agree that a party shall be liable for damage only up to a certain amount). As a result, it cannot be confirmed with certainty whether a contractual limitation of liability would be upheld by a Slovak court.

However, such limitations of liability are common in the practice – the reasoning being that such contractual limitation cannot worsen the position of the parties (i.e. either the court does recognize it or it does not, which puts the parties in a position, in which they were if no contractual limitation was agreed). Our view and interpretation of the law is that a reasonable limitation of liability should be recognized by court but, given the reasons outlined above, we cannot exclude that a court would take different view.

In relation to damages and compensation, we would like to note that current wording of the Article 10.3 (b) of the EFET General Agreement could lead to wrong interpretation of the legal characteristics of the Termination Amount. The reason for this is that it provides that "*With effect from the Early Termination Date all further payments and performance in respect of all Individual Contracts shall be released (and not merely suspended) and existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay* ***damages*** *for non-fulfilment to the other Party in an amount (if any) calculated in accordance with §11.1 ("****Termination Amount****").* From Slovak law perspective, the term *damages* is used in situations where one party that breached its contractual obligations is obliged to compensate to the other

Party damage actually incurred by that other Party in direct consequence of the breach. This is not what the Termination Amount stands for (there might be no breach of an obligation and no damage at all when Material Reason occurs), it is an independent obligation that is triggered in case of termination. Therefore, in order to avoid any misinterpretation, the Parties may want to consider to amend the last sentence of Article 10.3 (b) of the EFET General Agreement involving a Slovak counterparty as follows: "*…. existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay ~~damages for non-fulfilment to the other Party in~~ an amount (if any) calculated in accordance with §11.1 ("**Termination Amount**")".*

Other than as outlined above (and our comments in at 7.6.6, 8.1.2.3 and 8.4.1), we have no reason to believe that § 12 of the EFET General Agreement would be assessed by a Slovak court as being manifestly incompatible with overriding mandatory provisions of Slovak law, which are applicable irrespective of the choice of law, or Slovak public policy (*ordre public*).

8.4.1.5 Other comments

We note that certain claims of the parties to an agreement would not be fully enforcebale in case of bankruptcy or restructuring of a Slovak Party. This applies for example to any default interests due after the bankruptcy has been openend (this will not be satisfied at all) or contractual penalties (these are treated as subordinated claims). However, we believe that these restriction do not have significant impact on the overall enforceability of the EFET General Agreement.

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

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

In terms of Slovak law, the following would apply:

Generally, the written form of a legal act (*právny úkon*), such as notice, is fulfilled if the act is performed (among other means) by electronic means, which enable the content of the legal act to be captured and the person who performed the legal act to be identified. The written form shall be fulfilled whenever a legal act performed by electronic means is signed by a qualified electronic signature or a qualified electronic seal[78].

We believe that a notice, declaration or other communication given in accordance with the E-Notice Agreement should be recognized as valid under Slovak law, in case the parties agreed in the E-Notice Agreement that the legal acts and other contractual communication can be sent by electronic means (emails) and, ideally, if the qualified electronic signature / seal was used for signing of the respective legal act (e.g. notice). It should be noted that the recipient could try to challenge whether the actual owner of the sender's email account sent the respective communication, e.g. by claiming that the communicatin was sent from that account by a third party. However, such challenge has a relatively low merit without tangible proofs presented to the court.

Similarly, we have no reason to believe that the concept of deemed receipt of the termination notice established under 1 of Schedule 1 (Amendments and E-mail Address Details) to the E-Notice Agreement might be challenged by a Slovak court or bankruptcy administrator (správca konkurznej podstaty) / restructuring administrator (reštrukturalizačný správca). From the perspective of legal effects (perfection) of the termination notice, the actual knowledge of the recipient of the notice is not important, as otherwise the recipient could prevent the effects of the notice by non-acceptance / non-confirmation of receipt of the notice. On the contrary, it is sufficient if the termination notice reaches the recipient's 'sphere of influence' by e.g. sending and delivery of an email with termination notice attached to the recipient's email address, designated in the E-Notice Agreement / Schedule 1 for delivery of legal acts or other contractual communication (as long as the sender did not receive automated non-delivery message). For the sake of clarity, it is, however, still recommended to request an electronic delivery receipt.

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

[78] As defined in Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

I Regulation).

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

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

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

8.5 Part V: Confirmation Practices

8.5.1 Binding Individual Contract

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

According to Article 10 (1) of Rome I Regulation, the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under Rome I Regulation if the contract or term were valid[79]. Hence, this question would need to be assessed on the basis of the laws governing the relevant EFET General Agreement (i.e., primarily the governing law agreed upon by the Parties pursuant to § 22 of the EFET General Agreement).

In terms of Slovak law, the following would apply:

The contracts can be concluded both orally or in writing. Written from is mandatory if required by law; or if in the course of negotiations at least one party expresses its intent to conclude the contract in writing (§ 272 of the Slovak Commercial Code).

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

Typically, Slovak law requires mandatory written form of contract either due to subject-matter of the contract (e.g. contract on transfer of real estate; pledge agreement, etc.) or contracting party (e.g. public authority or municipality).

Moreover, contracts concluded with certain type of entities (e.g. public and municipal authorities, higher territorial units, entities founded from public budgets, etc.) have to published in a stipulated way in order to become enforceable (please see at 8.5.1.1.1 for details).

We believe that, subject to the below, Slovak law does not require any form of contract or any formal act in order to enter into a binding and enforceable Individual Contract. The parties are however obliged to agree on all essential terms of the relevant contract.

In respect of financial collateral agreements, we note that the requirement stemming from the Financial Collateral Directive for a financial collateral arrangement to be evidenced in writing has not been implemented into the Slovak Insolvency Act. The requirement for the financial collateral arrangement to be sufficiently clear so as to identify the collateral could be derived from civil law principles.

For transactions subject to Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"), recital 26 of Commission Delegated Regulation (EU) No 149/2013 ("**Delegated Regulation No 149**") may be relevant. It specifies that "confirmations" must either be "electronically executed" or signed by both counterparties. ESMA provides some further guidance on this in its Q&A-tool[80]. Question 5 of the ESMA Q&A deals with the issue of "electronic execution" of confirmations. ESMA states that confirmations sent by fax, on paper, or by manually sent e-mails do not meet the requirement of "electronic execution". ESMA apparently assumes that electronic confirmations are executed via an electronic platform or system. Following recital 26 of Delegated Regulation No 149 and respective ESMA guidance, non-electronic confirmations must thus be signed by both counterparties. However, according to the ESMA Q&A, an agreement providing for a negative affirmation mechanism would, arguably, be permissible in ESMA's view. This is also in

[80] Questions and answers on the implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories dated 4 February 2016 ("**ESMA Q&A**").

line with the view expressed by the International Swaps and Derivative Association, Inc. ("**ISDA**").[81] ISDA also allows a negative affirmation mechanism as permissible form of confirmation. Both ESMA and ISDA thus apparently do not view the form requirement set forth in recital 26 of Delegated Regulation No 149 as being so strict that it would require any confirmation to be signed by both counterparties. In any case, given that EMIR, respectively Delegated Regulation No 149, provide a regulatory framework only, we believe that any violation of the form requirement set forth in recital 26 of Delegated Regulation No 149 should have no impact on the legal validity of Individual Contracts.

Generally, from a civil law perspective, it is recommendable either conclude an Individual Contract in writing or confirm their understanding that an Individual Contract was indeed concluded by means of a written Confirmation for the avoidance of potential disputes and regarding the existence and/or contents of the agreement and evidentiary purposes.

Furthermore, any relevant declarations of will (*prejav vole*) or legal acts (*právny úkon*) must be made by persons duly authorized to act on behalf of the counterparty in order to be binding upon the counterparty. In this respect, Parties may also consider to provide for application of § 3.4 (*Authorized Persons*) of the EFET General Agreement.

8.5.1.1.1 Compulsory publication of an agreement concluded with public bodies

Provided that EFET General Agreement or the Individual Contracts will not qualify as agreements on financial instruments under Slovak securities law (i.e. mainly in case of physical commodity transaction) and are concluded with certain public bodies, they will have to be published on the special dedicated website, otherwise they will not be effective and thus also not-enforceable. Agreements will come into effectiveness on day following day of publication. If an agreement has not been published within three months from the conclusion or from the granting of consent, if the consent of the competent authority is required for its validity, it deemed that the agreement has not been concluded at all.

[81] See ISDA Commentary on ESMA RTS on Confirmations dated 29 January 2013.

Agreements with following entities must be published:

a) state authorities,

b) municipalities and self-governing regions,

c) legal entities and individuals required by law to make decisions about the rights and obligations of individuals or legal entities in the area of public administration (but only in the extent of such decision-making activities),

d) legal entities established by law (i.e. specific public institutions, such as the Social Insurance Agency), by state authorities, by municipalities or by self-governing regions,

e) legal entities established and still controlled by above listed obliged entities, in relation to management of property of such legal entity; this does not apply if an agreement is concluded in the ordinary course of business within the scope of the subject of business or activity entered in the commercial register or in other official registries[82],

f) public health insurance companies.

8.5.1.1.2 Prior approval of municipal council

A prior approval of a municipal council might be required for certain agreements concluded by a municipality. Otherwise, the agreement will be considered null and void, while the invalidity of an agreement cannot be "healed" by subsequent approval.

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

A contract is concluded at the moment when the acceptance of of an offer to conclude a contract takes effect. By acceptance a timely statement made by the person to whom an offer is addressed, or other timely action by him from which his consent may be inferred is meant. The acceptance of an offer takes effect from the moment when the expression of consent

[82] In such case, only general information on conclusion of an agreement must be published – the agreement in this case will come into effectiveness irrespective of publication of such information.

to the content of the offer reaches the person who made the offer. In this respect please note, that in general silence or inaction shall not of itself constitute acceptance of an offer. However, the Parties may agree that silence or inaction constitutes acceptance of the offer and in such case the contract is conclude eventhough the person to whom an offer is addressed remains silent or inactive.

As mentioned above in 8.5.1.1.1, contracts concluded with certain type of entities (e.g. public and municipal authorities, higher territorial units, entities founded from public budgets, etc.) have to published in a stipulated way in order to become enforceable.

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

No. We understand that a Confirmation is, typically, nothing more than a summary of an Individual Contract that has previously been agreed upon between the Parties – either via telephone, fax or e-mail. Usually, one of the parties will sum-up the commercial terms of the Individual Contract in form of the Confirmation that is forwarded to the other party without need for the other party to take any further action. Hence, "incorrect" terms (*i.e.*, terms contrary to what has previously been agreed upon between the Parties) will, under Slovak law, thus not be binding upon the other party, irrespective of whether such party objects to the Confirmation or not. The Confirmation containing terms contrary to what has been previously agreed upon between the Parties might, rather, be seen as an offer (*Návrh*) of the party delivering such Confirmation to amend the terms and conditions of the relevant Individual Contract.

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

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

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

Provided that inclusion of the Individual Contract in the EFET General Agreement was not agreed in the Indiviudal Contract terms of which are to be confirmed by Confirmation, a new offer has to be made and accepted as provided in the section 8.5.1.2 above.

8.5.2 Means of Evidence

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

The Slovak Act No. 160/2015 Coll., the Civil Procedure Code, as amended ("**Slovak Civil Procedure Code**") provides for demonstrative list of most common categories of evidence used in the civil proceedings,

(i) Deposition of a party and witness;
(ii) Document (deed);
(iii) Professional statement;
(iv) Expert evidence; and
(v) Inspection.

In general, any evidence is admissible, as long as it can contribute to the proper clarification of the matter and if it was obtained lawfully from presented means of evidence. Each of the parties must propose evidence proving its arguments; the only evidence that can be used without proposal from either party (i.e. by court *ex officio*) is the one resulting from the public registries and databases, if these suggest that arguments of the parties are in contradiction with factual reality.

As far as the taped recordings are concerned, generally, only taped recordings obtained in compliance with applicable laws will be admissible in court. The party, whose oral approval with terms of the Individual Contract is being recorded, needs to consent to recording, in order for such evidence to be considered as obtained lawfully. Otherwise, such evidence can be considered as being obtained unlawfully, as it could violate person's personal rights (privacy) and as a result, would be inadmissible in court proceedings. In exceptional cases, the unlawfully obtained recording may be accepted by the court, as long as such evidence passes a so-called proportionality test (i.e. a "stronger" constitutional right needs to be protected over the violated one).

Statements of witnesses are often used as means of evidence, whereas in case of orally concluded agreements, such statements can not only assist parties' position, however also the court in projecting the specific terms of oral contracts. The court decides in its own discretion whether a witness proposed by either party will be deposited at the court or not, always assessing relevance of potential witness' statement towards the merits of the case. If statements of two (or more) witnesses are contradictory, these witnesses can further be deposited at the same time.

Email and other electronic message are also eligible means of evidence. Typically, e-messages containing offer (terms) and acceptance are commonly accepted by the court as proof of concluded contract, if the parties can prove that person(s) sending the respective emails / electronic messages had proper capacity for concluding the contract on behalf of the party.

With respect to transaction entry system, its admissibility depends on the authenticity of data that can be presented to the court. In other words, if the excerpt from the system can demonstrably prove the terms of the Individual Contract and acceptance of both parties with these terms (including contractual capacity of parties' representatives), the excerpt (entry) can serve as means of proving the conclusion of the Individual Contract.

Facsimiled documents can also be used as means of evidence, though stricter essentials need to be met for their admissibility. The party needs to prove proper sending, as well as delivery of the documents sent by facsimile. In addition, authenticity (and acceptable type) of signatures and contractual capacity of representatives of all parties also need to be manifested to the court.

Under the Slovak Civil Procedure Code, no formal order of different forms of evidence applies. The judge (in case of a senate of judges: the judges) decide(s) by applying the principle of free evaluation of the evidence, meaning that the evidence is assessed independently (in own discretion of judge) and evaluated both individually and in its entirety. Such in-depth assessment is not necessary in case of public documents issued by authorities, which confirm the authenticity of what is certified in or confirmed by them (if not proven otherwise).

8.6 Part VI: Core Provisions

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

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

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

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

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

8.6.3 Cross-Product Netting: Would the inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under 8.1 and 8.2 above?

8.6.3.1 EFET Cross Product Payment Netting Agreement

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

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

8.6.3.2 Master Netting Agreement

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

We do not express an opinion whether (i) the EFET Master Netting Agreement is a netting agreement for purposes of Article 180 of the Slovak Insolvency Act or (ii) any and all of the transactions covered by an EFET Master Netting Agreement may benefit from the Slovak substantive netting privilege (see clauses 7.3 and 7.4 for further details). Furthermore, we do not express an opinion on the validity or enforceability of the EFET Master Netting Agreement under the laws of Slovakia.

8.6.3.3 Cross-Product Master Agreement

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

We do not express an opinion whether (i) the Cross-Product Master Agreement is a netting agreement for purposes of Article 180 of the Slovak Insolvency Act or (ii) any and all of the transactions covered by a Cross-Product Master Agreement may benefit from the Slovak substantive netting privilege (see clauses 7.3 and 7.4 for further details). Furthermore, we do not express an opinion on the validity or enforceability of the Cross-Product Master Agreement under the laws of Slovakia.

8.7 Part VII: Governing Law, Arbitration and Jurisdiction

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

8.7.1.1 Choice of law

According to Article 3 (1) of Rome I Regulation, Parties to a contract are, subject to certain exceptions, subject to certain exceptions free to choose the law governing the terms of such contract (*neobmedzená voľba práva*).

The Parties' agreement on the governing law will – subject to the limitations set out below in 9.5.5, thus be recognized under Slovak law and the courts of Slovakia would have to up-hold such choice of law..

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

Such choice of law would, however, only be recognized in relation to the Parties' obligations under the EFET General Agreement (i.e., questions in regard to determining the Parties' obligations, interpretation and remedies for breach of the EFET General Agreement), but not in relation to the creation, type, contents, effects, protection, transfer and loss of any right in rem in the Eligible Credit Support. In this respect, the applicable law will be determined in accordance with Slovak conflict of laws rules (see at 8.3.1.1 and 8.3.1.2 above).

8.7.1.2 Submission to jurisdiction

8.7.1.2.1 Arbitration

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

8.7.1.2.2 Submission to jurisdiction

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

If, however, the Parties submitted to the non-exclusive jurisdiction of a court not having its seat in a state that is bound by the Brussels Regulation Recast, the question whether a judgment obtained in such court would be recognized and enforced in the Slovak Republic, would need to be assessed in accordance with the Slovak Act No. 97/1963 Coll. on the international private and procedural law, as amended. A duly obtained foreign judgment, notwithstanding the general recognition of the choice of the jurisdiction of, will not be recognised in the Slovak Republic if:

(i) the matter is one within the exclusive competence of the courts of the Slovak Republic pursuant to its laws, or is one beyond the competence of any judicial proceedings of a foreign authority, as determined by the laws of the Slovak Republic; or

(ii) the decision is not final or enforceable in the state where it has been issued; or

(iii) the decision is not a decision on the merits of the matter; or

(iv) the party against whom such judgment is sought to be enforced has been deprived of an opportunity to participate in the foreign proceedings, especially if the summons or notice of the commencement of the foreign proceedings has not been duly served on the party; this exception does not apply if the party has not filed an appeal against the foreign judgment which has been duly served on it or if the party has waived the applicability of this exception; or

(v) a final decision in the same matter has previously been reached by a court of the Slovak Republic or by a foreign authority if that foreign authority's decision has been, or would be, enforced in the Slovak Republic; or

(vi) recognition of the foreign judgment would be contrary to public policy (*ordre public*) of the Slovak Republic.

8.8 Part VIII: 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?

8.8.1 Exchange control laws

Slovak exchange control laws (primarily the Foreign Exchange Act (Act No. 202/1995 Coll. the Foreign Exchange Act, as amended) and relevant secondary legislation) do not affect the enforceability of the EFET General Agreement or the Individual Contracts, unless extraordinary measures will be adopted.

However, there are certain notification obligations under the Foreign Exchange Act - a Slovak resident (in Slovak: *tuzemec*), which includes legal entities incorporated in Slovakia, or an organizational unit (branch) of a foreign person in Slovakia (in Slovak: *organizačná zložka cudzozemca v tuzemsku*) are obliged to notify the National Bank of Slovakia of (i) collections, payments, and transfers vis-à-vis residents abroad and non-residents, related to direct investments, financial credits, securities and financial market operations, including financial market operations conducted via non-residents, and (ii) the opening of accounts abroad. However, the implementing decree of the National Bank of Slovakia currently anticipates only notifications from residents (legal entities) and organizational units of a foreign person (except for banks and some other financial institutions) in case the value of the foreign assets or foreign liabilities is at least EUR 2,000,000 in a particular calendar month.

8.8.2 Financial regulatory licensing requirements

Slovak financial services regulatory laws (regulating mainly banking services, securities, insurance activities or alike) do not affect the enforceability of the EFET General Agreement or the Individual Contracts, unless extraordinary measures will be adopted.

However, transactions under the EFET General Agreement or the Individual Contracts might qualify as investment services under Slovak securities law since they comprise also sale or purchase of financial instruments (including also derivatives) on their own account or the account of a client. If carried out in Slovakia, the relevant entity must either hold a Slovak investment firm license (MiFID) or passport such license from another member state of EU. Whether or not the investment services are or could be considered to be provided in Slovakia must be assessed on a case-by-case basis. The investment services license is not required in case of a bank, if it holds a license for provision of investment services as part of its banking license.

Exemptions to this rule are based on the MiFID II and include mainly following exemption which may be relevant with a view to the EFET General Agreement: - persons:

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

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

are exempt from licensing requirements, provided that:

- for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis,
- those persons are not part of a group the main business of which is the provision of investment services, banking services or acting as a market maker for commodity derivatives,
- those persons do not apply a high-frequency algorithmic trading technique, and
- those persons shall, at the request of the National Bank of Slovakia, report the basis on which they consider that this activity is ancillary to their main business.

All relevant exemptions must be assessed in detail on a case-by-case basis.

In addition, other financial services providers such as insurance companies, asset management companies or pension fund managers, have various limitations on the trading with financial instruments.

We note that even if one of the counterparties does not fulfil the applicable license requirements described above, it does not cause the respective EFET General Agreement or the Individual Contracts to be null and void. Such breach of legal regulation may, however, lead to sanctions including substantial monetary fines up to 10% of the total net annual turnover in the previous calendar period (while in certain cases the turnover of the parent company is relevant for the calculation of the fine, not only of the local subsidiary).

8.8.3 Energy law licensing requirements

Slovak energy laws (primarily the Energy Act (Act No. 251/2012 Coll. on Energy, as amended)) do not affect the enforceability of the EFET General Agreement or the Individual Contracts, unless extraordinary measures will be adopted.

Trading with commodities which can be carried under EFET General Agreement or the Individual Contracts (especially in case of physical delivery of commodities) has, however, various regulatory implications which do not affect enforceability of the relevant EFET General Agreement or the Individual Contracts but introduce some practical restrictions how commodities can be traded.

These implications, especially the energy license requirements, are further described below at 8.8.3.1 to 8.8.3.5.

Even if one of the counterparties does not fulfil the energy license requirements as described below, it does cause the respective EFET General Agreement or the Individual Contracts to be null and void but may lead to sanctions including substantial monetary fines.

8.8.3.1 Trading of electricity

Under the Energy Act, supply of electricity is subject to a licensing regime. Supply of electricity is defined as any sale of electricity (not only to end customers). Based on this definition, electricity trading / shipping in Slovakia qualifies also as a supply of electricity and is generally subject to a license requirement. The same license is required for wholesale electricity traders as well for suppliers of electricity to end customers - Slovak law does not recognize electricity traders as separate market participants.

However, a Slovak license is required only in cases where the sale of electricity by traders is carried out in the territory of Slovakia.

An energy license is not required in case of supply of electricity at purchase prices, including components of the price for electricity transmission, electricity distribution and other services associated with electricity supply without further increase (i.e. reselling without any markup) – this does not apply in case of supply to end customer connected to the local distribution network (such networks are usually operated by operators of industrial parks). Such reselling requires only notification to national regulatory authority RONI (The Regulatory Office for Network Industries (in Slovak *Úrad pre reguláciu sieťových odvetví*).

8.8.3.2 Trading of gas

Under the Energy Act, supply of gas is subject to a licensing regime. Supply of gas is defined as any sale of gas (not only to end customers) for their own consumption or for subsequent sale. Based on this definition, gas trading / shipping in Slovakia qualifies also as a supply of gas and is generally subject to a license requirement. The same license is required for wholesale gas traders as well for suppliers of gas to end customers – similarly as in the case of electricity, Slovak law does not recognize gas traders as separate market participants.

However, a Slovak license is required only in cases where the sale of gas by traders is carried out in the territory of Slovakia. The license is thus not required in case of:

- Gas transit across or to the territory of Slovakia,
- Trading of gas to traders at any entry/exit cross-border points of transmission network provided that the trading is carried out at these points only,
- Trading at VTP (virtual trading point) which is located in the transmission network between entry and exit points, where it is possible to change gas ownership not only between transmission network users with reserved transmission capacity, but also between registered gas traders in accordance with the operational code of TSO, or
- Storage of gas in the gas storage facilities located in Slovakia.

The above exceptions are based on the interpretation of the law currently acknowledged also by RONI. However, it cannot be ruled out that the interpretation will change in the future.

An energy license is also not required in case of supply of gas:

- to other persons at purchase prices, including components of the price for gas transmission, gas distribution and other services associated with gas supply without further increase (i.e. reselling without any markup),
- Produced from biomass, or
- Produced from biogas.

These activities require only notification towards RONI.

8.8.3.3 Trading of emission allowances

Greenhouse emission allowances may be owned and traded by any natural or legal person who has been registered with the Emission Registry and has opened an account. The Emission Registry was established by the European

Commission in June 2012, the national administrator of the Emission Registry for Slovakia is the privately owned company ICZ Slovakia a.s.

The applicable law distinguishes between three groups of participants in the emission trading:

- Obligatory participants – mainly operators of facilities producing greenhouse emissions,
- Voluntary participants, and
- Any person who applies for registration in the emission registry.

Trading of emission allowances is not a separately regulated activity and does not require the trader to hold any license.

8.8.3.4 Trading of green certificates

Under Slovak law, a green certificate (called guarantee of origin (in Slovak: *záruka pôvodu*) is a document used for the purpose of proving that a given share of electricity was produced from (i) renewable energy sources or (ii) high-efficient cogeneration of electricity and heat and delivered to the electricity system.

In Slovakia, the guarantees of origin are traded on the platform operated by OKTE a.s., a state owned organizer of a short-term electricity market. OKTE a.s. is a member of Association of Issuing Bodies (AIB) which brings together entities with the competence to issue and administer guarantees of origin of electricity and enables the international transfer of energy certificates through the European Energy Certificate System (EECS).

Only producers or suppliers of electricity can apply for the access to the system for trading of guarantees of origin. Issuance of a guarantee of origin, its transfer, application in the AIB system and participation in the auction are possible only after opening an account in the information system of OKTE.

Trading of green certificates is not a separately regulated activity.

8.8.3.5 Trading of capacity rights

Slovak energy law does not regulate capacity rights and thus trading of capacity rights is subject to generally applicable civil / commercial law regime while taking into account related regulatory obligations.

8.8.4 Registry of public sector partners

Registry of public sector partners is a specific Slovak registry in which certain entities (such as holders of an energy license or for instance also bidders in public procurement proceedings) must register data mainly on their ultimate beneficial owners and shareholding structure. The registry is publicly available.

In case EFET General Agreement or the Individual Contracts will be concluded through public procurement process opened by Slovak contracting authority or contracting entity, a counterparty must be registered in the registry of public sector partners otherwise a contracting authority or contracting entity cannot conclude EFET General Agreement or the Individual Contracts. If an agreement was concluded despite that, a court action requesting declaration that the agreement is invalid can be initiated also by third parties.

This requirement does not apply for agreements under which a one-time performance the value of which does not exceed the value of EUR 100,000 or in case of several partial or recurring payments from the contract, the total value of which does not exceed EUR 250,000.

In addition, if a debtor (Party A) is registered in the public sector partners register or it has been registered there in the past five years prior to the declaration of its bankruptcy or opening of its restructuring, the creditor of such debtor, subject to a few exemptions (see below) and whose claims against such debtor exceed the aggregate amount of EUR 1,000,000 is considered to be such debtor’s affiliated party within the meaning of the Slovak Insolvency Act until it evidences to such debtor’s insolvency administrator that it has been registered in the register. On this basis, if bankruptcy of such debtor is declared or restructuring of such debtor is opened, such creditor will be required to register in the register; otherwise it will be regarded as such debtor’s affiliated party and such debtor’s liabilities will be considered related-party liability (i.e. it will be, *inter alia*, in bankruptcy proceedings relating to the assets of Party A subordinated to the unsubordinated liabilities of the other creditors of that Company).

The obligation to register does not apply also to following entities:

(i) bank, investment firm, insurance company, reinsurance company, management company, pension management company, supplementary pension company, central securities depository, stock exchange or other financial institution, or a foreign financial institution, including a foreign financial institution that has in the territory of the Slovak Republic located enterprise or organizational unit, if prior approval of the National Bank of Slovakia, the European Central Bank or the relevant foreign supervisory authority in the area of the financial market is required for the acquisition of a qualified participation in them,

(ii) another state and its authorities,

(iii) an international organization established on the basis of public international law and its bodies,

(iv) the owner of financial instruments and the person who has the right to the payment of financial instruments whose subscription or placement was mediated or carried out by an investment firm, an investment firm, a bank, another financial institution or a foreign financial institution,

(v) the owner of financial instruments and the person who has the right to payment of financial instruments that are traded on a regulated market within the EU or EEA, or will be admitted to such a market within six months from their emission;

(vi) natural or legal person which concluded agreements with selected Slovak financial institution, such as the National Bank of Slovakia or Agency for debt and liquidity management (ARDAL) if such agreement is not subject to public procurement proceedings.

8.9 Part IX: Other Provisions

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

We have no additional recommendations.

9 Limitations and qualifications

9.1 Bets and games

Pursuant to the § 845 of the Slovak Civil Code, winnings from bets and games cannot be claimed; claims from loans knowingly granted for bets or games cannot be recovered either. Also, such winnings and claims cannot be validly secured.

We believe that Individual Contracts are not caught by these restrictictions as they do not qualify per se as bets or gambling, especially if they enterered into for bona fide commercial purposes, such as hedging. However, there is no legal writing or case law on this issue under Slovak law.

9.2 Avoidance rules

Under §§ 57 et seqq. Of the Slovak Insolvency Act certain actions taken by debtors may be set aside by the courts if a voidance action (*odporovacia žaloba*) is filed in insolvency proceedings by the bankruptcy trustee (*spravca konkurznej podstaty*) or, in certain cases, the creditors directly. Please refer to Appendix ./ for a brief summary of Slovak avoidance rules.

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

Further to the Slovak Insolvency Act, the Slovak Civil Code (Article 42 et seq. of the Slovak Civil Code) also provides for rights of avoidance irrespective of an insolvency scenario. Such rights of avoidance are, however, limited to the relationship between the parties (*inter partes*), as the avoidance of the legal act performed to the detriment of a creditor may only be challenged by filing a lawsuit, whereas the effect of such lawsuit is limited to the relationship between the parties and accordingly the challenged legal act only loses its effect against the debtor that filed the lawsuit and only to the extent necessary to satisfy the said debtor's claim(s).

Article 16 of the Insolvency Regulation and, where applicable also the §192 (4) of the Slovak Insolvency Act, impose a restriction on the ability of a Slovak bankruptcy trustee to set aside set-off. Article 16 of the Insolvency Regulation and, where applicable also the §192 (4) of the Slovak Insolvency Act, limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors, if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

9.3 Rules on insolvency of Slovak financial institutions based on the Slovak Insolvency Act

As further provided in more detail in Appendix ./D), the Slovak Insolvency Act provides for specific rules for insolvency of certain Slovak financial institutions, which regulates procedure and ranking for satisfaction of claims in case of bankruptcy inter alia also of Banks, Insurance Undertakings, Re-insurance Undertakings, Investment Firms, Investment Fund Management Companies and Pension Funds Management Company.

9.4 Limitations and qualifications from separate assets

Irrespective of the law governing an EFET General Agreement, the enforceability of close-out netting will be limited whenever Slovak substantive law provides for certain funds of an Slovak legal entity to constitute a assets excempted from bankruptcy, restructuring or enforcement proceedings.

9.4.1 Banks

Under the Slovak Act on Banks, claims of a Bank that is an issuer of covered bonds recorded in the covered bond register and meeting the requirements laid down in the Act on Banks shall not be subject to enforcement proceedings.

In addition, under the Slovak Insolvency Act, in case of bankruptcy of a Bank which is a an issuer of covered bonds (*kryté dlhopisy*)[83], the separate bankruptcy estate of the secured creditors, who are the owners of the covered bonds issued by this Bank and the counterparties of hedging derivatives included in the cover pool, are made up of assets and other property values serving to cover the issued covered bonds and also serving as collateral claims of owners of covered bonds and counterparties of hedging derivatives against this Bank, which are part of the cover file. Part of this separate bankruptcy estate are also claims from loans or mortgage loans, including liens or other security rights serving to secure claims from loans or mortgage loans used to cover issued covered bonds. A separate entity of secured creditors is created separately for each respective covered bond program.

Further specific on above are provided in the Appendix./E.

9.4.2 Investment Firms

Under Slovak Act on Securities, client assets placed with an investment firm shall not be included in the assets of the investment firm and are thus not subject to bankruptcy, restructuring or enforcement proceedings.

9.4.3 Investment Fund Management Companies

Assets managed under collective investment are not a part of the bankruptcy estate of the Investment Fund Management Company, nor may they be used for settlement with the creditors of the Investment Fund Management Companies.

[83] These are bonds issued under implementation of the Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU to the Slovak Act on Banks.

9.4.4 Pension Funds

In relation to both forms of Pension Funds Management Companies in Slovakia (old-age pension fund management company (*dôchodková správcovská spoločnosť*) or supplementary pension fund management company (*doplnková dôchodková spoločnosť*), assets of pension funds and assets held in an unassigned payments account shall not be included in bankruptcy proceedings against a Pension Fund Management Company, nor may they be used in an arrangement with creditors of a Pension Fund Management Company or in restructuring proceedings.

In addition, assets which are entrusted to a depository (which can be only a Bank holding respective entitlement within its banking license) which are the assets of a pension fund, assets held in an unassigned payments account or assets of a Pension Fund Management Company may not be subject to any decision or execution enforced against the depository nor may they be subject to any receivership in which the depository is placed, nor may they be included in bankruptcy proceedings of the depository.

9.5 Other limitations and qualifications

9.5.1 Restrictions on the enforcement

Under Slovak law, any subsidies or other funds obtained from the state budget or from the budget of the European Union or any assets purchased from such funds are immune from attachment and from enforcement and would not be available to creditors in any enforcement proceedings against any entity being receiver of such funds or owner of such assets. Shareholdings held by municipalities and regions in legal entities which provide water supply, sewage disposal, municipal waste management, heat production and heat distribution are also immune from enforcement. Further restrictions of enforcement apply with respect to certain assets of the state (Slovak Republic).

9.5.2 Legislative power of the Slovak Republic

The Slovak Republic and its legislative bodies have legislative power as to the insolvency laws applying on the Municipalities and Regions (*vyššie územné celky*) and the national law on close-out netting. Through its legislative power it may implement special provisions regarding the insolvency of Municipality and Regions or may be used to restrict the enforceability of close-out netting under the EFET General Agreement in a pre-insolvency and a post-insolvency scenario. The legislative bodies of the Slovak Republic could, *e.g.*, decide that specific close-out netting legislation shall not be applicable. In that case and if the relevant piece of legislation stands the tests established by the Slovak Constitutional Court, the enforceability of Close-out Netting Provisions against the Municipalities could be adversely affected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9.5.10 The enforcement in the Slovak Republic of a Foreign Award will be subject to the limitations and the rights of a court in a state that is a party to the New York Convention, in particular to refuse enforcement of an arbitral award for the grounds set forth in the New York Convention (including, without limitation, its Article V, referring amongst others to (i) the capability of settlement by arbitration under Slovak law and (ii) public policy). Enforcement of a foreign award is subject to observance of Slovak law regulating enforcement procedure, in particular the Act No. 233/1995 Coll. on court bailiffs and on enforcement proceedings (Enforcement Code) and amending and supplementing other acts.

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

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

9.5.12 On 31 January 2020, the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland (the "**UK**") from the European Union and the European Atomic Energy Community (the "**Withdrawal Agreement**") entered into force and gave effect to the UK leaving the European Union ("**Brexit**"). On 24 December 2020, the European Union and the UK agreed on the EU-UK Trade and Cooperation Agreement (the "**Brexit Deal**"). The Brexit Deal defines the post-Brexit relationship between the European Union and the UK, however does not provide for any provision on cross-border cooperation on choice of law, courts and enforcement of court judgements in civil cases. As a result of Brexit, the patchwork of potentially applicable legal regimes is a source of uncertainty regarding agreements involving UK based parties or being subject to English law or the jurisdiction of English courts and there is a risk that, as a consequence of Brexit, judgments rendered by an English court will not be enforced (to the same extent or as swiftly as pre-Brexit) in the Slovak Republic. Specifically: As a result of Brexit, the Brussels Regulation Recast and the Lugano Convention 2007 no longer apply to civil and commercial cases commenced in the UK on or after 1 January 2021. The UK has applied to join the Lugano Convention 2007 on 8 April 2020. However, consent is required from all existing member parties, including the European Union. On 28 June 2021, the European Commission, representing the European Union, refused to give its consent to the UK acceding to the Lugano Convention 2007. The UK, having previously been member as part of the European Union, has acceded in its own right to the Hague Convention that, following Brexit, is effective as of 1 January 2021 and applicable to international cases with exclusive choice of court agreements concluded in civil or commercial matters. As § 22 of the EFET General Agreement appears to not provide for a non-exclusive choice of court agreement, the Hague Convention will, likely, not apply. It is to be noted that the recognition of judgments or other decisions of state courts outside the territorial scope of application of the Brussels Regulation Recast, Lugano Convention 2007 and Hague Convention is subject to the conditions set out in the Slovak Act No. 97/1963 Coll. on the international private and procedural law, as amended and might not be possible in the Slovak Republic. As a result, if the Hague Convention would not apply, the enforcement in Slovakia would be subject to Slovak rules of civil and enforcement procedure only (see qualifications below in this respect). There is a source of uncertainty regarding agreements involving UK based parties or being subject to English law or the jurisdiction of English courts and therefore there is a risk that, as a consequence of Brexit, judgments rendered by an English court will not be enforced (to the same extent or as swiftly as pre-Brexit) in the Slovak Republic.

9.5.13 Pursuant to Slovak rules of civil and enforcement procedure, a duly obtained foreign judgment, notwithstanding the general recognition of the choice of the jurisdiction of England, will not be recognised in the Slovak Republic if:

(i) the matter is one within the exclusive competence of the courts of the Slovak Republic pursuant to its laws, or is one beyond the competence of any judicial proceedings of a foreign authority, as determined by the laws of the Slovak Republic; or

(i) the decision is not final or enforceable in the state where it has been issued; or

(ii) the decision is not a decision on the merits of the matter; or

(iii) the party against whom such judgment is sought to be enforced has been deprived of an opportunity to participate in the foreign proceedings, especially if the summons or notice of the commencement of the foreign proceedings has not been duly served on the party; this exception does not apply if the party has not filed an appeal against the foreign judgment which has been duly served on it or if the party has waived the applicability of this exception; or

(iv) a final decision in the same matter has previously been reached by a court of the Slovak Republic or by a foreign authority if that foreign authority's decision has been, or would be, enforced in the Slovak Republic; or

(v) recognition of the foreign judgment would be contrary to public policy (*ordre public*) of the Slovak Republic.

9.5.14 It is to be noted that in concurrent proceedings between the same parties on the same grounds a plea of pendency might be raised in a Slovak court and that enforcement may be refused if a judgment is incompatible with the judgment in Slovakia between the same parties relating to the same issues or an earlier judgment which satisfies the same criteria and is enforceable in Slovakia.

9.5.15 In connection with enforcement in Slovakia it is to be noted that the legal and judicial system in Slovakia is not as developed as in other countries of the European Union. Further, Slovak legal practice is not widely adapted and used to transactions as contemplated under the EFET General Agreement and to the documentation technique applied in the related transaction. This may result in an interpretation by the authorities of Slovakia of certain aspects of the EFET General Agreement, which is unexpected and unforeseeable.

9.5.16 Under the Slovak Energy Act, a gas distribution system operator can declare a crisis situation in the gas industry and impose various measures which must be complied with market participants (except for gas storage operators or gas producers). Such measures might include restriction of gas consumption or interruption of gas supplies to certain customers. In electricity sector, a electricity transmission system operator can declare state of emergency and impose restrictive measures, for instance interruption of distribution of electricity. In addition, in September 2022 new powers to declare state of emergency were granted to the Slovak government in relation to the outgoing energy crisis. This amendment provides for possibility that the state of emergency can be decreed also if the price of wholesale energy products on the wholesale energy markets reaches a level, which may lead to price unavailability of electricity / gas for customers and which may cause a threat to the security of the state, health or life of a large group of customers or the threat of significant economic damage to end customers. The obligation measures that can be decreed in case of this state of emergency include (but are not limited to) to the following:

(i) restriction of electricity transactions, including the restriction of the export of electricity from Slovakia,

(ii) restriction or prohibition of gas transport to the gas networks of neighbouring states, with the exception of international gas transport and gas transport within the framework of international aid in crisis situations,

(iii) imposing an obligation on the gas storage operator in Slovakia or outside Slovakia (if connected to the Slovak network) to ensure the extraction of gas from the storage at a specified price for a gas supplier designated by the Ministry of Economy,

(iv) determination of the group of end-users of gas to whom it is possible to supply gas or establish the obligation to limit or interrupt gas consumption for the specified groups of end-users of gas.

10 No implied opinion

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

In particular, we do not express (i) any opinion in respect of the accounting treatment of any of the transactions contemplated under the Opinion Documents, or (ii) any opinion on anti-trust law in connection with the Opinion Documents, nor do we express (iii) any tax opinion, (iv) any opinion on the enforceability of the terms of the Opinion Documents in the event of insolveny of Party A's Credit Support Provider, (v) any opinion on whether Party A may (i.e. has capacity and authority to) enter into the EFET General Agreement and/or any or all of the Individual Contracts under applicable Slovak laws, their constitutional documents and/or their licenses, or (vi) any opinion on consumer protection law aspects or the qualification of counterparties as consumers pursuant to the Slovak Act No. 250/2007 on Consumer Protection, as amended or pursuant to Article 6 (1) of Rome I Regulation.

11 Purpose of Opinion

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

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

12 Addressees; liability

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

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

13 Disclosure

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

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

Very truly yours,

Schönherr Rechtsanwälte GmbH, o.z.

Appendix ./A
Entity Types[84]

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

Legend for below table:

Green: Positive statement	Red: Negative statement or significant issue	Yellow: Generally positive statement, but certain issues need to be considered

Description	Legal form(s)	Limitations
Banks / Credit Institutions	"**Banks**" *(banky)* means legal persons established as a joint stock company (*akciová spoločnosť*) with a registered seat in the territory of the Slovak Republic, classified as a credit institution under CRR and authorised by the National Bank of Slovakia to conduct banking activities. The business name of a bank must (except for banks established prior to effectiveness of the Slovak Act on Banks) indicate that the entity is a bank (*banka*) or a saving company (*sporiteľňa*) or a building society (*stavebná sporiteľňa*). In case a bank provides only investment services, the business name can indicate it is an investment bank (*investičná banka*). In this Opinion we refer to banks as a "**Slovak Bank**".	Limitations due to certain funds forming separate assets (see at 9.4.1 for details) Limitations due to possible application of resolution tools or exercise of resolution powers by the resolution authority (see at 7.6.3.2 above and at 3.4 of Appendix ./D).

[84] In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

Description	Legal form(s)	Limitations
Corporations	"**Corporations**" means corporations (*kapitálové spoločnosti*), types of companies established under Slovak law in the form of a limited liability company (*spoločnosť s ručením obmedzeným - s.r.o. or spol. s r. o.*), a joint-stock company (*akciová spoločnosť* - a. s.), simplified joint-stock company (*jednoduchá spoločnosť na akcie* - j.s.a.), or a European public limited-liability company (*európska spoločnosť - SE*). This does not include regulated entities (Banks, Insurance Undertakings, Investment Firms and Investment Fund Management Companies, for example), that are operated in the legal form of a Corporation and which are dealt with herein specifically. In this Opinion we refer to both Corporations and Partnerships as a "**Slovak Corporate**".	While the substantive Slovak netting privilege extends in principle also to corporations, this is limited only to cases where at least one of the counterparties is a Qualified Party (see at 7.3.1 for details). There is a significant risk that an EFET General Agreement entered into between two non-Qualified Parties (e.g. two corporates) would not benefit from the netting privilege.
Insurance Companies	"**Insurance Undertakings**" (*poisťovne*) means legal persons established either in form of a joint-stock company (*akciová spoločnosť* - a. s.), or an European public limited-liability company (*európska spoločnosť - SE*) with the registered seat in the territory of the Slovak Republic and authorised by the National Bank of Slovakia to conduct insurance business. Business name of an insurance company must indicate that the entity is an insurance company (*poisťovňa*). In this Opinion we refer to Insurance Undertakings as a "**Slovak Insurance Company**".	

Description	Legal form(s)	Limitations
	"**Re-Insurance Undertakings**" (*zaisťovne*) means legal persons established either in form of a joint-stock company (*akciová spoločnosť* - a. s.), or an European public limited-liability company (*európska spoločnosť - SE*) in territory of the Slovak Republic and authorised by the National Bank of Slovakia to conduct re-insurance business. Business name of an re-insurance company must indicate that the entity is a re-insurance company (*zaisťovňa*). In this Opinion we refer to Re-Insurance Undertakings as a "**Slovak Re-Insurance Company**".	A Re-Insurance Undertaking is not a Qualified Party under the Slovak Insolvency Act. Therefore, the limitations applicable to Corporations apply (i.e. there is a significant risk that an EFET General Agreement entered into by a Re-Insurance Undertaking and another non-Qualified Party, such as a corporate, would not benefit from the netting privilege.
Investment Services Providers / Investment Firms	"**Investment Firms**" (*obchodníci s cennými papiermi*) means legal persons established in form of a joint-stock company (*akciová spoločnosť* - a. s.), with the registered seat in the territory of the Slovak Republic and authorised by the National Bank of Slovakia to conduct investment services. Business name of an insurance company must indicate that the entity is an investment firm (*obchodník s cennými papiermi* or *o. c. p.*). In this Opinion we refer to Investment Services Providers as a "**Slovak Investment Firm**".	Limitations due to certain funds forming separate assets (see at 9.4.2 for details) and possible application of resolution tools or exercise of resolution powers by the resolution authority (see at 7.6.3.2 above and at 3.4 of Appendix ./D).

Description	Legal form(s)	Limitations
Investment Fund Management Companies	"**Investment Fund Management Companies**" (*správcovské spoločnosti*) means legal persons established in form of a joint-stock company (*akciová spoločnosť* - a. s.), with the registered seat in the territory of the Slovak Republic and authorised by the National Bank of Slovakia to establish and manage standard funds and European standard funds or alternative investment funds and foreign alternative investment funds. Business name of an insurance company must indicate that the entity is an investment fund management company (*správcovská spoločnosť, akciová spoločnosť* or *správ. spol., a. s.*). In this Opinion we refer to Investment Fund Management Companies as a "**Slovak Management Company**".	Limitations due to certain funds forming separate assets (see at 9.4.3 for details).

Description	Legal form(s)	Limitations
Municipalities	"**Municipalities**" (*obce*) are independent territorial self-governing and administrative unit of the Slovak Republic; each municipality brings together persons who have a permanent residence in its territory. A municipality is a legal entity that, under the conditions established by law, independently manages its own property and income. A municipality which fulfils certain conditions (mainly having at least 5.000 inhabitants) can be designated as a town (*mesto*). In this Opinion we refer to Municipalities as a "**Slovak Municipality**".	While the substantive Slovak netting privilege extends in principle also to municipalities, this is limited only to cases where at least one of the counterparties is a Qualified Party (see at 7.3.1 for details). There is a significant risk that an EFET General Agreement entered into between a municipality and other non-Qualified Party (such as a corporate) would not benefit from the netting privilege. In addition, limitations due to legislative power of the Slovak Republic and restrictions on enforcement (see at 9.5.1 and 9.5.2 for details).
Other Financial Institutions	"**Pension Funds Management Company**" means old-age pension fund management company (*dôchodková správcovská spoločnosť*) or supplementary pension fund management company (*doplnková dôchodková spoločnosť*), which are organized as a joint-stock company (*akciová spoločnosť* - a. s.) with the registered seat in the territory of the Slovak Republic and authorised by the National Bank of Slovakia to manage pension funds. Business name of a pension funds management company must indicate that the entity is a pension funds management company (*dôchodková správcovská spoločnosť* or *doplnková dôchodková spoločnosť*).	A pension funds management company is not a Qualified Party under the Slovak Insolvency Act. Therefore, the limitations applicable to Corporations apply (i.e. there is a significant risk that an EFET General Agreement entered into by a pension funds management company and another non-Qualified Party, such as a corporate, would not benefit from the netting privilege. Limitations due to pension funds constituting separate assets (see at 9.4.4 for details).

Description	Legal form(s)	Limitations
Partnerships	"**Partnerships**" means personal corporations (*osobné spoločnosti*), types of companies established under Slovak law in the form of of a general commercial partnership (*verejná obchodná spoločnosť - v. o. s.*), or a limited partnership (*komanditná spoločnosť - k. s.*). Slovak law generally (other than for corporate laws) does not distinguish between corporate and partnerships, in this Opinion we refer to both Corporations and Partnerships as a "**Slovak Corporate**".	While the substantive Slovak netting privilege extends in principle also to partnerships, this is limited only to cases where at least one of the counterparties is a Qualified Party (see at 7.3.1 for details). There is a significant risk that an EFET General Agreement entered into between two non- Qualified Parties (e.g. corporates or partnerships) would not benefit from the netting privilege.
Publicly-owned Corporations	"**MHM**" means company MH Manažment, a.s., which is organised as joint stock corporation (*akciová spoločnosť* - a. s.) and is wholly owned by the Slovak Republic (through the Ministry of Economy). MHM is subject to special legislation and its purpose is to manage certain Slovak state shareholdings in Corporations. Corporations (majority-)owned by the Slovak Republic or any Municipality are, for purposes of this Opinion, considered a Slovak Corporate.	See the limitations set out above for corporations. In addition, the limitations applicable to municipalities (legislative power of the Slovak Republic and restrictions on enforcement) would apply as well.
Self-governing regions	"**Self-governing region**" (*samosprávne kraje*) means an independent territorial self-governing and administrative unit of the Slovak Republic. In this Opinion we refer to the Self-governing Regions as a "**Slovak Region**".	See above for municipalities.

Description	Legal form(s)	Limitations
Quasi Governmental Entities	"**National Bank of Slovakia**" means National Bank of Slovakia which performs the function of the central bank of the Slovak Republic and is as such an integral part of the European System of Central Banks (ESCB). In this Opinion we refer to the National Bank of Slovakia as "**NBS**".	

Appendix ./B
Individual Contracts

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

Legend for below table:

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

Description	**Underlying Commodity** (each a "**Commodity**")	**Eligibility for close-out netting if Slovak substantive insolvency law was to apply**[1]
Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price, and the other party	Electricity / Natural Gas[2]	Eligible based on qualification as commodity derivative

[1] See at I.7.3 above for further details.
[2] As defined in Annex 1 to the EFET General Agreement Gas.

agrees to pay a price for the same quantity to be set on a specified date in the future.	Emission Allowances[3]	Expressly eligible
	Green Certificates[4] / Capacity Rights[5]	Eligible based on qualification as commodity derivative or under express regulation
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.	Electricity / Natural Gas	Eligible based on qualification as commodity derivative
	Emission Allowances	Expressly eligible
	Green Certificates / Capacity Rights	Eligible based on qualification as commodity derivative or under express regulation
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	Electricity / Natural Gas	Eligible based on qualification as commodity derivative.

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

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

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

of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.	Emission Allowances	Expressly eligible
	Green Certificates / Capacity Rights	Eligible based on qualification as commodity derivative or under express regulation.
Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.	Electricity / Natural Gas	Expressly eligible
	Emission Allowances	Expressly eligible
	Green Certificates / Capacity Rights	Eligible based on interpretation of catch-all-clause

Appendix ./C
Summary of Slovak set-off rules

1. Introduction

In general is set-off (in Slovak: *započítanie)* in commercial relationships governed by the Slovak Civil Code and the Slovak Commercial Code. In addition, for set off during ongoing insolvency proceedings the rules provided for under the Slovak Insolvency Act apply. The right to set-off may be limited on basis of law (eg in case of insolvency proceedings – please see below) or on basis of mutual agreement of parties.

We have not analysed set-off outside of commercial relationship, since it is not relevant for purposes of this memorandum.

2. Set-off in a non-insolvency scenario

Contractual bilateral set-off arrangements subject to Slovak law do not need to observe specific formal requirements. Such arrangements are, in principle, subject to the contractual freedom (*zmluvná sloboda*) of the parties involved.

However, certain mandatory statutory limitations on set-off may limit the enforceability of contractual set-off arrangements.

Pursuant to the Slovak Civil Code where the creditor and the debtor have mutual claims of the same type (eg monetary claim and monetary claim), these claims can be discharged by a set-off upon unilateral notice by one of the parties. It is not relevant whether the mutual claims arise under the same agreement or under various agreements or different legal causes *(e.g.* in connection with a damages claim). No agreement between the parties is required – these claims can be set-off even unilaterally.

Certain claims are excluded from the possibility of a unilateral set-off, in particular - with respect to the relationships to be established under the EFET General Agreement – unenforceable claims[1]. Claims which are not yet due cannot be set-off unilaterally against due claims.

In the commercial relationships, it can be however agreed that any mutual claims can be set-off ie. even a time-barred claim can be used for set-off provided that the set-off was possible before the claim became time-barred. Furthermore, also claims in different currencies (provided that these are freely convertible currencies) can be set-off against each other.

[1] Unenforceable claims are claims which cannot be claimed at the court

3. Set-off in an insolvency and insolvency- related scenario

According to Article 7 (2) lit d of the Council Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings (recast) (the "**Insolvency Regulation**") and § 190 of the Slovak Insolvency Act, respectively, the conditions under which set-offs may be invoked following the opening of insolvency proceedings are, generally, subject to the law of the forum concursus, i.e., Slovak law in case of opening of local insolvency proceedings over the assets of Slovak counterparty.

Generally, rules applicable to set-off in a non-insolvency scenario are also applicable to an insolvency related scenario with the Slovak Insolvency Act providing for the following set-off restrictions:

In respect of insolvency proceedings (both bankruptcy and restructuring), pursuant to Article 9 (1) of the Insolvency Regulation the opening of insolvency proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the insolvent debtor, where such a set-off is enforceable under the law applicable to the insolvent debtor's claim, i.e., the law governing the agreement under which the relevant claim has arisen.

Similarly, Article 190 of the Slovak Insolvency Act provides that – in case of bankruptcy of a Slovak financial institution (please see at 7.4.1.1.2 for an analysis of the entities covered by this term), the set-off of claims in bankruptcy shall be governed by the laws governing the claim of the debtor (while a set -off permitted by the Slovak Insolvency Act shall remain unaffected[2]).

Even if set-off was enforceable in accordance with Slovak Insolvency Act, set-off could still be subject to an action for avoidance (*odporovateľnosť*) under Slovak Insolvency Act. Also, Article 9 (1) of the Insolvency Regulation does not preclude actions for voidance, voidability or unenforceability under the law of the *forum concursus*.[3] Therefore, claims for avoidance (see Appendix ./E for further details) remain possible under Slovak law, even if Article 9 (1) of the Insolvency Regulation was resorted to in an attempt to preserve the enforceability of set-off.

Article 16 of the Insolvency Regulation (where applicable) imposes, however, a restriction on the ability of a Slovak bankruptcy trustee to set aside set-off. Article 16 of the Insolvency Regulation limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (*e.g.*, set-off), if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

2 This means that if the Slovak Insolvency Act does not allow set-off but the law governing the claim, set off will be possible. If the law governing the claim does not permit set-off but the Slovak Insolvency Act allows (i.e. in cases where the set off possibilities of the Slovak Insovlency Act are broader), set of will be also be possible.

3 See Article 9 (2) of the Insolvency Regulation.

Please note that the above explanations are limited to bilateral set-off between two Parties and are not to be understood as expanding to multi-party set-off.

3.1. Bankruptcy

Only a claim duly registered with the bankruptcy administrator in the manner set out in the Slovak Insolvency Act can be set off during bankruptcy.

In addition, even if registered, the following claims cannot be set off: (i) a claim acquired by the creditor after the declaration of bankruptcy as a result of its transfer or passage, (ii) a claim acquired by its creditor as a result of a voidable legal act of the bankrupt party and (iii) cannot be a liability claim for failure to file a bankruptcy petition on behalf of the bankrupt party.

Further, the Slovak Insolvency Act prohibits set off of a claim of the creditor against the insolvent debtor that has arisen before the declaration of bankruptcy against a claim of the insolvent debtor that has arisen after the declaration of bankruptcy, this applies also to contingent claims that are to be registered with the bankruptcy administrator in the proceedings.

The Slovak Insolvency Act does not provide for further restrictions on set-off of claims.

3.2. Restructuring

In restructuring proceedings in respect of a Slovak Corporate no claims which are claimed via application in the restructuring proceedings) that originated before the commencement of the restructuring proceedings can be set-off against claims of the Slovak Corporate in restructuring.

Further regulation is provided in the Insolvency Regulation pursuant to which set-off is possible if the right of set-off is available under the law governing the relevant claims, even where such set-off is not available under Slovak law.

3.3. Set-off in involuntary administration

In respect of Slovak Bank[4], Slovak Insurance Company[5], Slovak Reinsurance Company[6], Slovak Management Company[7] [8], Slovak Investment Firm[9] in an involuntary administration, a set-off is not permissible within six months after the institution of the involuntary administration.

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[4] § 59 (2) of the Slovak Act on Banks
[5] § 153 (2) of the Slovak Insurance Act
[6] § 153 (2) of the Slovak Insurance Act
[7] Please note that in case of a Slovak Management Company, these rules apply only in case the Slovak Management Company is authorized to carry out investment services under the Slovak Securities Act
[8] § 153(2) of the Slovak Securities Act
[9] § 153(2) of the Slovak Securities Act

The suspension of any set-off arrangements does not apply if the laws of the jurisdiction of a respective above-mentioned entity's counterparty permit set-off during the institution of any reorganisation measure. This, however, applies only if a respective above-mentioned entity's counterparty's jurisdiction is any of the Member States.

Appendix ./D

Overview of Slovak legal proceedings affecting creditors rights

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

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

The following types of proceedings under Slovak law may affect the rights of creditors:

(i) in respect of a Slovak Pension Fund, a Slovak Insurance Company, a Slovak Reinsurance Company and a Slovak Management Company: (i) bankruptcy (in Slovak: *konkurz*), (ii) involuntary administration (in Slovak: *nútená správa*), and (iii) liquidation (in Slovak: *likvidácia*);

(ii) in respect of a Slovak Bank and Slovak Investment Firm: (i) bankruptcy (in Slovak: *konkurz*), (ii) involuntary administration (in Slovak: *nútená správa*), (iii) resolution proceedings and (iv) liquidation (in Slovak: *likvidácia*);

(iii) in respect of a Slovak Corporate: (i) bankruptcy (in Slovak: *konkurz*), (ii) restructuring (in Slovak: *reštrukturalizácia*), (iii) preventive restructuring (*preventívna reštrukturalizácia*) and (iii) liquidation (in Slovak: *likvidácia*).

(iv) in respect of a Slovak Municipality and a Slovak Region: involuntary administration (in Slovak: *nútená správa*).

2. Legal framework in relation to proceedings that may affect creditors' rights

2.1. Bankruptcy and restructuring in the Slovak Republic are regulated primarily by the Slovak Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on amendment of other acts, as amended (the "**Slovak Insolvency Act**").

The Slovak Insolvency Act does not apply to the following entities: state, state budget-funded entities (*štátna rozpočtová organizácia*), state contribution-funded entities (*štátna príspevková organizácia*), Slovak Municipality, Slovak Region (vyšší územný celok), or another person for whom all obligations are responsible or guaranteed by the state. In addition, the Slovak Insolvency Act also does not apply to the arrangement of the property relations of the debtor, which is the NBS (*Národna banka Slovenska*), the Deposit Protection Fund (*Fond ochrany vkladov*) or the Investment Guarantee Fund (*Garančný fond investícií*).

The Slovak Insolvency Act recognizes two forms of the insolvency proceedings: (i) bankruptcy and (ii) restructuring proceedings. The main difference between these two is that bankruptcy proceedings are liquidation type of insolvency proceedings (i.e. once bankruptcy is declared, these proceedings lead to the company being deleted from the commercial registry once they are finalized), while restructuring proceedings shall lead to financial recovery of the company.

2.2. **Preventive restructuring** is regulated primarily by the Slovak Act No. 111/2022 Coll. on solving of the threatening insolvency[10] and amending and supplementing other acts (the "**Act on Preventive Restructuring**") by which on 17 July 2022, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring was implemented into Slovak law and legal framework for preventive restructuring was introduced. Since the regulation is new, there is no practical experience with this type of proceedings.

2.3. **Involuntary administration** is regulated primarily by:

(i) in respect of a Slovak Bank by the Act No. 483/2001 Coll. on Banks and amending and supplementing other acts, as amended;

(ii) in respect of a Slovak Insurance Company and a Slovak Reinsurance Company by the Act No. 39/2015 Coll. on Insurance and amending and supplementing other acts, as amended;

(iii) in respect of Slovak Investment Firm and Slovak Management Company[11] in the Act No. 566/2001 Coll. on Securities and Investment Services (the Securities Act), as amended (the "**Securities Act**"),

(iv) in respect of Slovak Pension Fund by the Act No. 43/2004 Coll. on the old-age pension scheme and amending certain laws, as amended and Act No 650/2004 Coll. on the supplementary pension scheme and amending certain laws, as amended (as applicable); and

(v) in respect of a Slovak Municipality and a Slovak Region by the Slovak Act no. 583/2004 Coll. on the budgetary rules of the territorial self-government and amending other laws, as amended. The Ministry of Finance of the Slovak Republic has also prepared a Methodological Guide on the recovery regime and forced administration of a municipality, the aim of which is to uniformly guide municipalities in applying these provisions and in ensuring the Slovak Municipality's obligations during management in recovery regime and involuntary administration.

2.4. **Resolution proceedings** are primarily regulated by the Slovak Act No. 371/2014 Coll. on resolution in the financial market, amending and supplementing other acts,

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10 A company is threatened with insolvency if illiquidity is possible, i.e. if considering all circumstances it can be reasonably assumed that the company will become illiquid (unable to pay its debts) within the next 12 months. Please see more information in relation to definition of insolvency in the clause 3.2.1

11 Slovak Management Company may also be subject to the involuntary administration pursuant to the Securities Act, if it provides investment services pursuant to the Securities Act

as amended the "**Resolution Act**") which implements the Directive (EU) 2014/59 of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (the "**BRRD**") and the Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (the "**BRRD 2**"). The Resolutions Act implements proceedings envisaged under the BRRD and the BRRD 2 without any substantial deviations.

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

2.5. Liquidation is primarily governed by the Slovak Act No. 513/1991 Coll. Commercial Code, as amended.

3. <u>Description of proceedings under Slovak law that may affect creditors' rights</u>

3.1. Bankruptcy in respect of a Slovak Corporate, Slovak Pension Fund, Slovak Insurance Company, Slovak Reinsurance Company, Slovak Management Company, Slovak Bank or a Slovak Investment Firm

3.1.1. General

The Slovak Insolvency Act provides for general regulation in relation to

Slovak entities, both corporates as well as regulated entities.

Pursuant to the Slovak Insolvency Act, the bankruptcy proceedings in relation to the Slovak Financial Institutions must be carried out in line with the Slovak Insolvency Act.

The declaration of bankruptcy with respect to the assets of the Slovak Financial Institution shall be notified by the court to the competent supervisory authority of all member states without delay after issuing the resolution on the declaration of bankruptcy; in the notice, the court will inform the competent supervisory authority of the effects of declaring bankruptcy.

3.1.2. Insolvency test and filing for bankruptcy

Pursuant to the Slovak Insolvency Act a debtor[12] is considered insolvent if it is either illiquid (cash-flow insolvency) or over-indebted (balance sheet insolvency).

A debtor is illiquid if it is not able to pay more than two monetary obligations to more than one creditor 90 days after such obligations were due. All claims that originally belonged to only one creditor during the 90 days prior to the filing of the bankruptcy petition are considered to be one monetary obligation when assessing the debtor's ability to pay. It is assumed that a debtor is solvent if, taking into account all the circumstances, it can be reasonably assumed that it is possible to continue the management of assets or the operation of the business and the difference between the amount of its payable monetary liabilities and monetary assets (the "**coverage gap**") is less than a tenth of the amount of its payable monetary obligations, or in a period not longer than 60 days, the coverage gap falls below such a limit.

A debtor is over-indebted if its liabilities under accounting exceed its assets and it has more than one creditor. When determining the amount of the obligation, the foreseeable results of further administration of the debtor's assets or running of the debtor's business will be also taken in account if, given all the circumstances, it is reasonable (at the time of the assessment) to assume that it will be possible to continue administering the debtor's assets or running the business.

<u>In respect of a Slovak Corporate</u>, the Slovak Corporate as well as its managing directors and the liquidator are obliged to file for bankruptcy in case of both types of insolvency - over-indebtedness as well as illiquidity. They shall do so within 30 days upon they have learnt about the material

[12] Since the Slovak Insolvency Act does not apply to Slovak Municipality and Slovak Region, for purposes of this clause, the term does not include Slovak Municipality and Slovak Region.

insovlency or, when acting with professional care, should have learnt about it. In addition, subject to fulfilment of statutory requirements (i.a. holding an overdue claim confirmed by the court or the debtor), also a creditor may file for bankruptcy of the Slovak Corporate.

3.1.3. Commencement of the bankruptcy proceedings

The court must resolve to commence the bankruptcy proceedings within 15 days from the receipt of the petition provided that it formally complies with the statutory requirement. Otherwise, it can provide 15 days period to correct the petition or reject the petition.

The bankruptcy proceedings commence on the day on which the resolution of the court on commencement of the bankruptcy proceedings is published in the Commercial Bulletin. It is then deemed to be served to all third parties on the day following the publication. Therefore, the creditor who fear that their debtor may fall into bankruptcy, should check regularly the Commercial Bulletin, which contains the most important decisions and documents in the insolvency proceedings, mainly the resolution of the court on commencement of the bankruptcy proceedings[13]. The reason is that the bankruptcy trustee does not notify foreign creditors, unless they are known to him (eg. from the accounting books of the company).

If the petition for bankruptcy is filed by a creditor in respect of the Slovak Corporate, the court will first request the Slovak Corporate to prove its solvency and sets a court hearing for this purpose. If the Slovak Corporate fails to prove its solvency within specified periods (or if it omits to communicate at all), the court declares the bankruptcy. The court shall decide on the declaration of bankruptcy within 7 days after the court has examined all evidence submitted or after the Slovak Corporate has waived its right to court hearing.

If the petition for bankruptcy is filed by the Slovak Corporate (as a debtor), the court shall declare the Slovak entity's bankruptcy within five days after the commencement of the bankruptcy proceedings.

3.1.4. Legal effects of bankruptcy declaration

The most important legal effect of the commencement of the bankruptcy proceedings from creditor's point of view is that the debtor must restrict its activities to those taken in the ordinary course of business, the automatic stay of enforcement actions by individual secured creditors (does not apply to enforcement of a pledge over funds, bank accounts, government bonds,

[13] Both are available online https://ru.justice.sk/ru-verejnost-web/pages/home.xhtml and https://obchodnyvestnik.justice.gov.sk/Obchod nyVestnik/Formular/FormulareZverejnene.aspx?csrt=14752858319815551561

transferable securities or continued enforcement of a pledge by a public auction) and automatic stay of individual court proceedings or administrative enforcement proceedings in respect of the assets owned by the debtor.

3.1.5. Filing claims in the bankruptcy proceedings

Pursuant to the Slovak Insolvency Act, a creditor must lodge its claims within 45 days following the declaration of bankruptcy electronically through electronic form into electronic mailbox of a bankruptcy trustee. If a claim is delivered later, it is still recognized but the creditor does not have certain rights (such as voting at a creditors' meeting) and satisfaction of such claim can be limited. The claim must be accompanied with exhibits proving its legal basis (such as invoices). There is no fee payable for submission of a claim.

3.1.6. Specific regulation in relation to Slovak Financial Institutions

3.1.6.1. Filing for bankruptcy

In respect of a Slovak Insurance Company, Slovak Reinsurance Company, Slovak Bank, Slovak Management Company, Slovak Pension Fund or a Slovak Investment Firm, NBS or, subject to the prior consent of the NBS, only the administrator in the involuntary administration of that respective entity can file for bankruptcy of such entity.

3.1.6.2. Commencement of the bankruptcy proceedings

If the petition for bankruptcy is filed in respect of a Slovak Insurance Company, Slovak Reinsurance Company, Slovak Bank, Slovak Management Company, Slovak Pension Fund or a Slovak Investment Firm, by NBS or, subject to the prior consent of the NBS, by an administrator in the involuntary administration, the court shall declare the Slovak entity's bankruptcy within five days after the commencement of the bankruptcy proceedings.

Declaration of bankruptcy in respect of a Slovak Insurance Company, Slovak Reinsurance Company, Slovak Bank and a Slovak Management Company shall be also notified to the relevant supervisory authority, before publishing in the Commercial Bulletin and consequently also the resolution of the court shall be delivered to such authority.

3.1.6.3. Legal effects of bankruptcy declaration

By declaring bankruptcy on the assets of a Slovak Insurance Company or a Slovak Reinsurance Company, the insurance agreement entered into by a Slovak Insurance Company or a Slovak Reinsurance Company as an insurer is automatically terminated by virtue of law.

3.1.6.4. Separate bankruptcy estate of covered bondholders

If a Slovak Bank is an issuer of covered bonds, the separate bankruptcy estate of the secured creditors, who are the owners of the covered bonds issued by such Slovak Bank and the counterparties of hedging derivatives included in the cover pool, are made up of assets and other property values serving to cover the issued covered bonds and also serving as collateral for claims of owners of covered bonds and counterparties of hedging derivatives, which are part of the cover file according to a special regulation; part of this separate bankruptcy estate are also claims from loans or mortgage loans, including pledges or other security rights serving to secure claims from loans or mortgage loans used to cover issued covered bonds. A separate bankruptcy estate of secured creditors is created separately for each respective covered bond program.

3.1.6.5. Miscellaneous

If a Slovak Financial Institution is bankrupt, its unpaid liabilities and claims that arose before the declaration of bankruptcy and which relate to property subject to bankruptcy, are considered mature for the purposes of bankruptcy only from the date of termination of the operation of the enterprise of such Slovak Financial Institution by the bankruptcy trustee after the declaration of bankruptcy; this also applies to the maturity of conditional claims that are applied for in bankruptcy and that arose before the bankruptcy trustee terminated the operation of the enterprise after the declaration of bankruptcy. The provisions of a special regulation apply to the extension of the maturity and terms of maturity of obligations, if the bankrupt is a bank that is the issuer of covered bonds that arose from covered bonds before bankruptcy was declared.

If a Slovak Insurance Company is bankrupt, insurance claims[14] to the unsecured extent are generally satisfied in bankruptcy before other unsecured claims.

3.2. Restructuring proceedings in respect of a Slovak Corporate

[14] Insurance claims are any amounts owed by the Slovak Insurance Company to the insured, policyholder or authorized person or other injured persons who have an immediate right of action against Slovak Insurance Company based on the insurance contract, including technical reserves created for individual insurance contracts concerning the above-mentioned persons in the event, that no insurance event occurred as of the date of declaration of bankruptcy. Paid insurance premiums that the Slovak Insurance Company owes due to non-acceptance of a proposal to conclude an insurance contract or due to the cancellation of insurance contracts before the date of declaration of bankruptcy are also considered an insurance claim. Regressions are not considered insurance claims.

The purpose of the restructuring proceedings is to rescue financially compromised business of a Slovak Corporate and to satisfy creditors of such Slovak Corporate to a certain extent. The outcome of the restructuring proceedings is the restructuring plan that must be approved by relevant majorities of creditors (and in some circumstances, also by the shareholders) and subsequently confirmed by the court. Creditors may find this alternative to a bankruptcy as a more viable option as it may rescue the business of the debtor which may in the end satisfy creditors' claims to a greater extent (statutory satisfaction requirement is 50% of the respective claim, unless the respective creditor agrees otherwise in written). The restructuring proceedings are not applicable to Slovak Banks, Slovak Insurance Company, Slovak Reinsurance Company, Slovak Management Company and Slovak Investment Firms (a similar proceeding in respect of these entities is involuntary administration, please see below).

3.2.1. Filling for restructuring

If a Slovak Corporate is materially insolvent, the Slovak Corporate, or its debtors (upon an agreement with such company) may authorize a restructuring trustee to prepare a so-called restructuring opinion in order to determine whether the Slovak Corporate meets the requirements for being granted the approval to conduct restructuring proceedings. Such requirements are: (i) Slovak Corporate is materially insolvent, (ii) financial statements provide faithful and true state of the facts that are the subject matter of the accounting and about the financial condition of the Slovak Corporate, (iii) at least two years have passed since the completion of the most recent restructuring or since the completion of the most recent public preventive restructuring, (iv) it can be reasonably assumed that at least a substantial part of the operation of the business will be maintained and (v) claims of creditors will be satisfied in a greater extent that in case of declaration of bankruptcy.

3.2.2. Commencement of the restructuring proceedings

Provided that the restructuring trustee confirms in its opinion on feasibility of restructuring that the conditions for permitting the restructuring have been met, the creditor or the Slovak Corporate may file a petition to the court to permit the restructuring.

If the petition for restructuring complies with the statutory requirements, the court decides upon commencement of the restructuring proceedings within 15 days from its receipt by the court. The commencement of the restructuring proceedings takes effect on the day following the day on which the resolution on the commencement of the restructuring proceedings was published in the Commercial Bulletin.

The most important legal effect of the commencement of the bankruptcy proceedings from creditor's point of view are mainly automatic stay of individual court enforcement proceedings or administrative enforcement proceedings in respect of the claims of creditors who filed their claims; and automatic stay of enforcement actions by individual secured creditors.

3.2.3. Filing claims in the restructuring proceedings

Pursuant to the Slovak Insolvency Act, a creditor must lodge its claims within 30 days period after declaration of restructuring electronically through electronic form into electronic mailbox of a restructuring trustee. If a claim is delivered after this time period, it is not recognized anymore in the restructuring proceedings (unlike in the bankruptcy proceedings). The claim must be accompanied with exhibits proving its legal basis (such as invoices). There is no fee payable for submission of a claim.

3.3. Involuntary administration of a Slovak Bank, Slovak Insurance Company, Slovak Reinsurance Company, Slovak Investment Firm and Slovak Management Company and the Slovak Pension Fund

Involuntary administration is a reorganisation and restructuring measure which may have an impact on the rights of third parties. Involuntary administration is not resolution proceedings under the BRRD, but it is recognised as a crisis prevention measure under the Resolution Act (please see below).

If the NBS becomes aware of any deficiencies in the activities of a Slovak Bank, Slovak Insurance Company, Slovak Reinsurance Company or a Slovak Investment Firm, depending on the nature of the relevant deficiency it may take various steps in compliance with the Slovak law. Such steps include the imposing of involuntary administration.

The purpose of the imposing of involuntary administration is in particular:

(i) to prevent the directors of the Slovak Investment Firm / Slovak Bank / Slovak Insurance Company / Slovak Reinsurance Company (who are collectively responsible for the deteriorating economic situation) from performing their functions;

(ii) to eliminate the most serious deficiencies in the management and activities of the Slovak Bank / Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company with the objective of stopping further deterioration of such entity's economic situation;

(iii) to determine the true condition of the Slovak Bank / Slovak Investment Firm/ Slovak Insurance Company / Slovak Reinsurance Company in all areas of its activities and economic performance;

(iv) to protect a) in respect of the Slovak Bank - deposits and other rights of clients of the Slovak Bank and holders of covered bonds issued by a Slovak Bank b) in respect of the Slovak Investment Firm - financial instruments or other clients' assets deposited, administered, managed or held by a Slovak Investment Firm c) in respect of Slovak Insurance Company and Slovak Reinsurance Company – rights of clients; from damage or continued growth of damage;

(v) in respect of Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company also to take necessary actions leading up to the declaration of bankruptcy of the Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company or its liquidation (if required by the economic condition of the Slovak Investment Firm);

(vi) in respect of the Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company also to ensure conditions for the application of client’s claims resulting from the system of client protection;

(vii) to adopt a recovery programme, if an economic recovery of the Slovak Bank / Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company is feasible, including the adoption and performance of organisational and other measures designed to gradually stabilise the Slovak Bank / Slovak Investment Firm and restore its liquidity, primarily in co-operation with the major shareholders of the Slovak Bank / Slovak Investment Firm / Slovak Insurance Company / Slovak Reinsurance Company;

(viii) in respect of Slovak Pension Fund to protect assets from damage or the increase of damage and to stop the depreciation of these assets;

(ix) in respect of Slovak Pension Fund to ascertain the actual balance of assets, if this is not ascertainable under other provisions of law.

It is imposed as of the delivery of a decision of the NBS on involuntary administration to a Slovak Bank, Slovak Insurance Company, Slovak Reinsurance Company, a Slovak Investment Firm or a Slovak Pension Fund. The effects of the imposing of the involuntary administration generally apply to each branch of the Slovak Bank, Slovak Insurance Company and Slovak Reinsurance Company situated in a Member State, unless any exception set out in the relevant laws applies.

Except for a Slovak Pension Fund, the decision on the imposing of the involuntary administration in relation to Slovak Financial Institution is also published by NBS in the Bulletin of the NBS (in Slovak: *Vestník Národnej banky Slovenska*) without undue delay, and in at least two Slovak daily newspapers with a nationwide distribution. In case of a Slovak Bank and a Slovak Insurance Company and a Slovak Reinsurance Company having any branch in the Member State, the decision will also be published in the Official Journal of the European Union and in case of a Slovak Bank also in at least two daily newspapers with a nationwide distribution in the relevant Member State.

The involuntary administration terminates in relation to Slovak Financial Institutions (except for Slovak Pension Funds) upon the earlier of: (i) the delivery of the decision of the NBS on the termination of the involuntary administration; (ii) the declaration of bankruptcy; (iii) the expiry of 12 months after the imposing of the involuntary administration; or (iv) the revocation or termination of the banking licence in respect of the Slovak Bank / the revocation or termination of the investment services licence in respect of the Slovak Investment Firm / the revocation of insurance licence of the Slovak Insurance Company or reinsurance licence of the Slovak Reinsurance Company.

The Slovak legal regulation in relation to involuntary administration of Slovak Pension Funds is very limited. In addition, it has not been tested in practice and thus it is difficult to predict, how NBS (the regulator) would approach such situation.

3.4. Resolution Proceedings in respect of a Slovak Bank or Slovak Investment Firm

The Resolution Act provides for the: (i) the procedure to be followed by entities listed below in connection with resolution in the Slovak financial market; (ii) the preparation and approval of resolution plans for financial market entities in the Slovak Republic by the Resolution Council; (iii) the establishment, powers and activities of the Resolution Council, and the resolution tools applied in the Slovak financial market; and (iv) the establishment and functioning of the national resolution fund and the management and use of its funds.

The Resolution Act applies to all Slovak Banks and certain Slovak Investment Firms. Specifically, it applies to: (i) selected institutions which are defined as banks and investment firms having a share capital in the minimal amount of EUR 730,000 required under the Securities Act; (ii) financial institutions subject to supervision on a consolidated basis under a separate regulation that have their registered seats in the Slovak Republic and that are subsidiaries of selected institutions or certain other entities set out in the Resolution Act; (iii) financial holding companies, mixed financial holding companies, and mixed activity holding companies with registered seats in the Slovak Republic; (iv) parent financial holding companies, EU parent financial holding companies, parent mixed financial holding companies and EU parent mixed financial holding companies; and (v) branch offices of selected institutions established in a third country.

3.4.1. Resolution Tools

The resolution authority is the Resolution Council (in Slovak: *Rada pre riešenie krízových situácií*) composed of representatives of the NBS, the Ministry of Finance and the Debt and Liquidity Management Agency. A special department of the NBS provides support to the Resolution Council and the NBS is also the competent authority.

Pursuant to the Resolutions Act, the Resolution Council is entitled to apply the following <u>main resolution tools</u>:

(i) the sale of business tool - allows the Resolution Council to sell all or a part of the failing institution to another entity, subsequently the old entity may be liquidated;

(ii) the bridge institution tool - identifying the "good" assets, rights or obligations, or essential functions of the failing institution, and separating them into another entity controlled by the Resolution Council (bridge institution) with a view to subsequent sale to one or more private sector entities;

(iii) the asset separation tool - the bad assets, rights or obligations of the institution are put into an asset management vehicle controlled by the Resolution Council. May only be used in conjunction with another resolution tool to prevent the failing institution benefiting from an undue competitive advantage.; and

(iv) the bail-in tool (capitalization)- a process of internal recapitalisation. Losses are imposed on certain of the institution's direct stakeholders by a process of bailing-in (in contrary to bail-out when the public sources were used), either by writing down their claims or by converting them to equity.

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

Bail-in tool may be applied only to eligible obligations of an institution, subject to the safeguards as described below. Eligible obligations include also claims under Individual Contracts, to the extent that such claims are not secured liabilities as set out in § 59 (1) let b of the Resolution Act or Article 27 (3) SRM-Regulation.

According to § 63 (1) of the Resolution Act, the resolution authority shall exercise the bail-in tool in relation to a liability arising from a derivative or another financial contract only upon or after closing-out the derivatives / other financial contracts.

For the purposes of applying § 63 BaSAG the resolution authority has the resolution power to close out and terminate derivatives contracts and other financial contracts (§ 9 (1) letter j) of the Resolution Act). In case the resolution conditions are met, the resolution authority has to close-out derivatives and other financial contracts for the purpose of a bail-in (§ 63 (1) of the Resolution Act). Should claims under derivatives transactions or other financial contracts be excluded from bail-in pursuant to § 59 (2) of the Resolution Act, the resolution authority cannot exercise its close-out powers.

Derivatives and other financial contracts that are entered into under a framework contract containing a netting agreement are subject to the protection of § 63 of the Resolution Act.

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

In case that derivatives or other financial contracts are subject to a close-out netting arrangement, the resolution authority or the independent valuer appointed by the resolution authority shall calculate the net-amount resulting from the mutual claims under such transactions on the basis of that contractual arrangement (§ 63 (2) of the Resolution Act). This net-amount should then be the basis for application of the bail-in tool. However, according to § 63 (3) let a to c of the Resolution Act, the resolution authority shall determine the value of liabilities arising from derivatives or other financial contracts in accordance with the following:

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

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

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

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

According to the Commission Delegated Regulation,

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

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

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

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

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

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

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

3.4.1.2. Protection of derivatives in case of partial transfer of assets

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

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

§ 80 (1) of the Resolution Act therefore states that for the purpose of an appropriate protection of a title transfer financial collateral arrangement, a set-off arrangement or a netting agreement, the Resolution Council is entitled to:

(i) transfer covered deposits and protected client assets, which are part of any of financial collateral arrangement, a set-off arrangement or a netting arrangement without transferring other assets, rights or liabilities that are part of the same arrangement; and

(ii) the transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits and protected client assets.

3.4.2. Resolution Powers

Partly in addition to what is stated above and partly in order to be able to exercise the rights mentioned above, the resolution authority has been granted <u>certain resolution powers</u> as outlined in §13 through 17a of the Resolution Act.

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

(i) suspend delivery obligations of an institution (§ 14 (1) of the Resolution Act);

(ii) restrict secured creditors of an institution from enforcing security interests in relation to any assets of that institution (§ 15 of the Resolution Act); or

(iii) suspend the termination rights of any party to a contract with an institution, provided that the payment and delivery obligations and the provision of collateral continue to be performed (§ 17 of the Resolution Act)

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

3.5. Involuntary administration in respect of Slovak Municipality and Slovak Region

Recovery regime precedes the involuntary administration. The recovery regime and the involuntary administration are two separate and essentially related institutes, which aim to solve the insolvency of a Slovak Municipality or a Slovak Region.

During the recovery regime, the solution is still in the hands of a Slovak Municipality or a Slovak Region, specifically the mayor of the Slovak Municipality or the chairman of a Slovak Region, the council and especially the chief controller, who during the duration of the recovery regime of a Slovak Municipality or a Slovak Region approves every expenditure of a Slovak Municipality or a Slovak Region.

If the recovery regime did not meet its goal, the state "intervenes" and solves the situation of a Slovak Municipality or a Slovak Region by introducing involuntary administration. The Ministry of Finance of the Slovak Republic appoints an administrator who will take on the role of chief controller in that, among other things, during the involuntary administration of a Slovak Municipality or a Slovak Region, to approve each of their expenses.

Involuntary administration of a Slovak Municipality or a Slovak Region is not a bankruptcy of a Slovak Municipality or a Slovak Region, nor is the debt relief of of a Slovak Municipality or a Slovak Region by the state. The obligations of a Slovak Municipality or a Slovak Region remain, the state does not take them over, but through ensures a controlled reduction of the debt of a Slovak Municipality or a Slovak Region.

3.6. Preventive restructuring of a Slovak Corporate

The Act on Preventive Restructuring provides for two types of preventive restructuring (i) public preventive restructuring and (ii) non-public preventive restructuring.

3.6.1. Public preventive restructuring

In case of threatened insolvency, a Slovak Corporate is entitled to apply to court for a public preventive restructuring. Slovak Corporate must be registered in the Registry of Partners of Public Sector when filling the application. The court will allow such preventive restructuring if the Slovak Corporate is threatened with insolvency, unless it can be assumed that an enterprise of a Slovak Corporate is not viable[15].

In addition, a Slovak Corporate may also request the court for three months stay on creditor enforcement action, provided a certain number

[15] Eg. there are reasons for termination of a Slovak Corporate, a Slovak Corporate was terminated or is in liquidation, bankruptcy or restructuring proceedings were declared in relation to a Slovak Corporate, there are ongoing enforcement proceedings, etc

of non-affiliated creditors agree. A Slovak Corporate may apply for prolongation of such period.

Certain classes of creditors will not be affected by a public restructuring plan such as creditors with small claims up to EUR 5,000, creditors with disputed claims or employees.

A public plan must be approved by at least 75% of each class of unsecured creditors (calculated pro rata of amount of their claims). A cross-class cramdown is possible where used in conjunction with a modified absolute priority rule (the shareholders must secure new equity in order to pay creditors at least 20% of their discharged claims).

3.6.2. Non-public preventive restructuring

Non-public preventive restructuring is aimed at restructuring debts owed to financial institutions (supervised either by the NBS or an equivalent foreign regulator) and requires creditors' consent. It can be agreed between one or more institutional creditors and the debtor who is threatened with insolvency, and who is not subject to the effects of other bankruptcy or restructuring proceedings.

It commences upon notification of a Slovak Corporate to the competent court, provided that such notification is approved by the creditors being party to the non-public preventive restructuring proceedings.

A Slovak Corporate as a debtor must submit to the court for its approval the concept of the preventive restructuring plan. Otherwise, the non-public preventive restructuring proceedings are automatically terminated.

The court shall reject the concept of the plan if it finds it potentially damaging to the economic interests of creditors who are not party to the private preventive restructuring. If the court approves the concept of the plan or fails to reject it within 15 days of its submission, the plan is deemed to be approved.

The approved plan in the private preventive restructuring is legally binding only upon creditors who have agreed to it (parties to it), but not on other creditors.

3.7. Liquidation (winding-up) in respect of a Slovak Corporate and Slovak Financial Institutions

After a dissolution of a Slovak Corporate and Slovak Financial Institution (in Slovak:

zrušenie), either on basis of the decision of the Slovak entitySlovak Corporate's and Slovak Financial Institution's relevant body or the relevant court or, in case of a Slovak Bank or Slovak Investment Firm in certain circumstances, the NBS, the Slovak Corporate or Slovak Financial Institution enter into a liquidation.

The purpose of the liquidation is to perform acts necessary in connection with the termination of all business activities of the Slovak Corporate or Slovak Financial Institution, to satisfy the Slovak Corporate's or Slovak Financial Institution's creditors' rights, to distribute the liquidation balance (if any) (in Slovak: *likvidačný zostatok*) to the shareholders and to de-register the Slovak Corporate or Slovak Financial Institution from the commercial register.

The appointed liquidator (in Slovak: *likvidátor*) assumes all the rights and responsibilities of a statutory body of the Slovak Corporate or Slovak Financial Institution. However, the liquidator is allowed to do the acts in connection with the liquidation of the Slovak Corporate or Slovak Financial Institution only. The liquidator shall discharge the obligations of the Slovak Corporate or Slovak Financial Institution, claim its receivables and receive any payments or deliveries made to the Slovak Corporate or Slovak Financial Institution. The liquidator is also allowed to enter any settlement agreements and any agreements on change or termination of rights and obligations. However, the liquidator may not enter into any new contracts on behalf of the Slovak Corporate or Slovak Financial Institution, unless such new contract is entered into in connection with the termination of the unsettled trades of the Slovak Corporate or Slovak Financial Institution.

The liquidator of a Slovak Corporate also has an obligation to file the petition for bankruptcy of the Slovak Corporate without undue delay upon learning that the Slovak Corporate is insolvent. Similarly, in respect of the Slovak Financial Institution – liquidation is possible only if it is solvent. In all other cases the NBS should either impose an involuntary administration over that Slovak Financial Institution (please see above) or file a petition for its bankruptcy with the relevant court.

Is there a distinction in time with respect to the creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines that a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected?

Different stages of the Slovak bankruptcy and restructuring proceedings are described in above.

The rights of the creditors indeed differ during these stages of the proceedings, generally matching the restrictions imposed upon the insolvent debtor that shall allow successful / efficient bankruptcy or restructuring.

Generally, both with respect to bankruptcy and restructuring, there are three main stages from the perspective of the creditors: (i) commencement of proceedings (ii) opening of bankruptcy / permission to conduct restructuring and (iii) after the expiry of registration deadlines, rights of creditors who did not register their claims can be either limited (e.g. no right to vote) or their claims can be disregarded entirely (e.g. if not registered for the restructuring within the statutory deadline).

Generally, the commencement of proceedings (both bankruptcy as well as restrcutiring) restricts the possibility to initiate enforcement against the debtor and causes suspension of those that are already ongoing and the possibility of exercise of security rights is not possible[16]. In addition, the termination rights of creditors are to a certain extent modified (please see in particular at 7.6 of this Opinion above).

After the permission to conduct restructuring has been granted by the court, any suspended ongoing enforcement proceedings are terminated and any ongoing court proceedings and arbitrations in respect of claims that need to be registered are suspended. The effects of opened bankruptcy are more far reaching – in line with the bankruptcy being a liquidation type of proceedings and impact the termination rights (please see at 7.6 of this Opinion above), maturity of claims, enforcement and other court and arbitration proceedings etc.

Finally, after the expiration of deadlines for registrations of claims in an ongoing bankruptcy or restructuring proceedings, rights of creditors who did not register their claims will be limited or completely disregarded.

Does Slovak insolvency law provide for a "safe harbor" for certain contract types and /or* entities *and would the contract types listed in Appendix B and the entities as specified in Appendix A benefit from such provision?

Yes, Slovak law provides for Safe Harbour provisions - please see at 7.3 and 7.4 above, where we provide an overview of these provisions as well as analyse to what extent the contract types listed in Appendix B and the entities as specified in Appendix A benefit from these provisions.

Is there publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g. financial statements, corporate actions, etc.).

Financial statements

Pursuant to Slovak law, the individual financial statements of legal entities are mandatorily

[16] In bankruptcy proceedings, this does not apply to the exercise of the right of security relating to funds, receivables from an account in a bank or in a branch of a foreign bank, government bonds, transferable securities or to the continuation of the exercise of the right of security through a voluntary auction according to a special regulation.

published and are publicly available (incl. via internet). Once they are filed to the competent tax authority, the tax authority publishes them in the Registry of Financial Statements (available at https://www.registeruz.sk/cruz-public/domain/accountingentity/simplesearch) without undue delay.

Corporate documents

Certain corporate documents of legal entities, such as memorandum of association, must be submitted to the Collection of Deeds of the respective commercial registry. The documents submitted there are also publicly available (not published online but can be requested at the court and the registry court is obliged to provide a copy (a fee applies).

Insolvency proceedings

No information concerning the filing of the petition for declaration of the bankruptcy / the restructuring proceedings is publicly available.

Information on the commencement of the bankruptcy and restructuring proceedings as well as declaration of bankruptcy / permission of restructuring is published in a Commercial Bulletin (in Slovak: *Obchodný vestník) available at https://obchodnyvestnik.justice.gov.sk/ObchodnyVestnik/Formular/FormulareZverejnene.aspx?csrt=4299306954614502518.*

In addition to the Commercial Bulletin, information on bankruptcy and restructuring bankruptcy proceedings are also published in the publicly available insolvency register[17].

Involuntary administration of a Slovak Bank and a Slovak Insurance Company

NBS publishes information concerning the involuntary administration in (i) Bulletin of NBS (in Slovak: *Vestník Národnej banky Slovenska),* (ii) at least two Slovak daily newspaper with a nationwide distribution and (iii) in publicly accessible premises of the entity upon which the involuntary administration has been established.

If the Slovak Bank / Slovak Insurance Company has a Branch in any EU Member State, the decision of NBS and other statutory information shall be published also in (i) Official Journal of European Union and (ii) at least two daily newspaper with a nationwide distribution in respective EU Member State either in Slovak language and in a language of respective Member State.

The publication of the information mentioned above has no legal effect on the initiation of the involuntary administration of respective entity.

Involuntary administration of a Slovak Investment Firm and a Slovak Management

[17] Insolvency Register is available at https://ru.justice.sk/ru-verejnost-web/

Company

NBS publishes information concerning the involuntary administration in (i) at least one Slovak daily newspaper with a nationwide distribution and (ii) in publicly accessible premises of the entity upon which the involuntary administration has been established.

Resolution proceedings in relation to a Slovak Bank and a Slovak Investment Firm

Decision on commencement of resolution proceedings is published (i) in the Commercial Bulletin, (ii) on a website of the Resolution Council, (iii) on a website of NBS and (iv) on a website of the concerned Slovak Bank or Slovak Investment Firm, unless the Resolution Council decides otherwise.

Involuntary administration of the Slovak Municipality and Slovak Region

The Slovak Municipality is obliged to publish the decision on imposing the involuntary administration by the means usually used for such purposes *(e.g.* information desk, periodical press issued by the relevant municipality, website, etc.). The Slovak Municipality also informs all banks and branches of the foreign banks keeping its accounts and any other municipality’s creditors on the imposing involuntary administration.

Liquidation

Information in relation to liquidation is published in the Commercial Bulletin and also registered with the commercial register.

As regards Slovak Bank and Slovak Insurance Company the liquidator is obliged to publish the information on entering these entities into a liquidation also in the Official Journal of the European Union.

In situation that Slovak Bank has branches established within the territory of any EU Member State, the liquidator shall publish the information on the liquidation in at least two daily newspapers with nationwide distribution in a relevant Member State.

Appendix ./E
Summary of Slovak Avoidance Rules

Discuss whether the termination of the Agreement, the calculation of the Termination Amount or its payment is voidable, challengeable or in any way deletable by a liquidator, receiver or third party or the court.

1. Introduction

Certain transactions of a Slovak debtor can be avoided by the debtors creditors or debtor's bankruptcy trustee. Such reversal of legal transactions is referred to as "voidability" (in Slovak: *odporovateľnosť právnych úkonov*). The grounds for avoidance are set out

(i) in the Slovak Civil Code (§§ 42a and 42b) – these rules apply to creditors of any Slovak entity in non-insolvency scenario, including (by a specific reference) in the event of an involuntary administration of a a Slovak Insurance Company18, Slovak Reinsurance Company[19], Slovak Management Company[20] [21],Slovak Investment Firm[22] and Slovak Bank[23].

(ii) In the Slovak Insolvency Act (§§57 – 66) – these rules can be applied by the bankruptcy trustee or the creditors of registered claims in case of bankruptcy of a Slovak entity. The Slovak Insolvency Act will apply to the extent insolvency proceedings are commenced in Slovakia (*lex fori concursus*).

2. General voidability (outside insolvency)

2.1. Pursuant to the Slovak Civil Code, a creditor may in certain cases demand that the court determines that certain legal acts are declared ineffective towards such creditor.

2.2. The requirements for such voidability of a transaction are the following:

(i) the transaction was entered into by the debtor with the intention to curtail the satisfaction of a creditor's claim if the other party to the transaction must have had knowledge of this intention of the debtor. This would not apply however if the other party could prove that it could not have known, with due care, of this intention of the debtor; or

(ii) the transaction resulted in the debtor assuming an obligation for an inadequate

[18] § 153 (3) of the Slovak Insurance Act
[19] § 153 (3) of the Slovak Insurance Act
[20] Please note that in case of a Slovak Management Company, these rules apply only in case the Slovak Management Company is authorized to carry out investment services under the Slovak Securities Act
[21] § 153(3) of the Slovak Securities Act
[22] Article 153 (3) of the Slovak Securities Act
[23] Article 59 (3) and (4) of the Slovak Act on Banks

consideration[24]; and at the same time the entering into the transaction: (A) caused the insolvency of the debtor; or (B) was intentionally performed to unjustifiably defer or prevent the payment to another creditor of the debtor; or (C) was intentionally performed to assume a liability which the debtor would not be able to discharge on its maturity.

2.3. Transactions can be challenged under the general avoidance rules within 3 years (i.e. after the lapse of 3 years the rights to challenge the transaction expires).

2.4. The effect of an act being successfully set aside under the relevant provisions of the Slovak Civil Code is that – although the transaction remains in principle legally binding upon the parties – it is legally ineffective towards the creditor and the creditor may request that his claim is satisfied from what the subject matter of the transaction that was transferred from the debtor assets during the transaction. If this is not possible, the creditor is entitled to compensation against the party that has benefitted from such successfully challenged transaction.

2.5. Specific rules apply to related parties' transactions, which are not addressed herein.

3. Voidability in bankruptcy proceedings

3.1. Pursuant to the Slovak Insolvency Act, a bankruptcy administrator or, under certain circumstances, creditors of the bankrupt party may demand that the court determines that certain legal acts of the insolvent debtor are ineffective towards the creditors.

3.2. A general requirement is that a legal act can only be challenged if it diminishes the satisfaction of a claim of a creditor that was registered in the bankruptcy proceedings (i.e. claims that were not registered are disregarded from this perspective even if otherwise the substantive voidability criteria are fulfilled).

3.3. Voidable transactions

The following transactions of the insolvent debtor can be challenged:

3.3.1. Transactions without adequate consideration

A transaction without adequate consideration is (i) any transaction entered into by insolvent debtor for no consideration at all (*bezodplatný právny úkon*) and (ii) a transaction entered into by the insolvent debtor where the consideration received was not adequate (this is defined as a case where the usual price of the fulfilment provided by the debtor is significantly higher than the usual price of the fulfilment received by the debtor).

[24] To be determined by an independent expert (*súdny znalec*) or by professional estimate (*odborný odhad*)

A transaction without adequate consideration can be challenged if it caused (material) insolvency of the debtor or was performed during the time when the debtor was (materially) insolvent.

The transaction can be challenged if it was entered into within a period of one year prior to the opening of bankruptcy (*vyhlásenie konkurzu*)[25].

3.3.2. Preferential transactions

A preferential transaction is

(i) a transaction by which the insolvent debtor satisfies a payment claim (in full or only partially) which otherwise would become due only upon opening of bankruptcy;

(ii) a transaction by which the insolvent debtor establishes a security over its assets to secure its already existing obligation (i.e. an obligation that was established before the security was granted);

(iii) a transaction by which the insolvent debtor agreed to an amendment or replacement of its right or its obligation to the detriment of the debtor;

(iv) any other unjustified preferential treatment of one creditor compared to other creditors;

(v) any full or partial waiver of right or a full or partial debt relief;

(vi) any act of the debtor by which the debtor agrees to or otherwise allows its right (against a creditor) to expire or

(vii) any other transaction disadvantaging the debtor to the detriment of its creditors.

A preferential transaction can be challenged if it caused (material) insolvency of the debtor or was performed during the time when the debtor was (materially) insolvent.

The transaction can be challenged if it was entered into within a period of

[25] A specific period applies in case a penalty of confiscation of property was imposed upon the debtor. In such case, transaction without adequate consideration entered into within 5 years before such penalty was imposed can be challenged.

one year prior to the opening of bankruptcy (*vyhlásenie konkurzu*)[26].

3.3.3. Detrimental legal act

A detrimental legal act is an any act detrimental to creditors intentionally performed to curtail the creditors if the counterparty knew or had to know of this intention.

A detrimental legal act be challenged if it was entered into within a period of five years prior to the declaration of bankruptcy proceedings[27].

3.3.4. legal act after the termination of the bankruptcy proceedings

Any act of the insolvent debtor that is outside of its ordinary course of business made after the termination of the bankruptcy proceedings can be challenged if (a new) bankruptcy has been declared in respect of that insolvent debtor within six months after the termination of the preceding bankruptcy proceedings.

3.4. Insolvency test

Insolvency in this context means illiquidity (*platobná neschopnosť*) or over-indebtedness (*predĺženie*).

A debtor is considered to be <u>illiquid</u> (*platobne neschopný*) if it is unable to pay its at least two monetary obligations[28] 90 days past their due date towards more than one creditor. Solvency of the debtor is assumed if, having regard to all the circumstances, it can reasonably be expected that the management of its assets or the operation of its business can be continued and the difference between the amount of its outstanding monetary liabilities and its monetary assets (the 'coverage gap') is less than one-tenth of the amount of its outstanding monetary liabilities or, within a period of not more than 60 days, the coverage gap falls below such a threshold.

The debtor company is considered to be <u>over-indebted</u> (predĺžený) if it has more than one creditor and the value of its obligations exceeds the value of its assets. The valuation is made based on the accounts or expert opinion, taking into consideration also any positive going concern prognosis.

26 A specific period applies in case a penalty of confiscation of property was imposed upon the debtor. In such case, transaction without adequate consideration entered into within 5 years before such penalty was imposed can be challenged.

27 A specific period applies in case a penalty of confiscation of property was imposed upon the debtor. In such case, transaction without adequate consideration entered into within 5 years before such penalty was imposed can be challenged.

28 For the purposes of assessing the debtor's solvency, all claims that originally belonged to only one creditor during the 90 days prior to the filing of the bankruptcy petition shall be considered as a single claim.

3.5. Effects of voidability

The effect of an act being successfully set aside under the relevant provisions of the Slovak Insolvency Act is that although the transaction remains legally binding on the parties, it is ineffective towards the creditors. That means that the creditors of the insolvent debtor are entitled to satisfaction depending on nature of the challenged act:

(i) the transferee must provide to the insolvent debtor's estate a cash equivalent of such asset, right or other economic value unless the challenging creditor or the bankruptcy administrator requires that particular asset, right or other economic value to be returned to the insolvent debtor's estate; or

(ii) the payee must return the funds to the insolvent debtor's estate. As a result, the original payment obligation of the bankrupt party is returned to the full extent; or

(iii) the counterparty will have to give or do whatever is necessary to ensure that the condition of the insolvent debtor's estate is the same as it would have been should such act of the insolvent debtor not have been performed.

3.6. Specific rules apply to related parties' transactions, which are not addressed herein.