

# **EFET**

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## **Guidance Notes**

**to the**

### **EFET Trade Restriction Clause to the EFET General Agreement concerning the Delivery and Acceptance of Electricity (version 2.1(a) / September 2007)**

**WAIVER: THE PROPOSED STANDARD WORDING AND THE FOLLOWING GUIDANCE NOTE WAS PREPARED BY EFET'S MEMBERS EXERCISING ALL REASONABLE CARE. HOWEVER, EFET, THE EFET MEMBERS, REPRESENTATIVES AND COUNSEL INVOLVED IN ITS PREPARATION AND APPROVAL SHALL NOT BE LIABLE OR OTHERWISE RESPONSIBLE FOR ITS USE AND ANY DAMAGES OR LOSSES RESULTING OUT OF ITS USE IN ANY INDIVIDUAL CASE AND IN WHATEVER JURISDICTION. IT IS THEREFORE THE RESPONSIBILITY OF EACH PARTY WISHING TO USE THE STANDARD WORDING TO ENSURE THAT ITS TERMS AND CONDITIONS ARE LEGALLY BINDING, VALID AND ENFORCEABLE AND BEST SERVED TO PROTECT THE USER'S LEGAL INTEREST. USERS OF THE STANDARD WORDING ARE URGED TO CONSULT THE RELEVANT GUIDANCE NOTES MADE AVAILABLE THROUGH EFET AS WELL AS LEGAL OPINION BY THEIR OWN COUNSEL.**

**The proposed standard Non-Performance Due to Trade Restriction clause has been drafted to assist market participants to further clarify the legal situation in case of the implementation of Trade Restrictions (as defined in the standard wording).**

**EFET and its Members had considered to either propose wording providing for an early termination and the calculation/payment of an early termination amount (including set-off) upon such termination, or to propose standard wording drafted on the basis of the standard Force Majeure provisions of the EFET General Agreement. Given that in case of the implementation of Trade Restrictions, the enforceability of a termination clause especially including close-out netting would be doubtful in some jurisdictions and specifically that the calculation and payment of a termination amount (and esp. a potential set-off) could be considered the provision of an economic advantage to the Trade Restricted Party and a breach of the relevant Trade Restriction and consequently expose the Trade Affected Party to prosecution, the proposed standard clause has finally been drafted on the basis of the standard EFET Electricity and Gas Force Majeure clauses. This means that as far as possible, the proposed Non-Performance Due to Trade Restriction clause uses standard wording which market participants consider market standard for extraordinary situations affecting their contractual relationships. Amendments to the standard wording of the Force Majeure clauses have been limited to such amendments necessary for the application to Trade Restrictions as well as to amendments which were considered important to avoid any gaps in the application of the Trade Restriction clause (e.g. parties are also released from obligations to pay or receive monies).**

**§ 7(a).1      Definition of Trade Restriction:**

The default definition of the term "Trade Restriction" has been drafted broadly in order to cover any law, regulation, decree, ordinance or legally binding order, rule or requirement of the United Nations or under the laws of the European Union, any EU Member State - as well as further jurisdictions which may be elected by the Parties - relating to trade sanctions, trade embargoes and other foreign trade controls, export controls, non-proliferation, anti-terrorism and similar laws.

However, given that under the laws of certain jurisdictions, in particular the laws of the Federal Republic of Germany, counterparties are limited regarding references to foreign sanctions/trade restriction regimes and thereby to give effect to such foreign sanctions/trade restriction regimes or to help regarding their enforcement, a Trade Restriction can release obligations only if it can be considered as Applicable Trade Restriction in accordance with §7(a).2 (see below).

#### **§ 7(a).2 Release from Delivery, Acceptance and Payment Obligations**

If a Trade Restriction: (i) is directly applicable to a Party; and (ii) fully or partially prevents this Party (the "**Trade Affected Party**") from performing or procuring the performance of any obligation otherwise required by the EFET Electricity General Agreement (an "**Affected Obligation**"), because this would constitute a violation of, be inconsistent with, or expose the Trade Affected Party to a punitive measure under such Trade Restriction (such Trade Restriction being an "**Applicable Trade Restriction**"), then the Trade Affected Party shall be released from those Affected Obligations.

However, such release will only apply and a Trade Restriction will only be considered as Applicable Trade Restriction, if the Trade Affected Party can legally bind itself under the national laws of the place of the Trade Affected Party's incorporation, registration, or establishment to comply with such Trade Restriction. This latter limitation in the scope of application of §7(a).2 et. seq. is necessary since - as already mentioned above - counterparties are limited under the laws of certain jurisdictions regarding references to foreign sanctions/trade restriction regimes. This is especially true in relation to German counterparties which are subject to section 7 of the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* - AWW), since section 7 of the German Foreign Trade Ordinance prohibits German residents (as defined in section 2 no. 15 of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* - AWG) to make so-called boycott declarations, i.e. declarations by which such residents take part in foreign boycotts that do not correspond with UN, EU, or German sanctions. As a consequence, legal means enacted e.g. by other EU Member States or the United States of America will not release an obligations of a German counterparty (even if the Parties have included such further jurisdictions in the definition of the Term Trade Restriction in § 7(a).1.

The wording of section 7(a).2 makes clear that generally the Trade Affected Party shall be released (and not merely suspended) from those obligations but only for the period of time and to the extent that such Applicable Trade Restriction prevents its performance.

EFET and its Members considered it appropriate to provide for the option that the Trade Affected Party and the Trade Restricted Party may terminate the affected Individual Contracts in case of long term restrictions. Accordingly and based on the Long Term Force Majeure concept as included in § 7.5 of the EFET Gas General Agreement, § 7(a).6 provides for a termination right once the Long Term Trade Restriction Limit is reached (see comments on § 7(a).6 below).

### **§ 7(a).3 Notification and Mitigation of Applicable Trade Restriction**

§ 7(a).3 has also been drafted on the basis of the standard EFET Electricity Force Majeure clause. However, compared to this wording, the wording of § 7(a).3 has been amended to make clear that notification must only be made where such notification is permissible. This avoids situations where the Trade Affected Party is required to make respective notifications, although the notification itself might be regarded as a breach of an Applicable Trade Restriction.

Besides, as regards the mitigation of the effects of an Applicable Trade Restriction, the proposed standard wording provides that the Parties shall use all commercially reasonable efforts to mitigate and overcome the effects of an Applicable Trade Restriction. However, the wording also makes clear that such obligation shall not require a party to procure a license to perform.

### **§ 7(a).4 Effects of Applicable Trade Restriction on Trade Restricted Party**

§ 7(a).4 has been drafted on the basis of the standard EFET Electricity Force Majeure clause. However, compared to the Force Majeure clause, the wording of § 7(a).4 has especially been amended to make clear that the Trade Restricted Party's delivery obligations are also released when the payment obligations of the Trade Affected Party are released due to an Applicable Trade Restriction. The wording further makes clear that the Trade Restricted Party's payment

obligations shall only be released if a Trade Affected Party's delivery obligations, which might have been released by Applicable Trade Restrictions, have not yet been performed.

#### **§ 7(a).5 Accrued Amounts**

The wording of § 7(a).5 takes into account situations where the Parties are prevented to pay or receive monies but where monies have already accrued between the Parties for deliveries of electricity or otherwise in respect of a period before an Applicable Trade Restriction came into force. The respective payment obligations will then be suspended until such time as payments of monies may lawfully be made under any Applicable Trade Restriction. Given that the inclusion of interest for the time period between the release of the payment obligation and the actual date of payment could be considered a breach of a relevant Applicable Trade Restriction, such interest payments have not been included in the standard wording.

#### **§ 7(a).6 Long Term Trade Restriction Limit**

As in case of the standard Force Majeure clause, in case of long term restrictions, § 7(a).5 provides for a termination right once the so-called Long Term Trade Restriction Limit is reached. The standard wording provides for a Long Term Trade Restriction Limit and allows for a termination by the Trade Affected Party and the Trade Restricted Party in case that the Applicable Trade Restriction is in place for a period of 10 days and provided that on average obligations of the Trade Affected Party for more than fifty (50) per cent of the aggregate contracted quantity during such period were adversely affected.

In this context, EFET Members expressed different views on the necessary duration of an Applicable Trade Restriction to trigger a termination right. It was finally agreed to include a standard 10 day period, however Parties may wish to consider whether they want to amend this standard period.

EFET Members also discussed whether the reference to the effects of the Applicable Trade Restriction on at least fifty (50) per cent of the aggregate contracted quantity (taken from the Long Term Force Majeure concept as included in § 7.5 of the EFET Gas General Agreement) could be deleted but finally decided that this should be incorporated in order to (i) keep it as close as possible to the Force Majeure clause, and (ii) to cope for (theoretical) situations where not all deliveries might be affected (e.g. Individual Contracts providing for multiple

Delivery Points and where only some of them are affected by the Applicable Trade Restriction).

Finally, EFET Members expressed different views on which obligations of a Trade Affected Party would need to be adversely affected by an Applicable Trade Restriction in order to be able to trigger the termination right under § 7(a).6, i.e. whether obligations must be adversely affected that are already due for performance or whether it is sufficient that obligations are generally caught by an Applicable Trade Restriction notwithstanding whether their performance was about to become due. As the wording of § 7(a).6 has been drafted to mirror as close as possible the Long Term Force Majeure concept as included in § 7.5 of the EFET Gas General Agreement and given that the EFET Gas Force Majeure clause requires deliveries to be due for performance to be able to trigger a Force Majeure event, also the definition of “adversely affected” in § 7(a).6 of the EFET Electricity Trade Restriction clause needs to be interpreted narrowly. Hence only obligations that are due for performance may enable the relevant party to trigger the termination right under § 7(a).6. Parties that wish to be entitled to terminate all Individual Contracts that are generally caught by an Applicable Trade Restriction irrespective of whether their performance is already due may want to amend this clause respectively.

#### **§ 7(a).7 Consequential Amendments**

§ 7(a).7 includes consequential amendments necessary in order to give effect to § 7(a). It provides that relevant references to "Force Majeure" in the EFET Electricity General Agreement shall be understood as references to "Force Majeure in accordance with § 7 or any Applicable Trade Restriction in accordance with § 7a" and that references to § 7 shall be understood as references to "§7 or § 7a".

#### **Relationship to Force Majeure or Frustration**

EFET Members are aware that the standard Force Majeure clause in § 7 of the EFET Electricity General Agreement or legal doctrines of frustration of contract under the dispositive governing law may also apply in case of (Applicable) Trade Restrictions. Notably, this may be the case where the Parties do not amend their agreements with the proposed standard wording on Trade Restrictions. In particular in the case of the doctrine of frustration of contracts, this can lead to different consequences for affected obligations and affected

Individual Contracts compared to the consequences provided for in the proposed standard wording on Trade Restrictions.

To the extent permissible under the dispositive governing law, by including the proposed standard wording on Trade Restrictions, its remedies and consequences will prevail. However, the fact that EFET has published a standard Trade Restriction clause shall in no way be interpreted as a confirmation or indication by EFET or its Members that other contractual and/or statutory rules will not apply in case of the implementation of respective sanctions/trade restriction regimes.

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