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GUIDANCE NOTES

EFET INDIVIDUAL POWER PURCHASE AGREEMENT FOR CORPORATES AND UTILITIES

GERMAN LAW

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These Guidance Notes have been prepared in relation to the Individual Power Purchase Agreement for Corporates and Utilities (hereafter referred to as “**CPPA**”), issued by EFET on 26 June 2019. The Guidance Notes are intended to inform users of the CPPA where:

- (i) The CPPA is governed by German law; and/or
- (ii) The Facility (electricity generation plant of the Seller) and/or the electricity consumption unit of the Buyer are located in Germany and connected to the German power system; and/or
- (iii) Specific German market practices affect the use of the CPPA.

Comments are provided in the table below. They may be addressed in an *ad hoc* appendix or in the Election Sheet (in the Section specified as per the table).

The notes do not address compliance with EU regulatory requirements, e.g. under Regulation (EU) No. 1227/2011 (REMIT) or Directive 2014/65/EU (MIFID).

Capitalised terms not defined herein have a meaning ascribed to them in the CPPA.

REFERENCE	COMMENT
General remarks	
1. Assumptions	The Guidance Notes at hand have been prepared on the basis of the understanding that the Parties to a CPPA are both acting in their capacity as energy wholesale market participants respectively industrial or commercial end consumers of electricity and that the power supply under the CPPA does not qualify as the supply of household customers.
2. Direct marketing	<p>Parties should be aware that the German Renewable Energy Act (<i>Erneuerbare Energien Gesetz</i> – "EEG"¹) contains different marketing options for renewable energy production. This includes the so-called 'other direct marketing' option (<i>Sonstige Direktvermarktung</i>) in the meaning of § 21a of the EEG, which will usually apply to installation operators who want to use the CPPA to sell their production originating from renewable sources including the green benefit thereof directly to end consumers or utilities. Under such marketing option, the installation operator will not receive financial support payments for the electricity generated but can instead claim the issuance of Guarantees of Origin (<i>Herkunftsnachweise</i> – "GoOs").</p> <p>In contrast, another marketing option under the EEG would be the direct marketing option in order to benefit from financial support payments in form of the so-called market premium (<i>Marktprämie</i>). However, under such latter marketing option, based on the EEG, no GoOs will be issued in Germany and the installation operator will therefore generally not be able transfer a green benefit to his customer. Where market participants should nevertheless want to make use of such marketing option in order to claim the market premium, amendments to the CPPA template will be required (e.g. regarding the obligations relating to the transfer of Certificates). Generally, under § 21b of the EEG, an installation could also restrict its direct marketing under the 'other direct marketing' option to a certain percentage rate of the production. However, the practical implementation of such proportionate direct marketing will need to be assessed in the individual case and may need to be discussed with the competent network operator.</p> <p>Also, operators may change the marketing form in line with the requirements under §§ 21b and 21c of the EEG but only with effect of the first calendar day of a month. Furthermore, the rules on market processes for generating market locations power (<i>Marktprozesse für erzeugende Marktlokationen (Strom)</i> - "MPES") as published by the Federal Network Agency provide for certain deadlines which will need to be observed in this respect.</p>
3. Qualification as energy/electricity supplier	Where a person supplies other third parties with electricity, it will generally qualify as energy/electricity supply company (<i>Energie-/Elektrizitätsversorgungsunternehmen</i>) under the German Energy Act (<i>Energiewirtschaftsgesetz</i> - " EnWG "). Furthermore, in case supply takes

¹ These Guidance Notes are drafted on the basis of the EEG in its version last modified on 21 December 2020 (also called the "**EEG 2021**"). We note that the EEG is regularly monitored and subject to legislative amendments.

	<p>place towards end consumers, the supplier will also qualify as an electricity supply company (<i>Elektrizitätsversorgungsunternehmen</i>) in the meaning of the EEG.</p> <p>As a consequence, regulatory obligations and requirements triggered by those functions may apply.</p> <p>For example, electricity supply companies in the meaning of the EnWG will - in case of end consumer supplies - need to comply with invoicing requirements (section 40 of the EnWG) and fuel mix disclosure obligations (section 42 of the EnWG). In case of wholesale transactions, obligations to store relevant transaction data will need to be observed (section 5a of the EnWG). Electricity supply companies in the meaning of the EEG will be obliged to pay the so-called ‘EEG surcharge’ (<i>EEG Umlage</i>) to the competent transmission system operator (section 60 of the EEG) and in this context will need to comply with certain reporting obligations (section 74 of the EEG). Furthermore, where supply takes place via the electricity network, electricity supply companies are also obliged to register with the market master data register (section 3 para. 1 no. 8 of the German Market Data Register Ordinance (<i>Marktstammdatenregisterverordnung</i> - "MaStRV"). (NB: This is not to be considered as an exhaustive list of obligations of electricity/energy suppliers and counterparties under the CPPA should obtain further legal guidance on applicable obligations and requirements.)</p>
<p>4. Contract Quantity / Pay as produced</p>	<p>Balancing risks attached to the agreed Contract Quantity will generally be allocated between the parties by way of assigning the Facility to a balancing group of either party of the CPPA or even a third party nominated by either party.</p> <p>Where the parties intend to apply a pay as produced-delivery mechanism in item 2.1 of PART I (Individual Terms) Section A: Commercial Provisions of the CPPA by applying item 2.1(a) (All Metered Output) for the purposes of the definition of the Contract Quantity, the parties will usually assign the Facility to a balancing group of the Buyer (or a third party nominated by the Buyer). However, especially where it is intended to split delivery of the Metered Output proportionally to several offtakers, additional provisions regarding the implementation via balancing groups/sub-balancing groups will need to be implemented.</p> <p>In this respect, the parties often agree that the costs for balancing services are shared between the parties. Where a cap for these costs is applied in the underlying balancing services agreement (and carried into the CPPA), it is customary that certain events are carved out. These often relate to certain matters regarding accuracy of forecasting or certain market illiquidity events. It is advisable that these terms are backed into the CPPA and that the drafting in the CPPA is thus supplemented accordingly.</p>
<p>5. Levies, charges, electricity tax</p>	<p>Electricity supplies to end consumer located in Germany are generally subject to certain statutory levies (in particular the so-called ‘EEG surcharge’ – <i>EEG-Umlage</i>) and also electricity tax. For the collection of electricity tax, tax registration/approval requirements may apply to the supplier.</p>
<p>6. Certificates</p>	<p>German statutory law provides for a number of restrictions regarding the utilization of Guarantees of Origin ("GoOs"). E.g. under the German</p>

	<p>Guarantees of Origin and Guarantees of Regional Origin Implementing Ordinance (<i>Herkunfts- und Regionalnachweis-Durchführungsverordnung – "HkRNDV"</i>), the utilization of GoOs shall only be possible by electricity supply companies for the purpose of electricity labelling purposes. Also, the attribution of a cancellation of GoOs abroad to deliveries of electricity to end consumers in Germany (a so-called ‘ex-domain cancellation’) is generally not accepted.</p> <p>Market participants and in particular end-consumers purchasing certificates under the CPPA will therefore need to carefully analyse how to make use of GoOs acquired under the CPPA and/or consider sleeving structures under which a supplier is engaged for the utilization of the GoOs.</p>
<p>7. Principle of frustration of the underlying basis of a contract</p>	<p>German statutory law provides for the principle of frustration of the underlying basis of a contract (<i>Wegfall der Geschäftsgrundlage</i> - see section 313 of the German Civil Code (<i>Bürgerliches Gesetzbuch – "BGB"</i>)). Such principle applies, whenever circumstances which have become the basis of a contract have changed in a way which makes it unbearable for one party to perform its obligations under the unadjusted terms of the contract, provided that the changes to the circumstances were neither within the control of the parties nor foreseeable by the parties at the time they entered into the contract. In such case, the party affected has the right to claim an amendment of the contract or to withdraw from or terminate the contract if the contract cannot be adjusted or if it would be unreasonable to do so.</p> <p>In light of relevant preconditions to be fulfilled, the application of such statutory principle would be rather unusual in the context of short term contracts. However, considering the often rather long contract terms of CPPAs on the one hand and the quick development of e.g. the economical, legal/regulatory and technical market conditions of the electricity markets on the other hand, such legal principle could generally well be applied in the context of long-term CPPAs. We however note that relevant preconditions for such principle to apply are considered to be rather strict.</p> <p>As regards the legal consequences of the principle of frustration of the underlying basis of a contract – as already indicated above - where possible and reasonable, a contract amendment will take precedence over a termination of/withdrawal from the contract. A potential claim for contract amendment would aim to adjust the contract to the new actually existing circumstances in accordance with the standard of reasonableness (<i>Maßstab der Zumutbarkeit</i>) for the parties and taking into account their contractual intent as far as possible. The interference in the existing contractual arrangement is to be kept at a minimum. However, the range of possible contract amendments is wide. They could - subject to the specific circumstances of the individual case - e.g. include an adjustment of pricing rules, delivery obligations but also of rather technical and operational rules.</p>
<p>8. Feed-in management</p>	<p>Please note that based on statutory law network operators may be entitled to engage in feed-in management measures and curtail the feeding-in of electricity of renewable installations in case of certain circumstances related to a (impending) network congestion (see section 14 of the EEG). However, in case of feed-in management measures, the installation</p>

	<p>operator will have a statutory claim for compensation against the network operator (see section 15 of the EEG). (The above rules on feed-in management measures will be transferred from the EEG to the EnWG with effect as of 1 October 2021. In this context, there may also be conceptual changes which at the moment are heavily discussed between market participants.)</p> <p>Parties may want to specifically address the implications resulting from potential feed-in management measures of network operators, i.e. a potentially reduced electricity generation but also the attached compensation claim against the network operator, in the CPPA.</p>
Comments in relation to specific provisions of the CPPA	
§ 16 Change in Law	<p>We note that, in addition to such Change in Law-clause, the German statutory principle of frustration of the underlying basis of a contract (<i>Wegfall der Geschäftsgrundlage</i>) may apply in relevant circumstances. Please see item 7 of the General Remarks above in this respect.</p>
§ 18.1 Term / § 18.2 Expiration Date / Total Supply Period	<p>For long-term contracts with high exclusivity respectively market closing effects, competition law regulations will generally need not be taken into account. Specifically, long-term contracts may be illegal under competition law regulations where they come along with a high degree of fulfillment of demand (<i>Bedarfsdeckungswirkung</i>). Also, a long contract term may be illegal under the provisions on the abuse of a dominant position in the market. Whether or not the conclusion of a PPA is a violation of competition law regulations is however subject to a detailed case-by-case analysis.</p>
§ 18.4 Automatic Termination	<p>Please refer to the statements made in relation to the application of Automatic Termination in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org.</p>
§ 18.5 (b) Winding-up / Insolvency / Attachment	<p>Please refer to the statements made in relation to the insolvency related termination rights, the application of Automatic Termination and the insolvency related challenge and avoidance rights in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org.</p>
§ 18.5 Definition of Material Reason	<p>Under German law (see section 314 of the BGB), each party to a contract relating to continuing obligations (<i>Dauerschuldverhältnis</i>) can terminate such contract for material reason (<i>wichtiger Grund</i>) without observing any notice period. Such material reason exists if – taking into account all the circumstances of the individual case and weighing the interests of both parties – the terminating party cannot be expected to continue the contractual relationship until the agreed termination or until a period of notice has expired.</p> <p>Since the parties cannot limit/restrict this mandatory statutory right, the statement in § 18.5 of the CPPA that “The above Material Reasons shall constitute the exclusive reasons for Early Termination under this § 18.” will not be enforceable. In contrast, the parties would also be able to</p>

	terminate the CPPA in case of the occurrence of any other material reason in the meaning of the above.
§ 19 Calculation of the Termination Amount	Please refer to the statements made in relation to the calculation, enforcement and the challenging of the Termination Amount in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org .
§ 22 Invoicing and Payment	<p>Section 40 of the EnWG provides for detailed requirements relating to the invoicing of energy supplies to end consumers (<i>Letztverbraucher</i>) in the meaning of the EnWG by suppliers (<i>Lieferanten</i>) in the meaning of the EnWG.</p> <p>For example, invoices addressed to end consumers must be simple and easy to understand must contain certain minimum requirements (see section 40 para. 2 and 6 of the EnWG).</p> <p>Suppliers are generally also obliged to offer end consumers monthly, quarterly or half-yearly billing (see section 40 para 3 of the EnWG).</p> <p>Besides, section 42 of the EnWG provides for certain electricity labelling and transparency requirements relating to electricity bills.</p> <p>For example, electricity supply companies (<i>Elektrizitätsversorgungsunternehmen</i>) in the meaning of the EnWG are obliged to state in or as an attachment to their bills to end consumers and in advertising material directed to them and on their website certain minimum information, e.g. relating to the fuel mix and on the environmental impact. Related notifications vis-à-vis the Federal Network Agency will apply as well.</p>
§ 28 Assignment	Please note that the contractual exclusion of an assignment will not be effective as regards payment claims (see section 354a of the German Commercial Code (<i>Handelsgesetzbuch</i> – " HGB ")).
§ 31 Governing Law and Dispute Resolution	Please refer to the statements made relating to the choice of law and the agreement on dispute resolution mechanisms in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org .
§ 32.1 Recording Telephone Conversations	Parties should be aware that under German law a tape recording is only admissible if the parties of the conversation have consented to the recording. Otherwise, the recording could qualify as a violation of the privacy of spoken word in the meaning of section 201 of the German Criminal Code (<i>Strafgesetzbuch</i>) and thus as a criminal offence. Parties should also check any applicable labor law implications. For further details please also refer to the statements made in relation to the recording of telephone conversations and the use of recordings as evidence in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org .
General risks regarding standard business terms	As in the case of other EFET (or similar business) standard documentation (see e.g. the respective comments in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity), there is a general risk that the CPPA may be considered as

	<p>standard terms and conditions (<i>Allgemeine Geschäftsbedingungen</i>) in the meaning of the German Civil Code. If that would be the case, the terms and conditions would be subject to a review of the limitations and restrictions that apply to such standard terms and conditions under sections 305 to 310 of the German Civil Code. Terms and conditions which are not in compliance with those restrictions could be regarded void and instead of such void provisions generally statutory provisions would apply. As regards the CPPA, clauses which could in our view be at risk to not be in compliance with those restrictions are e.g. the provisions on the limitation of liability (as in § 21 of the CPPA) and liquidated damages (as in §§13 and 14 of the CPPA) but more generally any clause that could unreasonably disadvantage the other party to the contract in the individual case.</p> <p>However, regularly, market participants rely on the argumentation that respective standard terms and conditions e.g. provided by industry associations, are not to be considered as standard terms and conditions (<i>Allgemeine Geschäftsbedingungen</i>) in the meaning of the German Civil Code given that they are not provided/imposed unilaterally by one party to/on the other party. Instead, there are two users (<i>Verwender</i>) of the respective terms. Unfortunately, there is however a risk that this lien of argumentation may not be upheld where one party is less experienced with the relevant business and/or the standard terms, so that again, the other party may be considered a user of such terms providing/imposing such terms unilaterally on the other less experienced party.</p> <p>For additional details on these aspects, please see also the respective comments in the German Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity, which can be procured via secretariat@efet.org.</p>
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