

# EFET

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## Usage Notes to the Certificate Master Agreement

(Version 1.1(a) / February 23, 2021)

### and Appendix (Version 2.0/16 April 2021)

**I. Introduction:** EFET’s form of Certificate Master Agreement (version 1.1(a) / February 23, 2021) as published on the EFET web page on 9 March 2021 (“**CMA**”) and Certificates Appendix (version 2.0 / 16 April 2021) as published on the EFET web page on 16 April 2021 (“**Appendix**”, together the “**Agreements**”), were developed by a working group comprised of EFET member company representatives and EFET’s counsel. A number of usage notes of which users of the Agreements should be aware are detailed below. Please note that this document is not intended as a user’s guide to the Agreements.

Unless otherwise expressly set forth in these usage notes, capitalised terms used throughout these usage notes shall have the meanings attributed to those terms in the Agreements or, as applicable, the EECS Rules (Version 14, Release 7 dated 11 November 2020).

#### *General comments*

**II. Application to CMA and Appendix:** Unless otherwise specified, the below comments apply to both the CMA and Appendix.

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**PLEASE NOTE:** These Usage Notes were prepared by EFET exercising all reasonable care and as a general guide only for the purposes of assisting users of the Certificate Master Agreement and Appendix. EFET, the EFET members, representatives and counsel involved in the preparation of these Usage Notes shall not be liable or otherwise responsible for their use and any damages or losses resulting out of their use and in whatever jurisdiction. It is the responsibility of each Party wishing to use the Certificate Master Agreement and Appendix to ensure that the terms and conditions set forth therein are legally binding, valid and enforceable and best serve to protect the user’s legal interest, and are suitably brought to the attention of a counterparty. Users of the Certificate Master Agreement and Appendix and/or Usage Notes are urged to consult their own legal counsel.

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**III. Rule Changes:** The Agreements, as drafted, is based on and relies on concepts and terms as provided in the EECS Rules (Version 14, Release 7 dated 11 November 2020) and as such parties are required to state in the Confirmation which version of the EECS Rules will apply to that Individual Contract.

It should be noted by users of the Agreements that if the EECS Rules are materially altered, then it may be necessary to make consequential amendments to the Agreements. In the event of a material change to the EECS Rules, users should consult their own legal counsel to ensure that the Agreements continue to be suitable.

**III. Material variations between Domain Protocols:** A Domain Protocol (which is implemented by local enabling legislation at Domain level) sets out the procedures, rights and obligations for the administration of EECS within a specific Domain and relating to certain EECS Products. Such procedures include the transfer and cancellation of EECS Certificates and the timeframes within which any of those requests are completed by each Domain and EECS Registration Database.

Users of the Agreements should be aware that the procedures, rights and obligations between the various national Domain Protocols may vary. Such variations may affect the right of certain users to hold accounts, transfer and cancel Certificates, and the Delivery timing of a particular transaction. Users should ensure they are aware of the Domain Protocols relevant to their transaction to ensure proper and timely discharge of their Delivery obligations under the Agreements and have a system of ensuring they stay up to date on relevant changes to the Domain Protocols that are relevant to them.

**IV. Voluntary nature of EECS:** As set out in the EECS Rules, EECS is a commercially funded, integrated European framework for issuing, holding, transferring and otherwise processing electronic records (EECS Certificates).

At its core, EECS is a voluntary scheme and membership of a particular country to the scheme does not automatically signify that EECS Certificates will be able to be used in that particular country for compliance with legal obligations set out under national legislation. Furthermore, in those instances where some members do accept EECS Certificates for compliance with legal obligations, the EECS Certificates accepted by each member may be limited in geographical scope (e.g. for national compliance purposes a member may accept EECS Certificates from some members but not all members). This lack of cross-member acceptability of EECS Certificates may therefore have an effect on prices of certificates from certain Domains.

Users of the Agreements should be aware that if the purpose of the transaction is to purchase EECS Certificates with a view to use those EECS Certificates to comply with legal obligations set at a national level, additional due diligence should be undertaken to ensure this purpose can be achieved.

**V. Renewable Energy Directive II:** In the Agreements, the position of the preceding EECS Master Agreement and EECS Appendix (both version 1.0 / 14 December 2013) has been modified to reflect the expanded scope of Guarantees of Origin under Directive (EU) 2018/2001 (“**RED II**”).

RED II expands the scope of Guarantees of Origin from renewable source electricity, heating and cooling to cover electricity produced from non-renewable sources as well as biogas and renewable source hydrogen. By making the appropriate elections in the Confirmation, the Agreement is capable of transferring biogas and renewable source hydrogen by means of Guarantees of Origin and National Scheme Certificates (as detailed below). At the time of writing, the EECS Rules have not been amended to align with the position under RED II and therefore EECS GOs remain applicable only to renewable source electricity, heating and cooling. This position may change upon the expiry of the RED II implementation date on 1 July 2021.

**VI. National Scheme Certificates:** The concept of "National Scheme Certificates" has been introduced into the Agreements to allow parties to agree on the trade of national Guarantees of Origin issued and traded outside the EECS Rules, as well as other types of environmental attribute certificates (such as the Norwegian / Swedish *Elcertifikat*). In both cases, parties may define *inter alia* the applicable Authorised Issuing Body, Registry, Registry Operator and National Scheme Rules. The Agreement defines EECS GOs and National Schemes collectively as "Certificates".

The transfer mechanisms of electronic transfer and transfer by cancellation statement, as well as default remedies under the EECS MA for EECS GOs remain materially the same for National Scheme Certificates in the Agreements. Due to the uniqueness of individual National Scheme Certificates and their issuance, transfer and cancellation, care should be exercised by the parties to ensure that the specificities of the applicable scheme are accurately reflected in the negotiated Agreements.

Users of the Agreements should be aware that if the purpose of the transaction is to purchase National Scheme Certificates with a view to use such Certificates to comply with legal obligations set at a national level, additional due diligence should be undertaken to ensure this purpose can be achieved. This may be reflected with *inter alia* appropriate representations and warranties, considering the Ineffectiveness definition (as detailed below), defining the Ineffectiveness Loss Amount, and defining the Designated Purpose (as detailed in point X below) of the Certificates.

**VII. Transfer, risk and Ineffectiveness:** The Agreements include detailed wording on the transfer of title and risk to Certificates, introducing a new dedicated mechanism specific to transfer by Cancellation Statement. Transfer of title and risk to Certificates in both cases is made at a Delivery Point individually defined by the parties. For Electronic Transfer, title commonly passes upon crediting of the Certificates in the Buyer's Account. For transfer by Cancellation Statement, title to the cancelled Certificates commonly passes upon receipt of the Cancellation Statement (in email or fax format) by the Buyer.

In recognition that end consumers of Certificates may seek their procurement for compliance purposes, the Ineffectiveness clause is triggered when a Certificate is (i) invalidated, revoked, suspended or withdrawn by a relevant authority, (ii) cancelled by the Seller in a manner other than agreed, (iii) not recognised or rejected by the relevant authority for an agreed Designated Purpose, or (iv) the issuance of a Cancellation Statement is refused, invalidated, revoked or withdrawn, or the Buyer is not listed as beneficiary. In such a scenario, the Seller is required to provide either replacement Certificates or pay the Ineffectiveness Loss Amount agreed in the Confirmation.

**VIII. Change in law:** The issuance, transfer and cancellation of Certificates, as well as the transfer of environmental benefit conferred by Certificates is highly dependent on European and national legislation and codes such as the EECS Rules. The Change in Law clause has therefore been developed to enable the parties to adapt the Agreement to ensure the continued delivery of the environmental benefit in the case of a legislative change which materially impacts the Agreement or Certificates.

**IX. Expert determination:** An Expert determination clause has been introduced as an optional initial escalation step in the case of non-agreement the parties regarding necessary amendments to the Agreement following a Change in Law. Parties may however amend the Agreement to include the Expert determination mechanism in respect of different dispute types.

**X. Designated Purpose:** Voluntary renewable reporting standards and mandatory compliance programmes are of increasingly relevance for certain market players, in particular suppliers and consumers seeking to make claims about the renewable origin of renewable electricity. In procuring Certificates, such market players may set conditions which the Certificates must fulfil. In the Agreements, this may be defined as the "Designated Purpose". Where Certificates are Delivered which do not fulfil the Defined Purpose, these are deemed Ineffective, triggering the remedies of either a replacement Certificate being due or payment of the Ineffectiveness Loss

Amount by the Seller. Furthermore, any regulatory fines imposed on the Buyer may be recovered as part of "Losses" as part of the Termination Amount.

*Appendix specific comments*

**XI. Relationship of the Appendix to the CMA:** The Appendix is designed to allow parties which have already executed an EFET General Agreement on Power (version 2.1(a) / September 21, 2007) as published on the EFET web page on 21 September 2007 (“**GA Power**”) to adapt its provisions to Certificate transactions. The Appendix therefore disapplies power transfer related clauses and introduces clauses relevant for Certificate transfer. In comparison to the CMA, the Appendix therefore relies on the general provisions and risk allocation already agreed by the parties under the GA Power.

**XII. Amendments to the Appendix:** In executing the Appendix, parties may wish to consider additional amendments in Part II of the Election Sheet to vary the position of the GA Power beyond those available in Part I, further tailoring it to the nature of Certificate transactions. Points which may be considered include (i) additional representations and warranties, (ii) additional Force Majeure events, (iii) amending the applicable time period for termination following long-term Force Majeure, (iv) whether the "Loss" definition should include losses associated with the payment of regulatory fines in case the Designated Purpose of the Certificates was the compliance with a regulatory obligation, or (v) events where an Expert determination step may be introduced as an initial dispute resolution step (points (iii), (iv) and (v) being in alignment with the CMA). Such amendments will however only impact Certificate transactions made under the GA Power as amended by the Appendix and not power transactions made under the initial GA Power.

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