

EFET

European Federation of Energy Traders

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WAIVER: THE FOLLOWING EMIR RISK MITIGATION TECHNIQUES AGREEMENT WAS PREPARED BY EFET'S MEMBERS EXERCISING ALL REASONABLE CARE, HOWEVER, EFET, THE EFET MEMBERS, REPRESENTATIVES AND COUNSEL INVOLVED IN ITS PREPARATION AND APPROVAL SHALL NOT BE LIABLE OR OTHERWISE RESPONSIBLE FOR ITS USE AND ANY DAMAGES OR LOSSES RESULTING FROM ITS USE IN ANY INDIVIDUAL CASE AND IN WHATEVER JURISDICTION. IT IS THEREFORE THE RESPONSIBILITY OF EACH PARTY WISHING TO USE THIS AGREEMENT TO ENSURE THAT ITS TERMS AND CONDITIONS ARE LEGALLY BINDING, VALID AND ENFORCEABLE AND BEST SERVE TO PROTECT THE USER'S LEGAL INTEREST. EFET IS PROVIDING THIS AGREEMENT AT THE REQUEST OF ITS MEMBERS AS A MEANS OF FACILITATING BILATERAL AGREEMENT BETWEEN PARTIES TO ADDRESS CERTAIN OBLIGATIONS UNDER EMIR. ANY PARTIES CONTEMPLATING USING THIS AGREEMENT ARE URGED TO CONSULT THEIR OWN COUNSEL.

EMIR Risk Mitigation Techniques Agreement

Supplementary Agreement for the Implementation of Obligations in respect of Regulation EU 648/2012 (EMIR)

Between

having its registered office at _____

("Party A")

and

having its registered office at _____

("Party B")

(referred to jointly as the "Parties" and individually as a "Party")

entered into on _____ (the "Effective Date")

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Part I. General Terms and Conditions of Agreement

§1

Subject of Agreement

1. **Subject of Agreement.** In order to facilitate compliance with their regulatory obligations resulting from EMIR, and to reflect that regulators require: (i) certain risk mitigation techniques to be put in place, and (ii) the reporting of trade data, to increase market transparency and enable the monitoring of systemic risk, the Parties enter into this Agreement, which shall supplement any ~~previously~~ agreed terms or Covered Agreement governing EMIR Relevant Transactions between them, whether entered into on, before or after the Effective Date. For the avoidance of doubt, this Agreement shall not override or amend any Agreed Process.
2. **Amendments to Covered Agreements.** The Parties hereby agree that, to the extent required in accordance with §1.1 (*Subject of Agreement*) above, the terms of each Covered Agreement, if any, between them will be amended and supplemented with effect from the Effective Date in accordance with the terms of this Agreement. The Parties may elect to designate in Part II of this Agreement that §4 (*Portfolio Reconciliation*), §5 (*Dispute Identification and Resolution Procedure*) and §8 (*Confidentiality Waiver*) of this Agreement shall not apply where the Parties have entered into an Alternative Documentary Solution.
3. **Applicability to non-EMIR Relevant Transactions.** At the discretion of the Parties, in order to facilitate and simplify internal operational and administrative processes, the terms of this Agreement that are applicable to EMIR Relevant Transactions may be applied to transactions other than EMIR Relevant Transactions. Any agreement by the Parties to apply the terms of this Agreement to any transaction is without prejudice to either Party's assessment of whether or not that transaction constitutes an EMIR Relevant Transaction and no inference should be drawn by virtue thereof.

§2

Definitions and Construction

1. **Definitions.** Terms used in this Agreement shall have the meanings set out in Annex 1 (*Defined Terms*).
2. **Inconsistencies.** In the event of any inconsistency between the provisions of Part I of this Agreement and Part II, Part II shall prevail. In the event of any inconsistency between this Agreement and any Agreed Process or Covered Agreement, the Agreed Process or Covered Agreement shall prevail, except to the extent that this Agreement specifically provides that a provision of this Agreement shall apply notwithstanding anything to the contrary in any Covered Agreement.
3. **Interpretation.** The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.

§3

Election of Counterparty Status; Status Change

1. **Election of Counterparty Status.** In some cases the application and content of obligations under EMIR and Supporting Regulation depend on the status of both Parties to an EMIR Relevant Transaction. For the purposes of determining the application and content of obligations under EMIR and Supporting Regulation, the Parties may elect to designate their respective counterparty status under Part II of this Agreement.
2. **Change of Status Notice.** Where a Party has elected to designate its counterparty status under Part II of this Agreement, such Party shall promptly give a written notice to the other Party in case of a change in such counterparty status ("**Change of Status Notice**"). Where such change affects the application and/ or content of the obligations of one or both Parties under EMIR and Supporting Regulation, any affected Party shall promptly ensure compliance with such affected obligations.

3. **Effect of Non-Compliance with Change of Status Notice Requirements.** If a designation of counterparty status by a Party under Part II of this Agreement is discovered to have been incorrect or misleading or a Party fails to send a Change of Status Notice when obliged to do so by §3.2 (*Change of Status Notice*), then each Party shall use commercially reasonable efforts, which may include negotiating in good faith and in a commercially reasonable manner to amend the terms of any EMIR Relevant Transactions or Covered Agreement, to maintain so far as possible the material economic terms of the affected EMIR Relevant Transactions while enabling each Party to fulfil its respective obligations under EMIR and Supporting Regulation.

§4

Portfolio Reconciliation

1. **Portfolio Reconciliation.** The Parties agree to reconcile portfolios as required by the Portfolio Reconciliation Risk Mitigation Techniques. Each Party shall ensure that Part II of this Agreement designates whether it is a Portfolio Data Sending Entity or a Portfolio Data Receiving Entity.

2. **One-Way Delivery of Portfolio Data.** If only one Party is a Portfolio Data Sending Entity:
- (a) on each Data Delivery Date, the Portfolio Data Sending Entity will provide Portfolio Data to the Portfolio Data Receiving Entity;
 - (b) on each PR Due Date, the Portfolio Data Receiving Entity will perform a Data Reconciliation;
 - (c) if the Portfolio Data Receiving Entity identifies one or more discrepancies which such Party determines, acting reasonably and in good faith, are material to the rights and obligations of the Parties in respect of one or more EMIR Relevant Transactions, it will notify the other Party in writing as soon as reasonably practicable and the Parties will consult with each other in an attempt to resolve such discrepancies in a timely fashion for so long as such discrepancies remain outstanding, using, without limitation, any applicable updated reconciliation data produced during the period in which such discrepancy remains outstanding; and
 - (d) if the Portfolio Data Receiving Entity does not notify the Portfolio Data Sending Entity that the Portfolio Data contains discrepancies in accordance with §4(2)(c) above by 16.00 local time in the place of business of the Portfolio Data Sending Entity on the fifth Joint Business Day following the later of the PR Due Date and the date on which the Portfolio Data Sending Entity provided such Portfolio Data to the Portfolio Data Receiving Entity, the Portfolio Data Receiving Entity will be deemed to have affirmed such Portfolio Data for the purpose of the Data Reconciliation.
3. **Exchange of Portfolio Data.** If both Parties are Portfolio Data Sending Entities:
- (a) on each Data Delivery Date, each Party will provide Portfolio Data to the other Party;
 - (b) on each PR Due Date, each Party will perform a Data Reconciliation; and
 - (c) if a Party identifies one or more discrepancies which such Party determines, acting reasonably and in good faith, are material to the rights and obligations of the Parties in respect of one or more EMIR Relevant Transactions, it will notify the other Party in writing as soon as reasonably practicable and the Parties will consult with each other in an attempt to resolve any such discrepancies in a timely fashion for so long as such discrepancies remain outstanding, using, without limitation, any applicable updated reconciliation data produced during the period in which such discrepancy remains outstanding.

4. **Change of Designation.** Each Party may change its own designation as a Portfolio Data Sending Entity or Portfolio Data Receiving Entity with respect to this §4 (*Portfolio Reconciliation*) but only with the written agreement of the other Party (such agreement not to be unreasonably withheld or delayed) and for this purpose the Parties agree, without limitation, that it will not be unreasonable for a Party to withhold agreement where this would result in the other Party having different designations (in terms of sending or receiving data) in respect of such Party and one or more Affiliates of such Party (whether pursuant to an agreement on similar terms to this Agreement or any other agreement or protocol addressing portfolio reconciliation under EMIR). No change of designation shall be allowed if the result would be that both Parties are Portfolio Data Receiving Entities. Upon such change of designation taking effect, either §4.2 (*One-Way Delivery of Portfolio Data*) or §4.3 (*Exchange of Portfolio Data*) shall apply as appropriate.

5. **Frequency of Data Reconciliation.** If a Party believes, acting reasonably and in good faith, that the Parties are required to perform Data Reconciliation at a greater or lesser frequency than that being used by the Parties at such time, it will notify the other Party of such in writing, providing evidence on request. From the date such notice is effectively delivered, such greater or lesser frequency will apply and the first following PR Due Date will be the earlier of the date agreed between the Parties and the last Joint Business Day in the PR Period starting on the date on which the immediately preceding Data Reconciliation occurred (or, if no Joint Business Day occurs which is within such PR Period and is on or following the date such notice is effective, the first Joint Business Day following the later of the end of such PR Period and the date such notice is effective).

6. **Agents and Third Party Service Providers.** For the purposes of performing all or a specified part of its obligations under this §4 (*Portfolio Reconciliation*):

- (a) each Party may appoint an Affiliate to act as its agent immediately on giving written notice to the other Party (including, without limitation, by specifying such Affiliate and the obligations with respect to which the appointment takes effect in Part II of this Agreement); and
- (b) if the other Party agrees (such agreement not to be unreasonably withheld or delayed and which may include any such agreement existing prior to the Effective Date), each Party may appoint:
 - (i) an entity other than an Affiliate to act as its agent; or
 - (ii) a qualified and duly mandated Third Party Service Provider.

§5

Dispute Identification and Resolution Procedure

1. **Dispute Identification and Resolution Procedure.** The Parties agree that they will use the following procedure to identify and resolve Disputes between them:

- (a) either Party may identify a Dispute by sending a Dispute Notice to the other Party;
- (b) on or following the Dispute Date, the Parties will consult in good faith in an attempt to resolve the Dispute in a timely manner, including, without limitation, by exchanging any relevant information and by identifying and using any Agreed Process which can be applied to the subject of the Dispute or, where no such Agreed Process exists or the Parties agree that such Agreed Process would be unsuitable, determining and applying a resolution method for the Dispute;
- (c) with respect to any Dispute that is not resolved within five (5) Joint Business Days of the Dispute Date, refer issues internally to appropriately senior members of staff of such Party or of its Affiliate, adviser or agent in addition to actions under §5.1(b) above (including actions under any Agreed Process identified and used under §5.1(b) above) and to the extent such

referral has not occurred as a result of action under §5.1(b) above (including any Agreed Process); and

- (d) each Party agrees that, to the extent the Dispute Resolution Risk Mitigation Techniques apply to each Party, it will have internal procedures and processes in place to record and monitor any Dispute for as long as the Dispute remains outstanding.

§6

Representations and Undertakings

1. **Representations and Undertakings.** As of the Effective Date, each Party represents to the other that:

- (a) it is duly organized, validly existing and, if relevant under such laws, in good standing under the laws of its jurisdiction of incorporation, or, if it otherwise represents its status in or pursuant to the Covered Agreement, has such status.
- (b) the signing and the entering into by it of this Agreement shall not violate any provision of its constitutional documents;
- (c) it has the power and is authorised to execute, deliver and perform its obligations under this Agreement and has taken all necessary action to authorise that execution, delivery and performance, and its execution, delivery and performance of this Agreement does not violate or conflict with any other term or condition of any contract to which it is party or any constitutional document, rules, law or regulation applicable to it;
- (d) it has all governmental, regulatory and other authorisations, licenses, approvals and consents necessary for it legally to perform its obligations under this Agreement; and
- (e) its entry into this Agreement will not, in and of itself, adversely affect the enforceability, effectiveness or validity of any obligations owed, whether by it or by any third party, under any Credit Support Document or Third Party Credit Support Document in respect of its obligations relating to any Covered Agreement as amended by this Agreement.

2. **Covered Agreements and Third Party Credit Support Provider's consent, approval etc.** With respect to Covered Agreements in respect of which there is a Third Party Credit Support Document that expressly requires that the consent, approval, agreement, authorization or other action of a Third Party Credit Support Provider be obtained, each Party whose obligations under such arrangements are secured, guaranteed or otherwise supported by such Third Party Credit Support Provider undertakes to the other Party that it has obtained the consent, approval, agreement, authorization or other action of such Third Party Credit Support Provider and that it will, upon demand, provide evidence of such consent, approval, agreement, authorization or other action to such other Party.

§7

Timely Confirmation

1. **Timely Confirmation.** If the Parties elect in Part II of this Agreement that §7 (*Timely Confirmation*) shall apply, then, notwithstanding anything to the contrary in any Covered Agreement, if only one Party sends a Confirmation for an EMIR Relevant Transaction, it shall send the Confirmation on or before the Confirmation Delivery Deadline and if the receiving Party does not confirm such Confirmation or give a notice disputing the accuracy of such Confirmation on or before the Timely Confirmation Deadline, the receiving Party will be

deemed to have agreed to the terms of the Confirmation and to have confirmed the Confirmation as soon as the Timely Confirmation Deadline has expired.

§8

Confidentiality Waiver

1. **Confidentiality Waiver.** Notwithstanding anything to the contrary in this Agreement, any Covered Agreement or in any other non-disclosure or confidentiality or other agreement between the Parties, each Party hereby agrees to disclosure of information:

- (a) to the extent required or permitted under, or made in accordance with: (i) EMIR and Supporting Regulation that mandates the reporting and/or retention of transaction and similar information, or (ii) any law, order, rule, regulation or directive in relation to EMIR and Supporting Regulation regarding reporting and/or retention of transaction and similar information and which is issued by an authority, body or agency in accordance with which the other Party is required or accustomed to act, or (iii) any law, order, rule, regulation or directive that mandates the reporting and/or retention of transaction and similar information, which is issued by an authority, body or agency in the European Union, the European Economic Area, Switzerland or any other jurisdiction recognised by ESMA as propagating EMIR-equivalent regulations and in accordance with which the other Party is required or accustomed to act (“**Reporting Requirements**”); or
- (b) to and between the other Party's head office, branches or Affiliates, or any persons or entities who provide services to such other Party or its head office, branches or Affiliates, in each case, in connection with such Reporting Requirements.

2. **Scope of Permitted Disclosure.** Each Party acknowledges that:

- (a) disclosures made pursuant to this Agreement may include, without limitation, the disclosure of trade information including a Party's identity (by name, address, corporate affiliation, identifier or otherwise) to any TR and any relevant regulators (including without limitation, ESMA and national regulators in the European Union, European Economic Area, Switzerland and any other jurisdiction recognised by ESMA as propagating EMIR-equivalent regulations) under Reporting Requirements, and that such disclosures could result in certain anonymous transaction and pricing data becoming available to the public;
- (b) for purposes of complying with Reporting Requirements, a Party may use a Third Party Service Provider to transfer trade information to a TR and that a TR may engage the services of a trade repository regulated by one or more governmental regulators; and
- (c) disclosures made pursuant to this §8 (**Confidentiality Waiver**) may be made to recipients in a jurisdiction other than that of the disclosing Party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the other Party's home jurisdiction.

3. **Permission from Third Parties.** The consenting Party represents and warrants that any third party to whom it owes a duty of confidence in respect of the information disclosed pursuant to this §8 (**Confidentiality Waiver**) has consented to the disclosure of that information.

§9

No Waiver

1. **No Waiver.** Unless stated otherwise in this Agreement, (i) this Agreement and any action or inaction of either Party in respect of it is without prejudice to any rights or obligations the Parties may have in respect of each other under any Agreed Process, Covered Agreement, or other contractual agreement, by operation of law or otherwise, and (ii) any action or inaction by a Party in respect of any of the obligations under this Agreement will not be presumed to operate as an exercise or waiver, in whole or part, of any right, power or privilege such Party may possess in respect of each other under any of the obligations under this Agreement, any Agreed Process, any Covered Agreement or other contractual agreement, by operation of law or otherwise. In particular, but without limitation:

- (a) any valuation in respect of one or more EMIR Relevant Transactions for the purposes of §4 (*Portfolio Reconciliation*) will be without prejudice to any other valuation with respect to such EMIR Relevant Transactions made for collateral, close out, dispute or other purpose;
- (b) the Parties may seek to identify and resolve issues and discrepancies between themselves before either Party delivers a Dispute Notice; and
- (c) nothing in this Agreement obliges a Party to deliver a Dispute Notice following the identification of any such issue or discrepancy (notwithstanding that such issue or discrepancy may remain unresolved) or limits the rights of the Parties to serve a Dispute Notice, to commence or continue an Agreed Process (whether or not any action under §5 (*Dispute Identification and Resolution Procedure*) has occurred) or otherwise to pursue any dispute resolution process in respect of any such issue or discrepancy (whether or not any action under §5 (*Dispute Identification and Resolution Procedure*) has occurred).

§10

Remedies for Breach

1. **Remedies for Breach.** Without prejudice to the rights, powers, remedies and privileges provided by law, failure by a Party to take any actions required by, or to otherwise comply with, obligations under this Agreement or any inaccuracy of any representation or warranty made under this Agreement, will not constitute an event of default, termination event or material reason (howsoever described) in respect of such Party or any other event which permits either Party to terminate any EMIR Relevant Transaction or any other transaction(s) under this Agreement or any other agreement.

§11

Form of Notifications

1. **Form of Notifications.** All notices under this Agreement shall be made in writing to the addresses specified in Part II below. Except to the extent the Parties elect otherwise in Part II, notices may be given by email. Notices sent by facsimile transmission or by email shall be deemed received and effective:

- (a) if sent by facsimile transmission and a valid transmission report confirming good receipt is generated, on the day of transmission if transmitted before 17.00 hours (recipient's time) on a Joint Business Day or otherwise at 09.00 hours (recipient's time) on the first Joint Business Day after transmission; and
- (b) if sent by email, on the date it is delivered.

§12

Governing Law and Dispute Resolution

OPTION A

1. **Governing Law.** If Option A is specified in Part II of this Agreement, then, subject to §12.3 (*Covered Agreements*), this Agreement and any non-contractual obligations arising out of or in relation to this Agreement shall be governed by and construed in accordance with the laws of England.

2. **Arbitration.** If Option A is specified in Part II of this Agreement, any dispute arising out of or in connection with this Agreement, including any non-contractual obligations arising out of or in relation to this Agreement, shall be referred to and finally resolved by arbitration under the LCIA Rules, which are deemed incorporated by reference in this Agreement, and the following shall apply:

- (a) the number of arbitrators shall be three (3), with each Party having the right to nominate one (1) arbitrator;
- (b) unless the Parties agree otherwise in writing, the seat or legal place of arbitration where all hearings and meetings shall be held shall be London, England;
- (c) unless the Parties otherwise agree in writing, the language to be used in the arbitral proceedings shall be English;
- (d) the Parties hereby expressly waive any right of appeal to any court having jurisdiction on any question of fact or law; and
- (e) the arbitrators shall have no authority to award exemplary or punitive damages of any type under any circumstances whether or not such damages are available under the relevant applicable law, the Parties hereby waiving their right, if any, to recover such damages.

OPTION B

1. **Governing Law.** If Option B is specified in Part II of this Agreement, then, subject to §12.3 (*Covered Agreements*), this Agreement shall be construed and governed by the substantive law of the Federal Republic of Germany.

2. **Arbitration.** If Option B is specified in Part II of this Agreement, any disputes which arise in connection with this Agreement shall be referred for resolution to the German Institute of Arbitration (DIS) and decided according to its rules ousting the jurisdiction of the ordinary courts. The number of arbitrators shall be three (3). The arbitration shall be conducted in the language specified in Part II of this Agreement.

PROVISION APPLYING IRRESPECTIVE OF OPTION A OR OPTION B

3. **Covered Agreements.** Notwithstanding §12.1 (*Governing Law*), amendments contained in this Agreement to any Covered Agreement shall be governed by and construed in accordance with the law specified to govern that Covered Agreement and otherwise in accordance with the applicable choice of law doctrine.

§13

Miscellaneous

1. **Partial Validity.** Should any provisions of this Agreement be or become wholly or partially invalid or unenforceable, this shall not affect the validity of the remaining provisions. The invalid or unenforceable provision shall be replaced by an appropriate provision, which, to the greatest extent legally possible, comes closest to the economic and legal intention of the Parties with respect to any affected transaction(s) that was applicable immediately prior to such change.

2. **Amendments.** Any amendments or additions to this Agreement shall be made only in writing signed by both Parties.

3. **Counterparts.** This Agreement may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

4. **Third Party Rights.** The Parties do not intend that any person that is not a Party to this Agreement shall have any rights under or be able to enforce this Agreement and the Parties exclude to the extent permitted under applicable law any such third party rights that may otherwise be implied.

Executed by the duly authorised representative of each Party effective as of the Effective Date.

[Name of Party]

[Name of Party]

[Name of Signatory/ies]

[Name of Signatory/ies]

[Title of Signatory/ies]

[Title of Signatory/ies]

EFET
European Federation of Energy Traders

ANNEX 1
To The
Agreement

Defined Terms

Save as otherwise expressly defined in this Agreement, capitalised terms used in this Agreement shall have the following meanings:

“**Affiliate**” means with respect to any person, any entity controlled, directly or indirectly, by that person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, “**control**” of any entity or person means ownership of a majority of the voting power of the entity or person.

“**Agreed Process**” means any process agreed between the Parties in respect of a Dispute other than the Dispute Resolution Procedure including, without limitation, any process under any Covered Agreement or in respect of any EMIR Relevant Transactions under which (a) a Dispute may be referred for adjudication by a court or for arbitration, (b) a Dispute relating to the exchange of collateral may be addressed, in each case as may be amended from time to time.

“**Agreement**” means this EMIR Risk Mitigation Techniques Agreement which is a supplementary agreement concerning the implementation of obligations in respect of EMIR.

“**Alternative Documentary Solution**” means a written arrangement (which may be comprised in a Covered Agreement) that addresses the substance of the issues covered in §4 (*Portfolio Reconciliation*), §5 (*Dispute Identification and Resolution Procedure*) and §8 (*Confidentiality Waiver*) of this Agreement.

“**CCP**” means a central clearing house authorised under Article 14 of EMIR or recognized under Article 25 of EMIR.

“**Change of Status Notice**” has the meaning set out in §3.2 (*Change of Status Notice*).

“**Confirmation**” means a confirmation in writing which purports to confirm the terms of an EMIR Relevant Transaction and is issued in accordance with the applicable terms of the relevant Covered Agreement.

“**Confirmation Delivery Deadline**” means (i) 16.00 hours in the Party A Business Day Location or 16.00 hours in the Party B Business Day Location (whichever is earlier) on the Joint Business Day prior to the Timely Confirmation Deadline; or (ii) if the Timely Confirmation Deadline falls after the day that is the second Joint Business Day following the Trade Date, 16.00 hours in the Party A Business Day Location or 16.00 hours in the Party B Business Day Location (whichever is earlier) on the second Joint Business Day immediately preceding the Timely Confirmation Deadline.

“**Covered Agreement**” means any agreement entered into between the Parties on, prior to or after the Effective Date that governs or supplements any EMIR Relevant Transaction or to which any EMIR Relevant Transaction is subject.

“**Credit Support Document**” means any document in effect on the Effective Date which by its terms secures, guarantees or otherwise supports a Party’s obligations under any Covered Agreement from time to time, whether or not such document is specified as such therein or in the Covered Agreement.

“**Data Delivery Date**” means each date agreed as such between the Parties provided that, in the absence of such agreement, the Data Delivery Date will be the Joint Business Day immediately prior to the PR Due Date.

“**Data Reconciliation**” means, in respect of a Party receiving Portfolio Data, a comparison of the Portfolio Data provided by the other Party against such Party’s own books and records of all outstanding EMIR Relevant Transactions between the Parties, in order to identify promptly any misunderstandings or discrepancies in respect of Key Terms.

“**Derivatives**” means a “derivative” or “derivative contract” as defined in Article 2(5) of EMIR.

“**Determination Date**” shall mean, unless otherwise agreed between the Parties, in respect of any Data Delivery Date the immediately preceding Local Business Day of, and as specified in writing by, the Party providing the Portfolio Data.

“**Dispute(s)**” means any dispute between the Parties:

- (a) which, in the sole opinion of the Party delivering the relevant Dispute Notice, is required to be subject to the Dispute Resolution Procedure (or other Agreed Process) pursuant to the Dispute Resolution Risk Mitigation Techniques; and
- (b) in respect of which a Dispute Notice has been effectively delivered.

“**Dispute Date**” means, with respect to a Dispute, the date on which a Dispute Notice is effectively delivered by one Party to the other Party (or if both parties deliver a Dispute Notice in respect of the same Dispute, the date on which the first such notice is effectively delivered). Each Dispute Notice will be effectively delivered if delivered:

- (a) in the manner agreed between the Parties for the giving of notices in respect of this Agreement; or
- (b) where a Party has specified contact information in this Agreement for such purpose to the address, number or other contact detail as set out for such purpose in this Agreement.

“**Dispute Notice**” means a notice in writing which states that it is a dispute notice for the purposes of §5.1 (*Dispute Identification and Resolution Procedure*) of this Agreement and which sets out in reasonable detail the issue in dispute (including, without limitation, the EMIR Relevant Transactions to which the issue relates).

“**Dispute Resolution Procedure**” means the dispute identification and resolution procedure set out in §5.1 (*Dispute Identification and Resolution Procedure*) of this Agreement.

“**Dispute Resolution Risk Mitigation Techniques**” means the dispute resolution risk mitigation techniques for OTC derivative transactions set out in Article 11(1)(b) of EMIR as supplemented by Article 15 of the RTS.

“**EMIR**” means Regulation (EU) No. 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories dated 4 July 2012.

“**EMIR and Supporting Regulation**” means EMIR and any applicable supporting law, rule or regulation including without limitation the RTS.

“**EMIR Relevant Transaction**” means an OTC Derivative Transaction entered into or to be entered into by the Parties that is not cleared by a CCP. “**EMIR Relevant Transactions**” shall mean more than one EMIR Relevant Transaction.

“**ESMA**” means the European Securities and Markets Authority.

“**European Economic Area**” means Iceland, Liechtenstein, Norway and those countries of the European Union that have ratified or approved the Agreement on the European Economic Area from time to time.

“**European Union**” means the economic and political union established in 1993 by the Maastricht Treaty, with the aim of achieving closer economic and political union between Member States that are located in Europe.

“**Joint Business Day**” means a day that is both a Party A Business Day and a Party B Business Day.

“**Key Terms**” means, with respect to an EMIR Relevant Transaction and a Party, the valuation of such EMIR Relevant Transaction and such other details the relevant Party deems relevant from time to time which may include the effective date, the scheduled maturity date, any payment or settlement dates, the notional value of the contract and currency of the EMIR Relevant Transaction, the underlying instrument, the position of the counterparties, the business day convention and any relevant fixed or floating rates of the EMIR Relevant Transaction. For the avoidance of doubt, “**Key Terms**” does not include details of the calculations or methodologies underlying any term.

“**LCIA Rules**” means the arbitration rules of the London Court of International Arbitration.

“**Local Business Day**” means either Party A Business Day or Party B Business Day, as applicable.

“**Member State(s)**” means a member of the European Union (from time to time).

“**OTC Derivative Transaction**” means “OTC derivative” or “OTC derivative contract” as defined in Article 2(7) of EMIR.

“**Party A Business Day**” means a day (other than a Saturday or Sunday) on which commercial banks are open for general business in the Party A Business Day Location specified in Part II of this Agreement.

“**Party B Business Day**” means a day (other than a Saturday or Sunday) on which commercial banks are open for general business in the Party B Business Day Location specified in Part II of this Agreement.

“**Portfolio Data**” means, in respect of a Party providing or required to provide such data, the Key Terms in relation to all outstanding EMIR Relevant Transactions between the Parties in a form and standard that is capable of being reconciled, with a scope and level of detail that would be reasonable to the Portfolio Data Sending Entity if it were the receiving party, prepared as at the close of business on the Determination Date.

“**Portfolio Data Receiving Entity**” means, subject to §4.1 (*Portfolio Reconciliation*):

- (a) if one of Party A and Party B is specified as such in Part II of this Agreement, that Party; and
- (b) if neither Party is specified as such in Part II of this Agreement, neither Party.

“**Portfolio Data Sending Entity**” means, subject to §4.1(*Portfolio Reconciliation*):

- (a) if one of Party A and Party B is specified as such in Part II of this Agreement, that Party; and
- (b) if both Parties are specified as such in Part II of this Agreement, both Parties.

“**Portfolio Reconciliation Requirements**” means the requirements one or both Parties are subject to if, and to the extent that, they enter into any EMIR Relevant Transactions with each other in accordance with the Portfolio Reconciliation Risk Mitigation Techniques.

“**Portfolio Reconciliation Risk Mitigation Techniques**” means the portfolio reconciliation risk mitigation techniques for OTC derivative transactions set out in Article 11(1)(b) of EMIR as supplemented by Article 13 of Chapter VIII of the RTS.

“**PR Due Date**” means each date agreed as such between the Parties provided that the PR Due Date will be the PR Fallback Date where either:

- (a) no date is agreed; or
- (b) the agreed date occurs after the PR Fallback Date.

“**PR Fallback Date**” means:

- (a) in respect of the PR Period starting on the PR Requirement Start Date, the last Joint Business Day in such PR Period; and
- (b) for all subsequent PR Periods, the last Joint Business Day in the PR Period starting on the calendar day immediately following the last calendar day of the immediately preceding PR Period,

provided that if there is no Joint Business Day in a PR Period, the PR Fallback Date will be the first Joint Business Day following the end of the PR Period.

“**PR Period**” means, with respect to the Parties:

- (a) if the Portfolio Reconciliation Requirements require Data Reconciliation to occur each business day, one Joint Business Day;
- (b) if the Portfolio Reconciliation Requirements require Data Reconciliation to occur once per week, one calendar week;
- (c) if the Portfolio Reconciliation Requirements require Data Reconciliation to occur once per quarter, three calendar months; or
- (d) if the Portfolio Reconciliation Requirements require Data Reconciliation to occur once per year, one calendar year.

“**PR Requirement Start Date**” means the first calendar day on which the Portfolio Reconciliation Requirements apply to one or both of the Parties.

“**Reporting Requirements**” has the meaning set out in §8.1 (*Confidentiality Waiver*) of this Agreement.

“**RTS**” means the Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 and published on 23 February 2013 in the Official Journal of the European Union.

“**Third Party Credit Support Provider**” means in relation to an agreement supported by a Third Party Credit Support Document, any party to such Third Party Credit Support Document other than either of the Parties.

“**Third Party Credit Support Document**” means, with respect to a Party and a Covered Agreement, any Credit Support Document which is executed by one or more Third Party Credit Support Provider (whether or not a Party

is a party thereto), whether or not such document is specified as a Third Party Credit Support Document or as a Credit Support Document therein or in the Covered Agreement.

“**Third Party Service Provider**” refers to a third party that the Parties agree will perform all or part of obligations under specified provisions of this Agreement for both Parties.

“**Timely Confirmation Deadline**” means the latest day by which an EMIR Relevant Transaction must be confirmed in accordance with Article 12 of Chapter VIII of the RTS.

“**Trade Date**” means in respect of an EMIR Relevant Transaction, the date the Parties entered into that EMIR Relevant Transaction.

“**TR**” means a trade repository registered in accordance with Article 55 of EMIR or recognised in accordance with Article 77 of EMIR or one or more systems or services operated by any such trade repository.

EFET
European Federation of Energy Traders
Election Sheet
to the
Agreement

PART II.

SECTION A: CUSTOMIZATION OF PROVISIONS IN PART I OF THIS AGREEMENT

§1

Subject of Agreement

§ 1.2 Amendments to Covered Agreements:

- §4 (*Portfolio Reconciliation*), §5 (*Dispute Identification and Resolution Procedure*) and §8 (*Confidentiality Waiver*) of this Agreement shall not apply where the Parties have entered into an Alternative Documentary Solution.
- §4 (*Portfolio Reconciliation*), §5 (*Dispute Identification and Resolution Procedure*) and §8 (*Confidentiality Waiver*) of this Agreement shall apply where the Parties have entered into an Alternative Documentary Solution.

§3

Election of Counterparty Status; Status Change

§ 3.1 Election of Counterparty Status:

- The Parties make no designation of their respective counterparty status.
- The Parties elect to make the designations of their respective counterparty status set out below:

Party A designates that as of the Effective Date and each time it enters into an EMIR Relevant Transaction, which designation shall be deemed to be repeated on every day on which an EMIR Relevant Transaction is outstanding, it is:

- a financial counterparty pursuant to Article 2(8) of EMIR;
- an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a financial counterparty pursuant to Article 2(8) of EMIR if it were established in the European Union;
- a non-financial counterparty pursuant to Article 2(9) of EMIR and which exceeds any of the relevant clearing thresholds (as determined in Article 11 of the RTS);
- an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a non-financial counterparty pursuant to Article 2(9) of EMIR if it were established in the

European Union and which exceeds any of the relevant clearing thresholds (as determined in Article 11 of the RTS);

- [] a non-financial counterparty pursuant to Article 2(9) of EMIR and which does not exceed any of the relevant clearing thresholds (as determined in Article 11 of the RTS); or
- [] an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a non-financial counterparty pursuant to Article 2(9) of EMIR if it were established in the European Union and which does not exceed any of the relevant clearing thresholds (as determined in Article 11 of the RTS).

Party B designates that as of the Effective Date and each time it enters into an EMIR Relevant Transaction, which designation shall be deemed to be repeated on every day on which an EMIR Relevant Transaction is outstanding it is:

- [] a financial counterparty pursuant to Article 2(8) of EMIR;
- [] an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a financial counterparty pursuant to Article 2(8) of EMIR if it were established in the European Union;
- [] a non-financial counterparty pursuant to Article 2(9) of EMIR and which exceeds any of the relevant clearing thresholds (as determined in Article 11 of the RTS);
- [] an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a non-financial counterparty pursuant to Article 2(9) of EMIR if it were established in the European Union and which exceeds any of the relevant clearing thresholds (as determined in Article 11 of the RTS);
- [] a non-financial counterparty pursuant to Article 2(9) of EMIR and which does not exceed any of the relevant clearing thresholds (as determined in Article 11 of the RTS); or
- [] an entity established outside the European Union that to the best of its knowledge and belief, having given due and proper consideration to its status, would be a non-financial counterparty pursuant to Article 2(9) of EMIR if it were established in the European Union and which does not exceed any of the relevant clearing thresholds (as determined in Article 11 of the RTS).

§4

Portfolio Reconciliation

§ 4.1 Portfolio Reconciliation: Portfolio Data Sending Entity:

- Party A
- Party B
- Both Parties

Portfolio Data Receiving Entity:

- Party A
- Party B
- Neither Party

§ 4.6 Agents and Third Party Service Providers

Party A appoints its Affiliate _____
to act as its agent for the purpose of performing [all of its][the
following] obligations under §4 (*Portfolio Reconciliation*):

Party B appoints its Affiliate _____
to act as its agent for the purpose of performing [all of its][the
following] obligations under §4 (*Portfolio Reconciliation*):

§7

Timely Confirmation

§ 7.1 Timely Confirmation: §7 shall apply
 §7 shall not apply

§11

Form of Notifications

11.1 Form of Notifications:

Party A: Address for notices:

Address: _____

Attention: _____

Fax: _____

Phone: _____

Email: _____

Copy to:
Address: _____
Attention: _____
Fax: _____
Email: _____

- Notices may be given by email to Party A
- Notices may not be given by email to Party A

Party B: Address for notices:
Address: _____
Attention: _____
Fax: _____
Phone: _____
Email: _____

Copy to:
Address: _____
Attention: _____
Fax: _____
Email: _____

- Notices may be given by email to Party B
- Notices may not be given by email to Party B

§12

Governing Law and Dispute Resolution

§12.1 Governing Law and Dispute Resolution:

- Option A shall apply; or
- Option B shall apply and the language of the arbitration shall be:
_____ ; or

“Party A”

”Party B”

[Name of Party]

[Name of Party]

[Name of Signatory/ies]

[Name of Signatory/ies]

[Title of Signatory/ies]

[Title of Signatory/ies]

[Date of Signing]

[Date of Signing]

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