

# Guidance notes

## concerning the EFET Ratification Letter(s) on Notice Amendments

**NOTICE & WAIVER: THIS DOCUMENT WAS PREPARED BY EFET'S MEMBERS EXERCISING ALL REASONABLE CARE. HOWEVER EFET, THE EFET MEMBERS, REPRESENTATIVES AND COUNSEL INVOLVED IN ITS PREPARATION AND APPROVAL SHALL NOT BE LIABLE OR OTHERWISE RESPONSIBLE FOR ITS USE AND ANY DAMAGES OR LOSSES RESULTING OUT OF ITS USE IN ANY PARTICULAR CASE AND IN WHATEVER JURISDICTION. IT IS THEREFORE THE RESPONSIBILITY OF EACH PARTY WISHING TO USE THIS DOCUMENT TO ENSURE THEIR TERMS AND CONDITIONS ARE LEGALLY BINDING, VALID AND ENFORCEABLE AND BEST SERVE TO PROTECT THE USER'S LEGAL INTERESTS. USERS OF THIS DOCUMENT ARE URGED TO CONSULT RELEVANT LEGAL OPINIONS MADE AVAILABLE THROUGH EFET AS WELL AS THEIR OWN COUNSEL AND/OR LEGAL OPINIONS.**

### **Purpose**

Capitalised terms used but which are not defined shall have the meaning given to them in the “Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices” and the “Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices” (together the **Ratification Letter(s)**), the General Agreement Concerning the Delivery and Acceptance of Electricity and/or Natural Gas (as applicable).

EFET and its members intend to offer users of various EFET agreements and/or users of other agreements, the opportunity to agree an additional method of serving notices and communications. In particular, in the light of the COVID-19 pandemic, established methods of serving notices and communication which are catered for in the Principal Agreements (e.g. delivery by hand, by first class post and facsimile) are insufficient and unworkable during times where physical offices are closed due to lockdowns or otherwise.

The Amendments focus on notices and communications of any kind including, but not limited to: (a) general legal notices; (b) termination notices; (c) notices that a Material Adverse Change has occurred; and (d) that the Tangible Net Worth of a Party has declined. They do however not interfere with, or change any customary practice developed, established or agreed between the Parties to any Covered Principal Agreements concerning: (i) invoices; (ii) Confirmations; or (iii) notices exchanged in relation to any credit support. Such notices and communications are expressly defined in the Ratification Letter as an “Excluded Communication”.

## **Ratification Letter**

### *English and German Law Versions*

Due to particularities of German law, EFET and its members decided to provide and publish a separate Ratification Letter and set of Amendments for agreements governed by German law and another for agreements governed by English Law.

Pursuant to the Ratification Letter for German Law, only the following EFET agreements may be amended:

- any EFET General Agreement Concerning the Delivery and Acceptance of Electricity and/or Natural Gas irrespective of the version; and
- the Master Netting Agreement and any Cross-Product Master Agreement used in conjunction with the EFET/IECA Commodities Schedule.

Pursuant to the Ratification Letter for English Law, Parties may amend those agreements specified in the paragraph above and also any of the other contracts named in Schedule 2 to the Ratification Letter(s).

It is therefore necessary to ratify and provide EFET with two Ratification Letters should a Party wish to amend a mixed portfolio of German and English law agreements.

### *Effect of Executing a Ratification Letter*

Irrespective of the governing law of the Principal Agreement, the effect of executing a Ratification Letter is retroactive only. This means that the amendments will only apply and be incorporated in relation to such agreements / terms & conditions that: (a) had been executed between the Parties prior to the Ratification Date; (b) are governed by the law of the executed Ratification Letter (i.e. German law or English law); and (c) have been mutually elected by the Parties.

Consequently, the Amendments will not have any effect on a Principal Agreement if one or more of the following circumstances apply:

- the Principal Agreement has been executed after the Ratification Date;
- a Ratification Letter has been signed for English law but the relevant Principal Agreement is governed by German law (or vice versa); or
- the elected Principal Agreements don't match, e.g. Party A elects only EFET Power V2.1(a) whereas Party B elects solely EFET Power (prev).

The process of how a Ratification Letter has to be handled and provided to EFET has not changed as compared to previous ratification letters. However, execution of a Ratification Letter is now expressly required by way of handwritten signature.

### *Application to Alternate Dispute Resolution Mechanisms*

Different to previous ratification letters that applied exclusively in relation to one specific EFET agreement and consequently to one dispute resolution mechanism, the Ratification Letter may apply to different agreements with different dispute resolution mechanisms.

EFET and members have decided that the dispute resolution mechanism of the first Principal Agreement that is a Covered Principal Agreement applies in relation to disputes between two Ratifying Parties arising out of or in connection with this Ratification Letter or any non-contractual obligations arising out of or in connection with it. This means that disputes arising under or in connection with one Ratification Letter between different Ratifying Parties may be subject to different dispute resolution mechanisms.

Parties must independently assess and monitor the Ratification Letters published by EFET. EFET accepts no obligation or liability in this respect. Considering the vulnerability of information published via the internet, users may want to consider storing and/or printing Ratification Letters of other users on other means than the Website.

### **Amendments**

All agreements that are listed as Principal Agreements in Schedule 2 of the Ratification Letter(s) contain a dedicated notices and/or communication section. This section is amended by the Amendments by providing for service of notices and communication via e-mail and deemed receipt and effectiveness of the same. Other requirements of any notices and/or communication section (e.g. in writing) remain unchanged.

### *The Requirement for a PDF Attachment*

It should be noted that it is not sufficient to provide a notice or communication solely in an e-mail itself but that such notice or communication shall be attached in an PDF format to such e-mail.

### *Deemed Receipt*

In line with the *Notice and Communication* section of the EFET General Agreements an e-mail shall be deemed received and effective on the day it is sent so long as it is sent before 17.00 hours (recipient time) on a Business Day, or otherwise at 09.00 hours (recipient time) on the first Business Day after the e-mail is sent. Different to other methods of serving notices or communications, Parties expressly waive the effects of later receipt or non-receipt of either the e-mail or the PDF attachment.

In a worst-case scenario this may mean that a legal notice will be deemed received and become effective against the (intended) recipient even if the recipient never received such notice e-mail with PDF attachment. The only requirement is that the sender can prove that the notice was sent

in accordance with the Amendments. Parties may want to consider supporting measures to avoid any hardship.

### *Business Day Definition*

The Amendments for English law governed agreements additionally contain a definition of “Business Day”. This is necessary to harmonise the different terms used in the Principal Agreements catered for. Agreements published by EFET unanimously use the term “Business Day”.

### *Email Addresses*

To minimise any operational efforts resulting from the implementation of these Amendments and as some Principal Agreements do not provide for disclosure of an e-mail addresses Parties are asked to specify a dedicated e-mail address for legal notices and communication in Schedule 1 of the Ratification Letter(s).

Parties are strongly encouraged to specify a group e-mail address rather than an e-mail addresses of an individual to ensure that the validity of such e-mail address is independent from changes in its personnel.

### **Notices in relation to insolvency, bankruptcy or similar proceedings**

DIFFERENT TO NOTICES AND COMMUNICATION THAT ARE PROVIDED IN THE NORMAL COURSE OF BUSINESS IN RELATION TO WHICH THE GOVERNING LAW OF ANY COVERED PRINCIPAL AGREEMENT APPLIES, ANY TERMINATION NOTICES OR OTHER NOTICES AND COMMUNICATION EXCHANGED IN THE CONTEXT OR RELATING TO AN INSOLVENCY, BANKRUPTCY OR SIMILAR PROCEEDINGS BE SUBJECT TO THE PREVAILING NATIONAL INSOLVENCY LAW.

PARTIES ARE URGED TO CONSULT THEIR OWN COUNSEL AND/OR LEGAL OPINIONS IF UNDER SUCH NATIONAL LAW NOTICES CAN BE VALIDLY SERVED BY E-MAIL.

LEGAL OPINIONS MADE AVAILABLE THROUGH EFET BEFORE THE YEAR 2021 DO NOT COVER THIS MATTER. IT IS INTENDED TO INCLUDE A DEDICATED SECTION DEALING WITH NOTICES BY E-MAIL IN LEGAL OPINION UPDATES INSTRUCTED FROM JANUARY 2021.