

**EFET Gas & Power
Clarification of “Affiliate” definition**

**for the EFET Legal Committee
3rd December 2015**

1. INTRODUCTION

The currently published version of EFET Gas (version 2.0(a)) & EFET Power (Version 2.1(a)) (“EFET”) contains the following wording for the definition of “Affiliate”.

*“Affiliate” means with respect to a Party, any Entity Controlled, directly or indirectly, by that Party, any Entity that Controls, directly or indirectly that Party or **any Entity directly or indirectly under the common Control of a Party.** (our emphasis)*

An ambiguity has been identified in respect to the wording under the third limb of the standard definition of “Affiliate”. The purpose of this memo is to clarify the meaning of the definition of “Affiliate” as understood by market participants and members of EFET, in particular the Legal Committee of EFET.

2. ANALYSIS

The definition of Affiliate, as currently drafted, covers 3 different scenarios:

- An “Affiliate” is a company under the (direct or indirect) control of a party to the EFET - subsidiary;
- An “Affiliate” is a company that (directly or indirectly) controls the party to the EFET – parent company;
- An “Affiliate” is a company that is directly or indirectly “under the common control of a party” to the EFET.

The last part of the definition does not make sense linguistically, as “under common control of a party” to the EFET would already be covered by “under (direct or indirect) control”. Any interpretation to read this sentence as intending to cover companies “under common control of a party and a third party” therefore, does not make sense.

In other trading agreements, including e.g. ISDA and EFET MNA, the wording of the last part of the definition of “Affiliate” reads “under common control **WITH** a party”. The fact that the EFET definition (1) does not cover the scenario of sister companies and (2) does not make sense from a linguistic perspective, is suggestive of there being a clear and unintentional mistake in the standard EFET documentation.

Considering the obvious mistake in the EFET and the market understanding that sister companies should be included in the definition of “Affiliate”, the rules of contractual construction under English law or of contractual interpretation (“Vertragsauslegung”) under German law should be applied when looking at the definition and it should be read as meaning “under common control **WITH** a Party”.

3. CONCLUSION

The EFET Legal Committee with this memorandum clarifies and states that the intention of the definition of Affiliate in its EFET Power and EFET Gas standard agreements published on its website is intended to mean and should be read as:

*“Affiliate” means with respect to a Party, any Entity Controlled, directly or indirectly, by that Party, any Entity that Controls, directly or indirectly that Party or **any Entity directly or indirectly under common Control with a Party.**”*

Any company trading based on EFET should understand and interpret the definition in any of its existing agreements based on the content of this memorandum.