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Zurich, February 25, 2013
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EFET European Federation of Energy Traders - Opinion on General Agreement Concerning the Delivery and Acceptance of Electricity

Dear Sirs,

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

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A. DOCUMENTS CONSIDERED

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

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007) (**Enclosure 1**),
- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (**Enclosure 2**),
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010) (**Enclosure 3**),
- EFET Credit Support Annex to the General Agreement (Version 1.0, published 5 April 2002) (**Enclosure 4**),
- EFET Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012) (**Enclosure 5**),
- Amendment Letter to Allowances Appendix Version 3.0/June 20 2008 to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012) (**Enclosure 6**),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and
  Acceptance of Electricity (Version 3.0, published June 20, 2008) (**Enclosure 7**),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 20 July 2005) (**Enclosure 8**),
- EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 30 November 2006) (**Enclosure 9**),
- EFET VAT Agreement for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and Natural Gas (published 20 November 2005) (**Enclosure 10**),
- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (**Enclosure 11**),
- GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a), published 21 September 2007) (Version 1.0, published 11 September 2009) (**Enclosure 12**),

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

- EFET Electronic Confirmation Agreement (published 28 June 2005) (**Enclosure 13**).
- Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012) (**Enclosure 14**),
- Confirmation of Allowance Transactions (including EUA, CER & ERU Transactions) to the Allowances Appendix to the EFET Power Master Agreement (Version 1.0, published 6 March 2008) (**Enclosure 15**),

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

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005) (**Enclosure 16**),
- EFET Master Netting Agreement (Version 1.0, published June 2010) (**Enclosure 17**),
- EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010) **(Enclosure 18)**.
- EFET CPMA Cross-Product Master Agreement by The Bond Market Association (TBMA) (Version 1.0, published 16 February 2000) (**Enclosure 19**),
- EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 20**),
- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 21**),
- EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011) (**Enclosure 22**).

Capitalized terms used in this opinion and not otherwise defined herein shall have the same meaning ascribed to such terms in the EFET Documents and references to numbered paragraphs shall be to the respective paragraphs in the General Agreement.

B. GENERAL ASSUMPTIONS AND LIMITATIONS

Our opinions are based on the following general assumptions:

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in

Switzerland ("**Party A**").

- Party A is (a) a trading or industrial company incorporated as a Swiss corporation (*Aktiengesellschaft*), a Swiss limited liability company (*Gesellschaft mit beschränkter Haftung*) or a commercial enterprise in the form of a partnership (*Kollektiv/ Kommanditgesellschaft*) under the Swiss Code of Obligations ("**CO**"), (b) a Swiss branch of a foreign corporation established in Switzerland, (c) a bank or a securities dealer incorporated as a Swiss corporation (*Aktiengesellschaft*), a Swiss limited liability company (*Gesellschaft mit beschränkter Haftung*) or a commercial enterprise in the form of a partnership (*Kollektiv / Kommanditgesellschaft*) under the CO, or (d) a Swiss branch of a foreign bank or securities dealer established and licensed in Switzerland, and is neither a public law institution nor regulated as an insurance company. 2

- The relevant EFET General Agreement is governed by either English or German law. 3

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

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

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

- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B. 7

- Each of Party A and B when entering into the EFET Documents initially and as of the date of the conclusion of an Individual Contract is neither insolvent (*zahlungsunfähig*) 8

nor overindebted (*überschuldet*) within the meaning of Swiss law or any other law applicable to such party.

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

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

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

- this opinion is limited to matters of law and does neither address any factual circumstances or statements of the parties to the EFET Documents, whether contained in representations or warranties of the parties thereunder or otherwise, nor any tax matters, including without limitation any tax consequences of the entering into, execution and delivery of, and performance under the EFET Documents, other than the qualification under n. 171 in respect of the gross-up for Swiss withholding taxes (*Verrechnungssteuer*). 12

C. EXECUTIVE SUMMARY

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

1. Insolvency and Early Termination

We are of the opinion that Early Termination is valid and binding notwithstanding the opening of insolvency procedures. We recommend, however, to elect "Automatic Termination" rather than to provide for a short term period within which an optional 14

termination would need to be declared and to provide for the day of the declaration of bankruptcy as the effective date for such termination in case of a Swiss party being involved. For more details and for a suggested wording for the election please see n. 86.

2. Close-Out Netting

We are of the opinion that as a matter of Swiss bankruptcy and insolvency law, the Close-Out Netting provisions are valid and binding outside and prior to the occurrence of an Insolvency Event (as defined in n. 78) as well as after the opening of a bankruptcy. The same holds true for banks and securities dealers based on the The Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[1] and the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**")[2] respectively. 15

3. Branches of Foreign Companies established in Switzerland

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

4. Collateral

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

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

[2] Bundesgesetz über die Börsen und den Effektenhandel (BEHG), SR 954.1.

D. ISSUES AND ADDITIONAL ASSUMPTIONS

I. Enforceability of Close-out Netting

1. General Overview Insolvency

1.1 Insolvency

Enforcement of contractual obligations is generally subject to limitations in case of insolvency procedures being instituted against Party A under applicable Swiss law in case of Party A's insolvency. In a nutshell, the various insolvency procedures against Party A qualifying as a Swiss party and their main impact on Party A's faculty to abide by its obligations under the EFET Documents can be described as follows: 18

1.1.1 Bankruptcy

Except for banks and securities dealers and for branches of foreign banks and securities dealers, the enforcement of claims and the questions relating to insolvency and bankruptcy in general are dealt with by the Swiss Federal Act on Debt Enforcment and Bankruptcy ("**SDEBA**")[3]. For banks and securities dealers and branches of foreign banks and securities dealers (see n. 62-69). 19

Except for branches of foreign banks and securities dealers, Swiss branches of foreign corporations are also subject to the SDEBA but on the liability side only with respect to debts and obligations incurred and entered into by the branch and on the assets side only with respect to assets located within Switzerland or to which Swiss authorities have access. Please note that all questions regarding corporate authority and capacity are governed by the law governing the foreign corporation and are thus not covered in this opinion. 20

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against the entities as described under n. 2 have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and hence a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special 21

[3] Bundesgesetz über Schuldbetreibung und Konkurs (SchKG), SR 281.1

enforcement proceeding limited to the liquidation of the collateral (*Betreibung auf Pfandverwertung*).

22 However, if the bankruptcy is declared while such a proceeding is pending, the special proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings.

23 A bankruptcy is declared by the court either on the initiative of a creditor or on the request of the debtor itself. The bankruptcy is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of the declaration of the bankruptcy and all assets acquired or received subsequently together form the bankruptcy estate which, after deduction of costs and certain other expenses, is to satisfy proportionally the creditors.

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

25 The competent court may, however, declare a debtor bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung*) under the following circumstances: at the request of the debtor (i) if the debtor's board of directors declares that the debtor is overindebted within the meaning of Article 725 par. 2 CO or (ii) the debtor declares to be insolvent (*zahlungsunfähig*) and at the request of a creditor if (i) the debtor commits certain

acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung*) or if certain events have happened during composition proceedings. Any of these events would constitute an event described under §10.5 c (iv) of the EFET General Agreement.

The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. 26

In addition, the bankrupt party loses its capacity to dispose of its assets and any mandate or power of attorney granted by the bankrupt party is automatically deemed revoked with the declaration of bankruptcy. 27

The creditor of a bankrupt party may as a rule set-off claims against debts it has towards the bankrupt party provided that both the claims and the debts existed at the time of the declaration of bankruptcy. 28

A set-off in bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where the debtor of the bankrupt party willing to set-off a claim has become the creditor of the bankrupt party prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors. These provisions are further supplemented by the general avoidance actions provided for in the SDEBA (see n. 41-57). 29

For the final distribution there is a ranking of creditors in three classes. The first and the second class, which are privileged, comprise claims under employment contracts, accident insurance, pension plans and family law. Certain privileges can further result for the government and its subdivisions based on specific provisions of federal law. All other creditors are treated equally in the third class. 30

1.1.2 Reorganization

The SDEBA also provides for reorganization procedures by entering into a composition agreement with the debtor's creditors. The reorganization is initiated by a request with the competent court for a stay (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors and confirmation of the composition agreement by the competent court. Distinction is being made between a composition agreement in the form of a general winding up (*Nachlass mit Vermögensabtretung*) which leads to a private liquidation and in many instances has analogous effects as a bankruptcy, and a dividend 31

composition agreement (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further there is the possibility of a composition agreement in the form of a mere payment term extension (*Stundungsvergleich*).

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

- *Stay of Debt* Collection *Proceedings*: No debt collection proceedings can be initiated for the duration of the stay and pending proceedings are stayed. Procedural steps taken before the stay, however, remain in effect until a decision is taken on a composition agreement, except for: 32

    - collection proceedings for claims of employees that have arisen in the course of the last six months and certain claims based on social security laws and family law (so-called first class claims);

    - collection proceedings for debt secured by real property;

    - collection proceedings for new debt arising out of the permitted continuation of the debtor's business.

Further permitted are sequestration and other measures of securing assets for creditors. The stay does not preclude initiating lawsuits and continuing pending litigations. 33

- During the stay, the debtor's power to dispose of its assets and to manage its affairs is restricted. While the debtor may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law to: 34

    - dispose of or pledge any fixed assets (such as holdings in other companies or real property);

    - create new security interests;

    - issue guarantees, and

    - enter into transactions which are not at arm's length

Such acts performed without court approval are invalid. If the debtor has entered into such a transaction, the counterparty is not entitled to any dividend or liquidation proceeds resulting for the creditors. The third party's claims for rescission of the contract must be recorded, and will be treated just like any other creditors' claims, thus receive a dividend or a share in the liquidation proceeds. 35

- *Interest*: Unsecured debts become non-interest bearing as of the date the stay is granted. If the stay is withdrawn later, the interest period will be deemed to have run during the stay. 36

- *Due Dates*: The stay does not affect the agreed due dates of debts (contrary to bankruptcy, where all debts become immediately due with the adjudication of bankruptcy). Should the stay proceedings end in a composition agreement providing for a general assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 37

- *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 29 above), whereby the date of the publication of the grant of the stay is relevant for determining which claims qualify for set-off. 38

The stay aims at facilitating the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims. 39

1.1.3 Emergency Moratorium

The SDEBA confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is (i) temporary and (ii) due to extraordinary circumstances of general implication (e.g. a general economic crisis). The competent authority can order that the grant of a security interest during such stay be subject to its prior approval. The emergency moratorium is an exceptional remedy, which has only been very rarely applied in the past. 40

1.1.4 Avoidance of Transactions

41 The receiver in bankruptcy and certain creditors may, by means of an appropriate lawsuit (*Anfechtungsklagen – actiones paulianae*), challenge certain arrangements or dispositions made by the insolvent during a period (suspect period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), the grant of the stay. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor, undertaken at such time as the debtor was overindebted (*Überschuldungspauliana*), and (iii) dispositions made by the debtor with the intent to disadvantage its creditors or to prefer certain of its creditors to the detriment of other creditors (*Absichtspauliana*).

a) Avoidance of Gifts and Gratuitous Transactions (Schenkungspauliana)

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

43 Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) established damages resulting therefrom for other creditors of the debtor.

b) Avoidance due to Over-Indebtedness (Überschuldungspauliana)

44 Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a stay, where the debtor, as an additional objective prerequisite, was already overindebted (*überschuldet*) at the time the relevant act was undertaken by the debtor. The term overindebted refers to the fact that the debtor's assets do not cover its liabilities. The existence of such over-

indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof.

45 The targeted acts are specifically acts that prefer one creditor over the others in the light of such over-indebtedness. Such acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity.

46 These acts must result in damages to the creditors. Such damages are presumed in the context of avoidance where the creditors have suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges an act. It is then up to the defendant to prove that the challenged act did not lead to such damages.

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

c) Avoidance for Intent (Absichtsanfechtung)

48 Art. 288 SDEBA subjects any act of a debtor within the suspect period of 5 years prior to its being declared bankrupt or being granted a stay to challenge to the extent that such act was made with the bankrupt debtor's intent to prefer certain creditors over others or to disadvantage certain of its creditors and if this intention was, or exercising the requisite due diligence, must have been known to the counterparty.

49 As for the other avoidance actions, in terms of objective prerequisites, the act of

the debtor must have led to damages to creditors. While the SDEBA does not specifically mention this prerequisite, it nevertheless follows from the nature and aim of an avoidance action.[4] Pursuant to Swiss jurisprudence, such damages are presumed in the context of the avoidance for intent, where the challenging creditor has suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges the act. It is then up to the defendant to prove that the challenged act did not in the case at hand lead to such damages, i.e. the burden of proof is shifted to the defendant in such cases.[5] The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the debtor, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA.

50 In terms of subjective elements, avoidance for intent calls for intent to prefer or to disadvantage creditors on the debtor's side and such intent must have been recognizable to the counterparty of the relevant act.

51 The intent on the debtor's side is presumed where the debtor could and must have recognized that the challenged act would prefer or disadvantage creditors.[6] It is sufficient, though, that the debtor, while not directly aiming at such preference or disadvantage by its act, merely accepts such preference or disadvantage as a possible consequence of its act.

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

53 As far as banks are concerned, Swiss legal doctrine holds, that the suspicion of the bank that the debtor when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the debtor's intent. Furthermore, pursuant to such scholarly opinions,

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4 BGE 101 III 94; 99 III 26 et seq.

5 BGE 99 III 27.

6 Swiss Federal Court 5C.29/2000, September 19, 2000, E.3.a).

the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the debtor, but also if there are indications of a distressed financial situation.

While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. 54

It is to be noted that (as is the case for Art. 286 SDEBA, but contrary to Art. 287 SDEBA) an actual over-indebtedness at the very moment when the act is undertaken, does not generally constitute a prerequisite for a challenge of the relevant act. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios: 55

Under the first scenario, there is no sufficient indication of financial difficulties when the debtor acts. Under such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to certain creditors if and when the debtor should be declared bankrupt or granted a stay (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy, so that in fact the intention is, that the counterparty should only be granted a preferential right over an asset if and when the debtor is declared bankrupt, but with no intent to treat the counterparty as a secured party other than in bankruptcy or an artificial creation of an overstated claim upon such declaration of bankruptcy in order to achieve a higher basis for a bankruptcy dividend or the like). 56

Under the second scenario, though, where the debtor is in financial difficulties, the scope of acts that can be challenged becomes significantly broader and on the verge of a bankruptcy eventually would also include the payment of a matured claim, if the counterparty must have recognized that the debtor would have had to file for bankruptcy and by making such payment outside the bankruptcy (which ensures proportional satisfaction of claims of the same class) prefers such counterparty over other creditors who will end up with a dividend that will not cover their full claims and who thereby are not getting the same pro rata share as the counterparty. 57

1.1.5 Swiss insolvency laws as they apply to forward, physically settled electricity transactions

58 There are no specific rules governing forward, physically settled electricity transactions contained in the SDEBA. Hence, the general principles governing insolvency apply: With the declaration of bankruptcy, as a rule, all claims against the bankrupt become immediately due and payable (*fällig*). Claims which are not claims for a sum of money are converted into a claim for money of a corresponding value and translated into CHF at the exchange rate prevailing on the date of the declaration of bankruptcy.

59 The receiver in bankruptcy has, however, pursuant to Art. 211 para. 2 SDEBA, the right to request the fulfillment of obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfills its obligations under the relevant contract to the extent that the reciprocal obligations under such bilateral contract have not been fully discharged at the time of the declaration of bankruptcy. This so called "step-in right" of the receiver in bankruptcy in effect, therefore, avoids the automatic conversion of claims which are not claims for a sum of money into mere money claims.

60 This step-in right does not exist, pursuant to the explicit rule of Art. 211 para. 2^{bis} SDEBA, with regard to fixed term obligations and certain financial transactions, provided that the value of the reciprocal contractual obligations can be clearly established based on market or exchange prices. This step-in right and the exception thereto will be discussed in some more detail under n.71-85.

61 The Banking Act does not contain any specific rules applicable to forward, physically settled electricity transactions either. Thus, the general rules of the SDEBA are also applicable to banks and securities dealers in this respect. However, Art. 27 para. 3 of the Banking Act clearly states that netting arrangements shall not be affected by protective measures, restructuring measures and liquidation proceedings (see n. 62-69).

1.1.6 Special rules for banks, securities dealers and branches of foreign banks and securities dealers

62 Special bankruptcy and insolvency rules are applicable to banks and savings banks and branches of foreign banks established in Switzerland. Pursuant to Art. 36a SESTA, the same rules apply to securities dealers and to branches of foreign securities dealers established in Switzerland. The rules are set out in the Banking Act and in the new Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers ("**BIO-FINMA**")[7]. The SDEBA rules are applicable (only) to the extent that the Banking Act and the IO-FINMA do not provide for special rules. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to banks and securities dealers.

63 In addition, the Swiss Financial Market Supervisory Authority ("**FINMA**")[8] may also deviate from the rules of the SDEBA where it deems appropriate to do so. Yet, according to the explanatory report accompanying the amendment of the Banking Act ("**Report**") and judging from the IO-FINMA, such derogation is mostly of a formal nature.

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

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

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

8 With effect from January 1, 2009, the former Swiss Federal Banking Commission (Eidgenössische Bankenkommission, EBK) has been merged into the Swiss Financial Market Supervisory Authority (Eidgenössische Finanzmarktaufsicht, FINMA) in accordance with the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) (Bundesgesetz über die Eidgenössische Finanzmarktaufsicht, FINMAG, SR 956.1).

Under the 2011 amendment of the Banking Act, the FINMA further has the power, by ordering reorganization proceedings, to order the transfer of all or part of the business with assets, liabilities and contracts to another existing bank or a newly established bridge bank, whereby such transfer will become effective upon the ratification of the reorganization plan by FINMA. Pursuant to Art. 57 of the IO-FINMA, this transfer could be coupled with a temporary stay of any contractual termination right of a counterparty with respect to finance contracts (*Finanzverträge*) for up to 48 hours if such contractual termination right would otherwise be triggered by officially ordered restructuring or protective measures. The reorganization plan can also provide for a debt equity swap. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent more than 50 per cent of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed an the FINMA has to order the bankruptcy.[9]

67 According to the Report the rules regarding the insolvency proceedings of banks and securities dealers are not meant to affect netting arrangements and, in particular, in a liquidation proceedings ordered by the FINMA the relevant provisions of the SDEBA governing netting arrangements shall remain applicable. Art. 27 para. 3 Banking Act explicitly states that netting arrangements shall not be affected by protective measures, restructuring measures and liquidation proceedings.

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

69 Finally, under the 2011 amendment of the Banking Act, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. Federal Act on Private International Law

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

("**PILA**")[10], subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors.

1.2 Set-off

Our Opinion is based on the following additional assumption:

- After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Switzerland and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty. 70

1.2.1 Opinion on effects of insolvency proceedings on the EFET General Agreement and transactions arising under the EFET General Agreement

a) Enforceability under Swiss law of Early Termination rights available as the result of an insolvency based Material Reason (§ 10.5(c)) (whether by automatic or active termination)

i) The EFET General Agreement

The termination of the EFET General Agreement as the result of a Material Reason (§ 10.5(c)), whether by automatic or active termination, is valid and enforceable against Party A. For details regarding the rights available as a result of such termination see n. 77-87. 71

- *All Individual Contracts in existence at time under the EFET General Agreement (the "Single Agreement" concept)(§1.1)*

While the single agreement concept, i.e. the linking of various agreements in respect of multiple transactions so as to be treated as one agreement for purposes of termination, close-out netting calculation of one Termination Amount etc., is not specifically regulated under Swiss substantive law, such linking is, within the general limits of applicable Swiss law, valid and 72

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

the particular aspects of such treatment as one agreement do not, as discussed below, violate Swiss substantive law or the Swiss *ordre public*.

Under the laws of Switzerland it is not necessary that the obligations to be netted form part of a single agreement in order for the netting and close out provisions to be effective. It is sufficient that the different obligations are covered by the respective netting and close out provisions contractually agreed among the parties (even if such netting and close out provisions form part of a separate agreement). 73

The agreement to include pre-existing contracts as part of the Agreement as Individual Contracts constitutes an amendment of such pre-existing contracts and might be subject to further prerequisites stipulated in such pre-existing contracts. 74

Subject to the enforceability of the "Single Agreement" concept under the law chosen by the Parties, the "Single Agreement" concept would also be enforceable in an insolvency scenario, but only to the extent not contravening Art. 211 SDEBA (see n. 77-87) if the insolvent party is Party A. 75

b) Enforceability of discretionary termination rights, close out netting and the calculation and payment of a Termination Amount under §§ 10.3 and 11, (absent operation of Automatic Termination) arising as the result of an insolvency

In the context of an insolvency procedure, the proposed close-out netting constitutes a contractual exclusion of the receiver's step-in right pursuant to Art. 211 para. 2 SDEBA. In addition, together with § 11 of the EFET General Agreement, it provides for a particular method of calculation and aggregating Termination Amounts (including costs and further damages of the terminating party) and, unless the parties have elected Automatic Termination pursuant to § 10.4 of the EFET General Agreement (see n. 85-87), it is an optional termination, which constitutes a modification of the statutory close-out netting pursuant to Art. 211 para. 2bis SDEBA. 76

The validity of the exclusion of the step-in right and the provisions on the calculation of the one net amount to be paid, therefore, need to be analyzed on the basis of the step-in right of Art. 211 para. 2 SDEBA and the statutory close-out of Art. 211 para. 2bis SDEBA. 77

Upon Party A being declared bankrupt, a receiver in bankruptcy would pursuant to Art. 211 para. 2 SDEBA have the right to step into any bilateral agreement which is not yet fully performed as mentioned in n. 59. The same would apply in case of a composition agreement of Party A by way of an assignment in the form of a general winding up (*Nachlass mit Vermögensabtretung*) as Art. 211 para. 2 SDEBA is applicable to this insolvency procedure by analogy pursuant to prevailing doctrine and Federal Supreme Court practice. The opening of a bankruptcy (*Konkurs*) or bank insolvency (*Bankenkonkurs*) and the confirmation of a composition agreement by way of an assignment in the form of a general winding up (*Nachlass mit Vermögensabtretung*) are referred to as an "Insolvency Event" for purposes of the discussion of the enforceability of netting following an insolvency of Party A. 78

The step-in right of the receiver pursuant to Art. 211 para 2 SDEBA is held by the prevailing doctrine to constitute a mere procedural provision, which based on such qualification can be validly excluded by the parties in an agreement entered into prior to a Swiss party becoming subject to an Insolvency Procedure. The calculation of a Termination Amount under such circumstances is also valid and binding as outlined under n. 89-90. As per the legislative history, the introduction of Art. 211 para. 2^{bis} SDEBA did neither aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision, that can be excluded by the parties' agreement, nor limit close-out netting to agreements specifically addressed in Art. 211 para. 2^{bis} SDEBA. Hence, it is our view, that Art. 211 para. 2 SDEBA may be validly waived by the parties for agreements which do not qualify as agreements falling under Art 211 para. 2^{bis} SDEBA. One should note, however, that no court precedents are available to the very point of the non mandatory character of Art. 211 para. 2 SDEBA, be it before or after enactment of Art. 211 para. 2^{bis} SDEBA. 79

The more recent Art. 211 para. 2^{bis} SDEBA excludes the step-in right discussed under n. 77-80 for certain types of agreements, i.e. (i) fixed term agreements (*Fixgeschäfte*) within the meaning of Art. 108 CO and (ii) certain financial derivative transactions, including financial swaps, forward agreements and options. The applicability of Art. 211 para. 2^{bis} SDEBA is, however, always based on the premise that a market price or an exchange quoted price is available for the deliverable under the aforementioned agreements. If applicable, Art. 211 para. 2^{bis} SDEBA provides for an automatic termination of such agreements upon the declaration of a bankruptcy and an abstract calculation of a termination amount based on such market or exchange quoted prices as compared to the contractual value. Such calculation does not as per its language, however, take into account any further damages or costs of either party. 80

Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other side were to specifically agree to it, qualifies as such *Fixgeschäft.* Furthermore, the predominant view is, that the exclusion of the step-in right pursuant to Art. 211 para. 2bis SDEBA applies to all fixed term agreements rather than to financial agreements only. The Deliveries of Electricity may, therefore, if the parties have provided for given delivery dates or periods and elected to apply § 10.5 (d) of the EFET General Agreement, constitute such fixed term obligations as described above. In turn, the derivatives mentioned are specified as "financial" and we doubt that Options on Electricity would need to or even could be qualified as financial options within the meaning of Art. 211 para. 2bis SDEBA; this also based on the particular content of the right conferred by such Option and our understanding that such Options, upon exercise, are to be physically settled in the ordinary course. Following an exercise of an Option, however, the Electricity Deliveries may again constitute fixed term obligations as described above. 81

Art. 211 para. 2bis SDEBA has been introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in an Insolvency Event. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2bis SDEBA, which, as outlined above, does not limit itself to excluding the step-in right of the receiver in bankruptcy provided by Art. 211 para. 2 SDEBA, but also stipulates that the relevant agreements be automatically terminated and finally lays down a calculation method, which as an abstract calculation by and large amounts to the abstract calculation method which is optionally available to the parties of the Agreement, but for the cost element and the reservation of further damages. This raises the question, whether Art. 211 para. 2bis SDEBA may be modified, most noteworthy as to the automatic character of a termination and the calculation method of the amount to be paid following such termination. What we view as the prevailing opinion in (the albeit scarce) doctrine holds, that like Art. 211 para. 2 SDEBA the new Art. 211 para. 2bis SDEBA does not either constitute mandatory law, that could not be contractually modified. There is one dissenting scholarly opinion, which holds that Art. 211 para. 2bis SDEBA in its entirety constitutes substantive law rather than a procedural rule and as such substantive rule is mandatory. In its report to the revision of the step-in right in the SDEBA, though, the Federal Office of Justice specifically stated that the proposed provisions only aimed at procedural aspects and not aspects of substantive law and, in addition, a qualification as a substantive rather than procedural rule does not in our view *eo ipso* exclude its modification by contract which view is also supported by a more recent scholarly 82

opinion. Other qualifying opinions hold, that while a different contractual calculation method is permissible, the automatic character of the termination is to be viewed as mandatory or at least to limit optional termination to a termination with effect prior to the declaration of a bankruptcy and one scholarly opinion holds that in the absence of a termination by the opening of bankruptcy, the termination and the calculation method at law applies. In sum, there seems to be more controversy as to whether an optional termination taking place after the opening of bankruptcy should be effective or replaced by an automatic termination upon the opening of a bankruptcy in the light of Art. 211 para. 2bis SDEBA.

83 In this context one should note, in addition, that already in respect of Art. 211 para. 2 SDEBA an optional termination after the declaration of bankruptcy was only held to be effective, if it had to be declared within a certain short time period. While the optional termination is valid and enforceable outside an Insolvency Event, the effectiveness of an optional termination is more questionable in case of an Insolvency Event. Doctrine holds that an optional termination would allow a counterparty to speculate to the detriment of the other creditors of the insolvent debtor in the absence of a pre-agreed short notice period and should, therefore, be disregarded. It is furthermore held, that if the termination notice provides for an effective date which is later than the date of the opening of bankruptcy or the confirmation of a composition agreement with assignment of assets, then notwithstanding any designation of another date, all calculations may need to be made as of such date. The EFET General Agreement does not provide for such pre-agreed short period and also leaves full discretion to the terminating party as to the termination date.

84 Although the Banking Act does not contain any specific rules regarding close out netting in insolvency procedures and thus in this respect the general rules of the SDEBA should also be applicable to banks and securities dealers, Art. 27 para. 3 of the Banking Act clearly states that netting arrangements shall not be affected by protective measures, restructuring measures and liquidation proceedings (see n. 62-69).

85 In the light of the above uncertainties we recommend to elect "Automatic Termination" rather than to provide for a short term period within which an optional termination would need to be declared, and, thereby, in effect also provide for the day of the declaration of bankruptcy as the effective date for such termination in case of a Swiss party being involved.

c) Enforceability of close out netting and the calculation and payment of a Termination Amount (§§ 10.3 and 11) under an Automatic Termination scenario

For the reasons explained under n. 83 we recommend to opt for Automatic Termination in the case of a Material Reason described in § 10.5(c). Please refer to Appendix A for proposed wording in the Election Sheet, which specifies the events subject to Automatic Termination and also refers to the special rules applicable to Swiss banks and securities dealers and to Swiss branches of foreign banks and securities dealers. 86

1.2.2 A general description of limitations to set off of claims (both in an Early Termination scenario and otherwise):

a) between Parties (of claims arising under the EFET General Agreement)

b) between Parties (of claims arising outside the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement)

c) between Affiliates or Credit Support Providers of Parties (if contractually provided for in an amendment to the EFET General Agreement)

As a matter of Swiss substantive law, money claims that two parties have against each other and that are due and payable, may be set off by either party, notwithstanding whether such claims arose out of the same contract or contractual relationship. This, as a rule, also holds true following the occurrence of an Insolvency Event (except where one party acquired a claim against the bankrupt specifically in order to set it off against the bankruptcy estate, to the detriment of the other creditors). 87

Please note that in the case of contractually provided netting and set-off provisions between Affiliates or Credit Support Providers, the claims to be set-off must result from specific obligations the respective parties have entered into inter se (be it directly or be it by way of disclosed agency based on a valid power of attorney). Such arrangement could still in the case of Swiss Parties be challenged on the basis of corporate law restrictions limiting the capacity of Swiss Parties to enter into undertakings in favor of Affiliates other than their own subsidiaries and which in effect could frustrate the purpose of such undertakings. A general set-off arrangement, whereby Affiliates of the principal debtor undertake to have claims against the 88

principal debtor set-off against themselves (although they are not or at least not a primary obligor), may not be enforceable against a Swiss party as a matter of Swiss mandatory law.

1.2.3 Opinion on whether or not Early Termination, close out netting or the calculation and payment of the Termination Amount is voidable, challengeable or in any way deletable by a liquidator or any third party if insolvency procedures are opened.

89 Absent any court precedents dealing with the very question, and based on the arguments laid out in greater detail under n. 77-87, it is our opinion that Early Termination is valid and binding and not voidable or deletable as a consequence of insolvency procedures. Art. 211 para. 2bis SDEBA should further neither affect the validity of the close-out netting provided in § 10 nor the calculation method of the Termination Amount pursuant to § 11 of the EFET General Agreement in principle. But it may, for the reasons outlined above, lead to an automatic termination with an obligation to calculate the Termination Amount as per such date even in the absence of the parties' election of Automatic Termination.

90 The calculation of the Termination Amount by the terminating party and the calculation method (including the abstract calculation method provided as an alternative) are also valid, albeit subject to judicial review if the amount so calculated is being contested as erroneous. This opinion is based on our understanding that a negative Termination Amount would be payable to the terminating party (or in the case of Automatic Termination, the party which has not triggered such termination), while a positive Termination Amount would be payable to the terminated party. We strongly recommend to clarify the aforestated principle, by specifically stipulating such two-way payment, which in the light of the term "damages" used in § 10.3 is otherwise not free from doubt.

1.2.4 Opinion on whether or not the mere institution of proceedings seeking a judgement of insolvency prior to the opening of the proceedings has any implication on the Enforceability of Early Termination, close out netting and the calculation and payment of the Termination Amount (§§10.3 and 11).

91 The Early Termination, close-out netting and the calculation and payment of the Termination Amount are, subject to the general limitations and explanations contained herein, valid and binding outside and prior to the occurrence of an Insolvency Event, as discussed under n. 77-87, notwithstanding any opening of proceedings that may lead to such a bankruptcy or liquidation.

1.2.5 Opinion on whether or not Individual Contracts for physically settled Options will be treated in a manner consistent with Individual Contracts for forward sales and purchases.

An option under Swiss law, according to the prevailing view, confers its holder a right against the writer to have the underlying contract concluded. We however note that the description of the right conferred by the grant of an Option as defined in the EFET General Agreement does not match that usual characterization of an option right under Swiss substantive law. Rather it confers to the Holder the right to require both parties (the Writer and the Holder) to meet their already existing obligations. It is our view that the content and definition of the Options as per the EFET General Agreement would prevail, but that enforcement thereof would also be subject to the general limitations of an insolvency procedure of the Swiss party as described above. 92

A forward contract, under Swiss substantive law, is a contract which creates mutual rights and obligations from the time of the party's entering into the contract, but is to be fulfilled (at least by one party) at a later stage. The treatment of forward contracts is different from the treatment of options insofar as the holder of an option may at any time decide not to exercise the option (thereby preventing its own obligations towards the writer under the underlying transaction from arising), whereas under a forward sale or purchase the rights and obligations under the main contract are already validly entered into and therefore enforceable as they mature. 93

1.2.6 Opinion and recommendations on the protection of any Performance Assurance (§ 17) posted by a Party based in your jurisdiction and/or to be held in your jurisdiction, in the event of the posting Party's insolvency.

The obligation to provide or increase certain collateral as contained in § 17 of the EFET General Agreement is a mere contractual obligation under Swiss substantive law and is only valid and enforceable as such contractual obligations entered into are enforceable at the time the Requesting Party posts its request for the Performance Assurance. 94

In particular, the Performance Assurance as contained in § 17 of the EFET General Agreement is not enforceable against a Swiss party that has been declared bankrupt and may not be enforceable against it if it has been granted a stay, irrespective of the law chosen as the law governing the EFET General Agreement. 95

Further, it may not be excluded that a Performance Assurance posted by a party that is already insolvent at the time the Performance Assurance is being posted may be subject to a successful challenge under Swiss avoidance of preferences rules, based on the view that the contractual obligation to post such Performance Assurance did in fact only arise after the respective party had become insolvent. 96

2. Non-Insolvency related Material Reasons

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

II. Multibranch Parties

1. Swiss Multibranch Party

Our Opinion is based on the following additional assumption:

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

99 The close-out netting mechanism provided for in the EFET General Agreement is valid and enforceable under Swiss law (see n. 77-87). This conclusion would not be affected if the Swiss Party entered into the EFET General Agreement and Transactions thereunder through a branch established in a jurisdiction other than Switzerland, provided that the laws applicable to such foreign branch characterise the branch as being legally part of the Swiss Party and hence recognise that the branch is not a separate legal entity. In this case, the requirement of reciprocity allowing the set-off of claims is met. A different question is whether the laws of such foreign jurisdiction recognize multibranch close-out netting for purposes of insolvency proceedings in such foreign jurisdiction. This question is answered under Swiss conflict of laws rules by the applicable foreign law to which the PILA refers.

2. Foreign Multibranch Party

Our Opinion is based on the following additional assumptions:

- A corporation, a bank, an investment services provider or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Switzerland has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Switzerland (the "**Swiss Branch**"). 100

- 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. 101

The first question is whether there would be a separate proceeding in Switzerland with respect to the assets and liabilities of the Swiss Branch and at the start of the insolvency proceeding for Party F in Country H. The Swiss Branch of the insolvent Party F is neither automatically subject to the insolvency proceedings initiated against Party F in Country H nor automatically subject to separate insolvency proceedings in Switzerland. The creditors and the receiver of Party F are, however, entitled to start separate insolvency proceedings in Switzerland. 102

Two proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA and (ii) the ancillary insolvency proceeding (*Hilfskonkur*s) pursuant to Art. 166 et seq. PILA. 103

If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this debtor can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note in this context that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, 104

agreements entered into by the principal office in accordance with applicable law are binding also on the branch.

Art. 166 et seq. PILA, on the other hand, provide for the so-called ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor, (ii) it is enforceable in the state where it was rendered, (iii) there is no ground to deny recognition based on formal and material principles of Swiss *ordre public*, and (iv) if the state where the decision was rendered grants reciprocity. The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA). 105

If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law (Art. 170 PILA), including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA). 106

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency proceeding, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, and (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) may directly file claims in such ancillary insolvency proceeding. If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors. 107

A branch insolvency can be opened after an ancillary insolvency proceeding has been declared, but only until the ancillary insolvency proceeding reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*), and if opened would then take precedent over the ancillary insolvency proceeding, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 108

The second question is whether the Swiss authorities would defer to the proceedings in Country H so that the assets and liabilities of the Swiss Branch would be handled as part of the proceeding for Party F in Country H. The Swiss authorities would other than with respect to banks and securities dealers and Swiss branches of foreign banks and securities dealers (see below n. 110) not defer to the proceedings in Country H, except to the extent provided in case of an ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA as further discussed under n. 105-107. If the decree is recognized pursuant to Art. 166 et seq., the competent Swiss authorities will open ancillary bankruptcy proceedings covering all assets located in Switzerland in accordance with Swiss insolvency laws (Art. 170 PILA). Any excess of the bankruptcy estate of the Swiss Branch is transferred to the foreign bankruptcy in Country H as soon as the collocation plan is recognized by the Swiss judge pursuant to Art. 166 PILA. 109

With respect to banks and securities dealers and Swiss branches of foreign banks and securities dealers, under the 2011 amendment of the Banking Act, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors. 110

The third question is whether legal creditors of the Swiss Branch could initiate a separate proceeding in Switzerland even if the relevant authorities in Switzerland did not so. In this respect, please note that claims against the Swiss Branch can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). A branch insolvency can be opened against the Swiss Branch, but in case ancillary bankruptcy procedures have been requested only until the ancillary insolvency proceeding reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*). If opened, the bankruptcy of the Swiss Branch will take precedence over the ancillary insolvency proceeding, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 111

In both scenarios (i) the branch insolvency (*Zweigniederlassungskonkurs*) and (ii) the ancillary insolvency proceeding (*Hilfskonkurs*), a Swiss receiver would be bound by the set-off and netting rights of the counterparty of the Swiss Branch under a Master 112

Agreement, whether entered into on a multibranch basis or not. The ability of the counterparty to set-off its claims against the claim of the Swiss Branch would thus extinguish the latter's claim, provided the counterparty's claim exceeds such claim. Accordingly, there would be no asset of the Swiss Branch available to the Swiss receiver after close-out netting under the EFET General Agreement entered into on a multibranch basis.

Furthermore, a Swiss court, or a Swiss receiver or liquidator, would be bound by the principles on which the EFET General Agreement is based as a matter of substantive law, including the "Single Agreement" concept. We are thus of the opinion that a Swiss court would give effect to the "Single Agreement" concept on which the EFET General Agreement is based. We also note that this recognition would be in line with the principle of the universality which applies in the context of any Insolvency in Switzerland as well as based on the principle that, to the extent Art. 211 para. 2 SDEBA is of a mere procedural nature, a Swiss court or a liquidator or receiver would be bound by the contractual arrangements entered into by the parties prior to bankruptcy. In sum, separate insolvency proceedings with respect to the Swiss Branch would not in our view and as a matter of Swiss law adversely affect the multibranch close-out netting. 113

III. Collateral

Our Opinion is based on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral. 114

- The counterparties agree that Eligible Credit Support will consist solely of Cash and/or Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency. 115

- Collateral in the form of Cash will not be remitted physically and any disposition of Cash will be conducted by way of wire-transfer. 116

- Collateral in the form of Letters of Credit will be provided by having a duly licensed bank ("**Issuing Bank**") issue such Letter of Credit directly in favor of the Transferee, but that Party B is not a party to the agreement between Party A and the Issuing Bank based on which the Issuing Bank issues the Letter of Credit to Party B. The Issuing Bank issues the Letter of Credit a as part of its ordinary banking business and on customary terms and conditions. In the context of close-out-netting, the Letter of Credit is accounted for with the full nominal value of the un-drawn amount of the Letter of Credit. 117

1. EFET Credit Support Annex

The agreement in the EFET General Agreement and the EFET Credit Support Annex to provide Eligible Collateral in the form of Cash or a Letter of Credit is a valid undertaking under Swiss law and the choice of German or English law to govern the EFET Credit Support Annex and the undertaking by Party A to provide Cash collateral or a Letter of Credit to Party B as Transferee is a valid choice of law in accordance with Art. 116 PILA and would have to be applied to any claim under the EFET Credit Support Annex by a Swiss court. 118

1.1 Cash Collateral

Based on the assumption that Cash will not be remitted physically, but that any disposition of Cash will be conducted by way of wire-transfer, neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the collateral arrangement does not consist of assigning or pledging a claim that the counterparty holds as against its bank, but rather of a wire-transfer resulting in a debit on the counterparty's bank account, i.e. in the discharge of the counterparty's bank from paying the respective amount, and in a credit on the bank account of the other counterparty. Thus, in our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the parties, only a claim that is governed by the EFET Credit Support Annex remains and the Secured Party's rights to claim the transfer of Cash and to use the Cash as collateral will be governed by German or English law (as applicable) as the law applicable to the EFET Credit Support Annex (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer). 119

It is our view, that the Parties may as a matter of Swiss law subject Cash provided as collateral to the provision of close-out-netting as provided for under the General Agreement 120

in connection with the EFET Credit Support Annex in accordance with § 11 of the EFET Credit Support Annex and that Party B may as part of such close-out-netting and in terms of realizing such Cash collateral for purposes of the General Agreement and the EFET Credit Support Annex merely account for the Cash as part of "other amounts payable" owed by the Transferee.

1.2 Letters of Credit

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

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

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

124 In our view, there is not either any reasonable basis in Swiss law for a receiver in bankruptcy of, or a liquidator in a composition procedure against Party A to request that

any amount having been paid to the Secured Party under the Letter of Credit be paid over by the Secured Party to the receiver in bankruptcy or liquidator so as to be shared with Party A's other creditors.

IV. General Validity of the EFET General Agreement as modified and amended by the Allowances Appendixes

Our Opinion is based on the following additional assumptions:

- The Parties have entered into the EFET General Agreement as modified and amended by the Allowances Appendixes under the following scenarios:

  - Party A trading Allowances only without trading electricity; and

  - Party A trading both electricity and Allowances simultaneously.

1. Legal or regulatory classification of Allowance Transactions

1.1 Regulatory Framework

As at the date hereof, no legal or regulatory classification has been made under the laws of Switzerland with respect to Allowance Transactions. 125

The Kyoto-Protocol has been implemented in Switzerland by enactment of the Federal law on the Reduction of CO_2, that has come into force on May 1, 2000 ("**CO_2-Code**") and the implementing ordinances thereto. Trading in emission allowances and certificates based on the Swiss Emission Trading Register (*Emissionshandelsregister*) has commenced in early 2008. The following emission allowances and certificates can be traded: (i) Assigned Amount Unit (AAU), (ii) Removal Unit (RMU), (iii) Emission Reduction Unit (converted from AAU) (ERU), (iv) Emission Reduction Unit (converted from RMU (v) Certified Emission Reduction (CER), (vi) Temporary CER (tCER) and (vii) Long Term CER (lCER). European Union Allowances (EAU) cannot yet be traded through the Swiss emission trading register and the Swiss trading system is for the time being neither linked to nor compatible with the Emissions Trading Scheme (EU ETS) established by the EU and its Member States for the trading of European Allowance Units (EAU). 126

To participate in the EU ETS, Switzerland has yet to conclude an agreement with the EU to provide for the mutual recognition of Allowances (EAUs and Allowances granted by 127

Switzerland) between the EU and Switzerland. Following exploratory negotiations, the Swiss Federal Council (*Bundesrat*) has now issued a mandate for formal negotiations with the EU in December 2009.

1.2 Legal Qualification of Allowances

Whether Allowances would be qualified as securities within the meaning of the SESTA or other rights is a question of interpretation. 128

We would like to point out that our views expressed below with regard to the legal qualification of Allowances are, in the absence of any precedents, formed on the basis of general legal principles.[11] 129

Under the SESTA, securities are defined as standardized certificates which are suitable for mass trading, rights not represented by a certificate with similar functions (book-entry securities) and derivatives. There are no provisions in the SESTA or related legislation governing the legal qualification of Allowances under Swiss law. Allowances, which each represent the right to emit one tonne of carbon dioxide or equivalent during a specified period, are, in our view not comparable to financial instruments or securities respectively which entitle the holder to monetary, shareholder or similar rights. We are, therefore, of the opinion that Allowances as such are not to be qualified as securities within the meaning of the SESTA but constitute rights *sui generis*. The same approach has to our knowledge been adopted in the EU. Financial derivatives on Allowances meeting the criteria of standardization and suitability for mass trading in turn would qualify as securities within the meaning of the SESTA. Over-the-counter Financial derivatives, however, are not as a rule suitable for mass trading. 130

Were the Allowances to be qualified as securities within the meaning of the SESTA, then entities which trade Allowances in a professional capacity, on the secondary market, either for their own account with the intent of reselling them within a short period of time or for the account of third parties, or make public offers on the primary market, or create derivatives and offer them to the public and were thus to be qualified as security dealers would be subject to authorization by the FINMA in its capacity as Supervisory Authority. 131

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[11] In its 2009 Annual Report, the FINMA states that it is currently looking into the question of qualification of Allowances, but has not yet come to a conclusion.

1.3 Qualifications and limitations

Unless specifically stated to the contrary in n. 133-137 below, any qualification or limitation expressed herein in respect of the EFET General Agreement as applied to Individual Contracts for and concerning the delivery and acceptance of electricity does also apply to the EFET General Agreement as modified and amended by an Allowances Appendix and as applied to Allowance Transactions. 132

The EFET General Agreement as modified and amended by an Allowances Appendix is subject to the following additional or modifying qualifications and limitations: 133

- *Swiss insolvency laws as they apply to forward Allowance Transactions settled by delivery of Allowances to Trading Accounts*

  There are no specific rules governing forward Allowance Transactions settled by delivery of Allowances to Trading Accounts contained in the SDEBA. Hence, subject to the following modifications and amendments, the general principles governing insolvency as set out under n. 58-61 above apply. 134

  The delivery of Allowances may constitute a fixed term obligation within the meaning of Art. 108 CO as delivery of Allowances shall only be permissible up to a certain date and the Delivery Date is of particular importance to the Buyer with respect to the calculation of its Allowances during a specified period. Pursuant to the predominant view, that the exclusion of the step-in right pursuant to Art. 211 para. 2^{bis} SDEBA applies to all fixed term agreements rather than to financial agreements only, such exclusion would also apply to Allowance Transactions. 135

- *Opinion on whether or not Individual Contracts for physically settled Options will be treated in a manner consistent with Individual Contracts for forward sales and purchases*

  As Allowance Transactions in the form of options are not contemplated by the Allowances Appendix, our opinion under n. 92-93 above is not relevant with respect to the Allowances Appendix. 136

- *Term and Termination Rights (§ 10.5 of the Allowances Appendix)*

The possibility to terminate the Allowances Appendix only and not the previously executed EFET General Agreement, is, within the general limits of applicable Swiss law, valid. 137

- *Exclusion of cross product payment netting (§ 13.3.1 of the Allowances Appendix)*

The exclusion of cross product payment netting as provided for in §13.3.1 of the Allowances Appendix is, subject to the insolvency issues set out above, in compliance with Swiss law. 138

- *Gross-up (§ 14.5 of the Allowances Appendix)*

If the Parties elect § 14.5 of the Allowances Appendix to apply, then the gross-up obligation is subject to the limitations addressed in n.170. 139

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

1. (§7) Force Majeure

- *Would this provision be enforceable under the law of your jurisdiction in accordance with its own terms?*

The Force Majeure provision contained in the EFET General Agreement is, as a matter of Swiss substantive law enforceable in accordance with its own terms and does not violate the Swiss ordre public. 140

We, however, note that under Swiss substantive law the term "release" in respect of an obligation would connote a permanent release (*Aufhebung*), whereas in case of a mere temporary character the term suspension (*Aufschub*) would typically be used. As the main consequence of a release of one party due to force majeure, namely the release of the other party's corresponding obligations is described in sufficient detail, such terminology does, however, not pose any difficulty so long as such force majeure lasts and the Agreement is not terminated pursuant to § 7.5. It is unclear to us, however, whether once the force majeure is terminated, any released obligation under an Individual Contract would be reinstated, and hence, in the absence of a termination of the Agreement as mentioned above, would merely constitute a temporary suspension, or whether such obligations and the concerned Individual Contract have been terminated. This point should be clarified in order to avoid any uncertainty be it as to 141

performance under such Individual Contracts or as to whether such Individual Contracts would need to be taken into consideration for purposes of calculating a Termination Amount under § 11 in case of a termination subsequent to the end of a force majeure event. This applies mutatis mutandis to other paragraphs that specifically stipulate that a certain obligation is released and not merely suspended (see in particular: § 7.2 / 9 / 10.3 (b));

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

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

  If the fulfillment of its obligations validly entered into under an agreement has become impossible for one party for reasons that are beyond that party's control, the respective party is released from its obligations at law. The other party is then also released from its obligations and is entitled, as a rule, to claim back any pre-payments made to the defaulting party. 142

  If the facts and circumstances surrounding a transaction materially change in a way that could not reasonably have been foreseen by a party and if such changes would lead to a situation where the mutual rights and obligations would become clearly disproportionate to the detriment of one party, the judge may amend the respective terms of the agreement. Swiss courts are rather reluctant in applying that so called concept of *clausula rebus sic stantibus* in general, and especially where the parties entering into an agreement were seasoned market participants which specifically intended to conclude an agreement that deals with uncertain future developments (such as price changes, etc.). 143

2. (§8) Remedies for Non-Performance

As a matter of Swiss substantive law, the parties are free to determine the consequences of non-performance within the limits of mandatory law. The remedy of damages as such as well as the alternative calculation methods of §8 are valid and binding to the extent that §8 is aimed at calculating the immediate damages resulting from such failure to deliver or to accept only and in the light of §11 is not meant and may not be interpreted as limiting compensation for any further damages suffered by the other party, other than as contemplated by §11. 144

3. (§12) Limitation of Liability

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

  As a matter of mandatory Swiss substantive law, liability cannot be validly excluded for willful misconduct (*Absicht*) and gross negligence (*grobe Fahrlässigkeit*). In case of an entity holding a government license to carry out its activity, which in particular includes banks, securities dealers and Swiss branches of foreign banks and securities dealers, even an advance waiver of liability for simple or slight negligence may not be enforceable upon the court's discretion. 145

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

  The limitation of exclusion of liability mentioned under no. 145 above, also applies with regard to consequential damages and similar types of liabilities. 146

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

  Under Swiss substantive law, a party has a duty to mitigate already at law. 147

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

  There is no such possibility, as the restrictions described under no. 145 above exist as a matter of mandatory law. 148

VI. Confirmation Practices

Our Opinion is based on the following additional assumptions:

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

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

1. Binding Individual Contract

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

- *Is a taped verbal agreement sufficient or is a written agreement required?*

The Transactions contemplated by the EFET General Agreement do not call for any particular mandatory form, an oral agreement is sufficient. 149

With regard to the taping of the conversations held, please note that in order to be effective under Swiss law, the consent to the recording of telephone conversation not only needs to be given by the parties, but by the physical persons acting on behalf of the parties. It is, however, sufficient that the respective persons are made aware of such recording, be it when initiating a telephone call or be it by having the persons acting for a party generally agreeing to such recording. 151

- *Is an electronically transmitted confirmation of a Transaction acceptable?*

The Transactions contemplated by the EFET General Agreement do not call for any particular mandatory form, such electronically transmitted confirmation is, therefore, acceptable. 152

- *Is there a signature requirement?*

Based upon and subject to n. 149-152, there is no such requirement. 153

- *At what point in time does an Individual Contract agreed upon orally and later confirmed in writing become legally enforceable?*

The Individual Contract becomes legally enforceable at the moment the two duly authorized representatives reached an agreement on all essential terms of the transaction orally. 154

Please note in that context that while an Individual Contract is validly concluded when the essential terms are agreed orally, the specific terms agreed may be difficult to prove. 155

- *Does failure to object to incorrect terms in a received Confirmation (as provided for in § 3.3) constitute "acceptance" of those terms? If so, is there a relevant time period?*

Notwithstanding the oral conclusion of an Individual Contract, any terms of a written Confirmation which are inconsistent with the oral understanding, but have not been timely rejected, as specifically required by § 3.3 of the EFET General Agreement, the addressee of the Confirmation would override the terms of the previous oral agreement, provided that the inconsistency is not such, that the confirming party could not (by objective measure) legitimately expect the addressee thereof to agree with the inconsistent part. In turn, due fulfillment of an Individual Contract in strict compliance with an inconsistent Confirmation by the addressee thereof would constitute irrevocable acceptance of the terms laid down in such Confirmation. 156

2. Means of Evidence

The means of evidence in a Swiss court depend on the procedural rules applicable in such court and to the particular procedure. Generally speaking, in an ordinary procedure, besides written evidence, witness statements and hearings of witnesses and parties are typically acceptable means of evidence of the conclusion and the contents of an agreement. Tapes that have been recorded legally could also be introduced in a court proceeding. Note though, that the assessment of any evidence remains in the discretion of the court and the court is not bound by any agreement of the parties as to the permissibility and the conclusiveness of any particular means of evidence. 157

Please note that in the context of debt enforcement procedures, the special summary procedure (*Rechtsöffnungsverfahren*) discussed under n. 24 is only available if the debt acknowledgment is in writing and signed by the debtor. 158

VII. Core Provisions

1. Core Provisions, Modifications and Amendments

We regard all of the provisions dealing with the netting aspects (in particular § 11 in connection with § 13.3 of the EFET General Agreement) as core provisions of the EFET General Agreement. A material alteration thereof could affect the conclusions reached in Part D of our opinion. 159

Further please note that our opinion is given on the basis of the EFET General Agreement (including Annexes, Schedules and the Allowances Appendixes) only. Any modification to any provision of the EFET General Agreement (including a modification to the wording suggested for § 10.4 of the Election Sheet (Automatic Cancellation) and § 14.9 of the EFET General Agreement (Tax Gross-up) or any additional provision could affect the conclusions reached in our opinion in respect of such clauses. 160

2. Alterations

You have asked us to confirm whether the two following proposed alterations (set forth in italics below) to the EFET General Agreement would affect the conclusions reached in Part D of our opinion: 161

- *Any change to the effect that § 10.4 ("Automatic Termination") shall only apply in respect of an event specified in § 10.5(c)(iv) of the EFET General Agreement, if the relevant proceeding is instituted by, or the relevant petition is presented to a court or authority in the jurisdiction where the party is incorporated or in certain other jurisdictions.*

  This change would not affect the conclusions reached in Part D of our opinion. However, please note that we propose a specific language to be included in the Election Sheet which is intended to clarify Automatic Termination (see the proposed language in Appendix A hereto which language, for the avoidance of doubt, would replace, and not be in addition to, the above alteration). 162

- *Replacing § 10.5 (c) with a new wording describing the events intended to be covered as "Winding-up/Insolvency/Attachment" differently, provided that the following events are included: (i) a party becomes insolvent or becomes unable to pay its debts, when*

they fall due, (ii) a party makes a general assignment, arrangement or composition with or for the benefit of its creditors, and (iii) a petition is filed with respect to a party for (a) seeking a judgment of insolvency, bankruptcy or other similar proceeding or (b) appointing an administrator, liquidator, receiver or other similar officer for its assets or substantially all of its assets (the change may or may not be combined with a grace period).

163 Also this change would not affect the conclusions reached in Part D. However, for Swiss parties, we strongly recommend using the additional wording proposed by us for the election of Automatic Termination (see the proposed language in the Annex hereto which language, for the avoidance of doubt, would replace, and not be in addition to, the above alteration).

VIII. Governing Law, Arbitration and Jurisdiction

Our Opinion is based on the additional assumption:

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

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

165 Subject to the general limitations discussed above and except as addressed for specific provisions, the Agreement constitutes valid and enforceable obligations of Party A as a matter of Swiss law both (i) if governed by Swiss law or (ii) another law such as German law or the law of England and Wales, if under scenario (ii) such obligations constitute valid and enforceable obligations of Party A under such other law including German law or the law of England and Wales. Unless specifically stated to the contrary, any qualification or limitation expressed above in respect of Swiss substantive law would also apply in case of the EFET General Agreement being governed by foreign law.

- *Are there any applicable limitations on the courts in your country with regard to upholding a choice of local law and submission to the jurisdiction of local courts?*

166 The choice of law clause contained in the EFET General Agreement, providing for the applicability of the substantive law of the Federal Republic of Germany as well as the law of England and Wales is, under the laws of Switzerland, in each case a valid choice of law, assuming that no applicable law (other than Swiss law) contains provisions to the contrary.

167 The EFET General Agreement provides for an arbitration court having its seat in London, England, if Option A is chosen, or in Germany if Option B is chosen. An award of an English or a German arbitration court, as the case may be, against Party A would be enforced in Switzerland in accordance with the 1958 New York (United Nations) Convention, which provides for acknowledgement and enforcement in the absence of a cause for refusal pursuant to Art. V of said Convention.

IX. Regulatory Regime

- *If an entity is trading with a counterparty organized in your jurisdiction, or if a delivery point is in your jurisdiction, what, if any, licenses, permits or other approvals would be required under local law?*

168 The import, export and trading in electricity as such is not subject to a license. Pursuant to a recent amendment of the SESTA, though, exchanges on which electricity may be traded are exchanges within the meaning of Art. 2 lit. b SESTA and Art. 2a SESTA delegates legislative power for the regulation of exchange trading of electricity to the Federal Council (*Bundesrat*), who has not, however, so far enacted such implementing ordinance. Foreign exchanges allowing remote access to Swiss parties need to obtain a licence as a foreign exchange pursuant to Art. 37 SESTA in conjunction with Art. 14 of the implementing ordinance thereto. Based on Art. 2 lit. b and Art. 7 SESTA the license to a foreign exchange imposes on the foreign exchange to only allow access to Swiss parties being supervised by the FINMA for trading in electricity derivatives. It is our understanding that the same does not apply, though, to spot transactions. Over-the-counter financial derivatives do not typically satisfy the requirement of suitability for mass-trading and, hence, would not qualify as securities within the meaning of the SESTA and, hence, trading of electricity is not as a matter of Swiss law regulated.

- *Are there any currency or exchange control laws which may affect the General Agreement?*

  There are no exchange or currency control rules in force under present Swiss law which would today affect the EFET General Agreement in Switzerland. 169

X. Other Provisions

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

- *Tax Gross-up (§14.9).*

  In view of Art. 14 of the Swiss Federal Withholding Tax Act the undertaking of the Obligor to make all payments without deduction of Swiss withholding tax (*Verrechnungssteuer*) and to gross-up its payments accordingly, may be considered unenforceable in the case that at any time such payments should become subject to any Swiss withholding tax. The Swiss Federal Tax Administration published in 1990 guidelines stating that a gross-up provision would not need to be generally qualified as a circumvention of said Art. 14 if (i) the gross-up is not worded as an obligation to pay an additional amount to compensate for such withholding in a tax clause, but is rather addressed through a minimum interest provision which in case of any withholding provides for the necessary increase, (ii) the corresponding amount of withholding tax (based on the increased amount) is actually remitted to the tax authority, (iii) the borrower agrees to furnish to the lender such certificates and other documents as shall be necessary to claim a refund or reduction of the withholding tax and (iv) the parties in good faith had assumed that no withholding tax was applicable.[12] 170

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

  The appointment of one party as the Calculation Agent for determination of the Settlement Price is valid. The criteria and methods stipulated by the agreement both during and outside a Market Disruption if followed satisfies the requirement that a determination by a contract party be made using objective criteria and acting 171

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

commercially reasonable. The appointment of Dealers pursuant to §15.3 (c) constitutes the appointment of experts (*Schiedsgutachter*) and the respective Dealers will be subject to the same standard of independence applicable to judges and arbitrators and it is not free from doubt whether legal entities are eligible or only physical persons. The determination of the Settlement Price of such Dealers is binding (i) in the absence of a manifest error, as specifically reserved in §15.3 (c) and if (ii) it has been reached in a proper procedure and none of the Dealer was subject to exclusion or rejection on grounds of lack of independence.

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

A notice made to Party A in Switzerland and which is not actually received by it, may, notwithstanding the fiction stipulated in the Agreement, not constitute a valid notification to Party A and, hence not be binding on it. 172

- *Amendments in writing (§23.3).*

Notwithstanding the formal requirement stipulated for amendments to the Agreement, one cannot rule out that a party to the Agreement could successfully argue (being understood that it would carry the burden of proof therefor) that this particular formal requirement has been overruled by an amendment of this clause by the parties agreed in another form. We, therefore, usually recommend to specifically include in such clauses that the formal requirements also apply to amendments of that particular clause. 173

- *Partial Invalidity (§23.4).*

The provision on partial invalidity is subject to the scope of and reason for the invalidity. It may in particular not be effective if (i) the illegal provision constitutes an essential (by objective measure) part of the overall agreement which is indispensable for the valid conclusion of such agreement and failing agreement of the parties on an alternative provision - the obligation to agree on such alternative being a mere obligation of negotiating in good faith - would therefore void the entire agreement or (ii) where the reason for such invalidity lies in the legal effect that the parties wanted to achieve with the particular provision, in which case any alternative provision aiming at the same effect would be invalid as well. 174

E. ADRESSEES, GOVERNING LAW, JURISDICTION

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

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

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

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

Yours sincerely

LENZ & STAEHELIN

Patrick Hünerwadel

Appendix A

Drafting proposal for Automatic Termination in respect of Swiss Parties:

> "Automatic Termination shall apply with termination effective upon the occurrence of the earlier of (i) the filing for a request for stay (*Gesuch um Nachlassstundung*), whether provisional or definitive; (ii) the date of the resolution passed by the competent corporate body for the dissolution with liquidation; (iii) the date of registration of the liquidation with the Commercial Register; (iv) the filing by the respective entity of a request to be declared bankrupt (*Antrag auf Konkurseröffnung*); or (v) the formal declaration of bankruptcy (*Konkurseröf*fnung); (vi) in respect of a Swiss bank or Swiss branch of a bank licensed under the Banking Act, it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory Authority, (aa) protective measures (*Schutzmassnahmen*) under Article 26 para. 1 lit. f, g or h of or other protective measures establishing a payment moratorium of general applicability or ordering the termination of its business operations, (bb) restructuring procedures (*Sanierungsverfahren*) under Articles 28-32 of the Banking Act or (cc) an order for liquidation and the withdrawal of its banking license under the Federal Banking Act."

If one wishes to limit the scope for Automatic Termination in respect of Swiss banks or Swiss branches of a bank licensed under the Banking Act, one can limit Automatic Termination to (vi)(cc) and move (aa) and (bb) to the events giving rise to optional termination.

Appendix B

Transactions under the EFET General Agreement

Commodity Forward. A transaction in which one party agrees purchase from or sell to the other party a specified quantity of a Commodity at a future date in exchange for payment of an agreed price to be set on a specified date in the future. The transaction may either be settled by physical delivery of the quantity of Commodity in exchange for the specified price or it may provide for cash settlement with the payment calculation based on the quantity of the Commodity and settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Spot. Some jurisdictions recognise a subset of Commodity Forward transactions with an extremely short tenor (i.e. the period of time between entry into the transaction and its settlement) which can be as short as the same day or as long as one or more days (in accordance with the local definition of the term, if any). Such a "Commodity Spot" transaction typically contemplates settlement by only physical delivery of the quantity of Commodity. In this regard, please confirm whether or not the laws of your jurisdiction make a distinction between a "spot" and a "forward" trade or contract as described above. Is a "spot" trade or contract defined under the laws of your jurisdiction? If so, do spot transactions fall within the scope of your opinion on close-out netting and would they be enforceable transactions under the close-out netting provisions of the EFET General Agreement?

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.

Commodity means electricity or emission allowances rights.