

# **EFET**

## **European Federation of Energy Traders**

E-mail: [secretariat@efet.org](mailto:secretariat@efet.org)

Webpage: [www.efet.org](http://www.efet.org)

## **Guidance notes**

**concerning the EFET**

**Ukrainian Border Appendix, the EFET Ukrainian Customs**

**Warehouse Storage Appendix and**

**the recommended clauses for trading with Ukraine counterparties  
under the EFET General Agreement concerning the Delivery and  
Acceptance of Natural Gas**

**(Version 3.0/May 2021)**

**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.**

**CONTENT**

- I. STRUCTURE..... 3**
- II. EXPLANATION OF THE CUSTOMS WAREHOUSE STORAGE ..... 4**
  - A. CUSTOMS WAREHOUSE CONCEPT ..... 4**
  - B. PLACEMENT OF NATURAL GAS INTO THE CWS ..... 4**
  - C. TRADING WITHIN THE CWS ..... 6**
  - D. TRANSFER AND VALIDATION ..... 7**
    - 1. Trade notifications ..... 7*
    - 2. GTA Report ..... 8*
  - E. SHORT HAUL CAPACITY ..... 8**
  - F. RE-EXPORT ..... 9**
  - G. TAX IMPLICATIONS..... 9**
- III. EXPLANATION OF SPECIFIC PROVISIONS ..... 10**
  - A. UA BORDER APPENDIX ..... 10**
    - 1. Clause 1 ..... 10*
    - 2. Clause 4 amending §6.3 (Transfer of Rights) ..... 10*
    - 3. Clause 5 introducing a new §13A (Reports)..... 10*
    - 4. Other clauses market participants may want to include in respect of specific UA Border Transaction..... 11*
  - B. UA CWS APPENDIX ..... 12**
    - 1. General comment about the language versions ..... 12*
    - 2. Clause 2..... 12*
    - 3. Clause 4..... 13*
    - 4. Clause 5 extending §21 (Representations and Warranties)..... 13*
    - 5. Clause 6(c) replacing §4.1(a) (Delivery and Acceptance and Net Scheduling Obligations)..... 13*
    - 6. Clause 7 amending §6.3 (Transfer of Rights) ..... 14*
    - 7. Clause 8 introducing a new §13A (Reports)..... 14*
  - C. RECOMMENCED CLAUSES FOR GENERAL AGREEMENT ..... 15**
    - 1. §3.2 (Confirmations) and §3.3 (Objections to Confirmations)..... 15*
    - 2. §3.4 (Authorised Persons) ..... 16*
    - 3. §10 (Term and Termination Rights) and §11 (Calculation of the Termination Amount) ..... 17*
    - 4. §23.2 (Notices and Communication) ..... 18*
    - 5. Prepayment ..... 18*
    - 6. Payment Netting ..... 19*

## **I. Structure**

EFET and its members have developed several standard documents to support trading (i) at the Ukrainian border and (ii) in Ukraine within the customs warehouse storage (“CWS”).

Trading at any of the EU-UA border points or in the CWS can be performed by

- (i) two companies incorporated outside Ukraine, or
- (ii) by one company incorporated in Ukraine and one company being incorporated outside of Ukraine.

The UA Border Appendix and the UA CWS Appendix are intended to be annexed to an EFET General Agreement governed by English or German law. The UA Border Appendix and the UA CWS Appendix provide the framework to enable the Parties to any UA-EU Border Transaction and CWS Transaction respectively.

Please note that trading in Ukraine at the VTP, or storage point (save for the trade in the CWS), can only be performed by two companies incorporated in Ukraine under a contract governed by Ukrainian law. Ukrainian companies have no freedom to choose the law governing the contract.

EFET and its members developed a set of additional clauses and standard amendments to the EFET General Agreement to serve the and comply with particularities of Ukrainian law as they are relevant for any and all Individual Contracts. Users of the EFET General Agreement may want to consider implementing some or all of these clauses.

This guidance note was prepared by EFET’s members exercising all reasonable care elaborating reasons for changes to the General Agreement via the Appendix or the recommended clause. 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 company wishing to use any of the UA documentation to ensure its provisions are legally binding, valid and enforceable and best serve to protect the user’s legal interests. Users are urged to consult relevant netting agreement opinions if and when made available through EFET as well as their own counsel.

## **II. Explanation of the customs warehouse storage**

### **A. Customs warehouse concept**

Under Ukrainian law the concept of *customs warehouse storage* (CWS) refers to a specific customs regime – the *customs warehouse*, which allows storing goods within Ukrainian customs territory under control of Ukrainian customs authorities (customs control) for up to 1095 days with the conditional full exemption from customs duties (including import VAT exemption) and free from application of mechanisms of the non-tariff regulation (these are measures, other than customs duties, that state authorities may implement in relation to import/export of goods, such as quotas, special licences and other).

In relation to Natural Gas, this implies that the customs warehouse regime allows to benefit from a full conditional exemption from Ukrainian 20% import VAT for the period of 1095 days upon transportation of Natural Gas across Ukrainian border for its storage in Ukrainian underground storage facilities (“UGSFs”) until Natural Gas is: (i) customs cleared for import (for sale on the Ukrainian market) or (ii) placed under different customs regime, such as re-export (in each case tax implications may differ).

The customs warehouse regime, nevertheless, does not exempt from payment of tariffs to the customs warehouse operator or other tariffs, such as gas transmission system entry/exit fee.

The CWS is available for both residents and non-residents of Ukraine. However, the way residents and non-residents may use the CWS would mostly be different. From the practical standpoint the CWS appears to be more versatile for non-residents.

Both Natural Gas acquired on the Ukrainian market (*i.e.*, Natural Gas that was either produced in Ukraine or imported from abroad and then customs cleared for free circulation on the Ukrainian market) and Natural Gas brought from abroad may be placed into the CWS. However, Natural Gas originating from Ukraine may only formally be placed into the CWS for its further export and cannot be traded in the CWS.

Therefore, this CWS Appendix purports to regulate only transactions involving Natural Gas of non-Ukrainian origin, *i.e.*, Natural Gas that was brought and placed into CWS from abroad. Such Natural Gas may in most cases be traded, imported or re-exported abroad.

### **B. Placement of Natural Gas into the CWS**

Both foreign and Ukrainian entities are allowed to place Natural Gas of foreign origin into the CWS.

Transportation of Natural Gas from abroad, including for storage in the CWS, is documented by periodic customs declarations. A periodic declaration states an estimated volume of Natural Gas that is planned to be transported across Ukrainian border over a certain period and must be submitted before the beginning of the transportation. The maximum term covered by periodic customs declaration by law is 180 days, though in relation to Natural Gas periodic declarations in practice are filed monthly.

Within 45 days after filing of a periodic customs declaration (usually by 15<sup>th</sup> day of the following month), the declarant is required to submit with the customs authorities an additional customs declaration stating the exact quantity of Natural Gas that entered Ukraine and was injected into the UGSFs (if any) in each month for which the periodic declaration was filed. Information about the quantity of Natural Gas is obtained from the operators of upstream and downstream (Ukrainian) gas transmission systems.

Custom authorities may also require provision of a financial security (usually in the form of a bank guarantee or cash deposit on the treasury account of the custom office) to guarantee payment of customs duties, if and when such become due, for Natural Gas transported across the Ukrainian customs border, including for its placement into the CWS. This may be the case if the quantity of Natural Gas stated in a respective periodic declaration exceeds the quantity of Natural Gas that was imported or placed into the CWS during the previous 365 days. Consequently, traders placing Natural Gas into the CWS for the first time would need to provide a financial security. However, as long as it relates non-resident entities, the requirement to provide a financial security is currently fulfilled by the TSO.

The CWS period of 1095 days starts from the day when goods are placed into the CWS. The law does not clarify whether the beginning of this period is linked to a periodic or an additional customs declaration. Hence, the safest approach is to count the CWS period from the day of filing of the periodic customs declaration for the respective quantity of Natural Gas, although in practice customs authorities might take a more liberal view in this case.

Customs authorities treat Natural Gas placed in the CWS under each periodic/additional declaration independently. As a result, for customs purposes Natural Gas placed in the CWS under one periodic/additional declaration cannot be formally mixed with the Natural Gas under another periodic/additional declaration. Practically, this means that the 1095 period is counted separately for each periodic/additional declaration. For clarity, the formality above does not restrict selling or re-exporting only part of the Natural Gas quantity declared into the CWS under single periodic/additional declaration.

In relation to Natural Gas placed into the CWS, all customs formalities are performed only by the gas storage operator (“SSO”). Hence, an entity placing Natural Gas into the CWS would generally need to conclude an agreement on customs declaration services with the SSO.

### **C. Trading within the CWS**

Ukrainian customs legislation explicitly allows transferring the ownership to foreign goods kept in the customs warehouse regime. The change of ownership over the foreign goods in the CWS does not change the customs status of such goods. Consequently, the new owner assumes responsibility of the previous owner for further compliance with all customs formalities related to the CWS, such as not exceeding the 1095-day maximum storage period, performing customs clearance upon further import or re-export, etc.

Trading of Natural Gas in the CWS between non-residents would generally not be subject to any restrictions, including any licencing requirements. Non-residents may also freely sell Natural Gas in the CWS to Ukrainian counterparties, who may either continue storing it in the CWS or import for free circulation on the Ukrainian market. Due to various legal restrictions Ukrainian entities are only allowed to sell Natural Gas to non-residents and mostly if Natural Gas was placed into the CWS by themselves.

The sale under the customs warehouse regime is only possible within UGSFs. Selling Natural Gas within the gas transmission system, including at the virtual trading point (UA VTP), physical points of exit to end-consumers and gas distribution system is not possible with respect to Natural Gas placed in this customs regime.

Apart from all customs formalities, entities willing to trade Natural Gas in the CWS must also comply with all relevant requirements of the gas storage system operator (“SSO”). For instance, to be able to perform their scheduling obligations, both the buyer and the seller must have EIC codes, have a valid storage agreement with the SSO, book necessary storage capacity to deliver Natural Gas to the storage or accept Natural Gas in storage, not have any debts to the SSO, etc.

As these requirements may change from time to time, EFET recommends the Parties to study them in detail before proceeding with each CWS Transaction.

Please also note that there may be certain unalignment between the customs and gas market legislation, which may affect seamless execution of CWS Transactions.

For instance, Natural Gas may not be traded immediately upon injection into the gas storage. According to the SSO, Natural Gas is considered to be “on its way to storage” until an additional customs declaration is filed, which shall happen by 15<sup>th</sup> day of the following month.

As noted previously, an additional declaration is filed on the basis of the transfer and acceptance protocol between the operators of an upstream (of a neighbouring country) and a downstream (Ukrainian) gas transmission systems. As a rule, such protocol is executed by the 5<sup>th</sup> day of the

month following the month of transportation of Natural Gas across the border. Therefore, the CWS Transaction maybe delayed until then.

Nevertheless, according to the SSO for the interconnection points with Slovakia and Hungary it can file final (additional) declarations reasonably promptly (within a matter of days) on the basis of certificates issued by the Ukrainian TSO. As for the Polish interconnection points, although it is possible to apply the same approach, the respective certificates issued by the TSO could be inaccurate and thus it may be later necessary to perform corrections of the respective customs declarations in accordance with the protocol between the upstream and downstream operators.

## **D. Transfer and validation**

The transfer of Natural Gas in the CWS is performed in accordance with the rules and procedures of the SSO, which are based on the requirements of the Gas Storage System Code. However, in respect of the CWS Transactions, the SSO may require its customers to comply with additional formalities triggered by the specific customs status of such Natural Gas. There are no charges or fees payable to the SSO for performing a Natural Gas transfer transaction in the CWS (CWS Transaction).

### **1. Trade notifications**

Under the Gas Storage System Code, the SSO administrates the transfer of Natural Gas in UGSFs, and particularly in the CWS, by processing and validating *trade notifications* of the parties to a transaction. A trade notification is an instruction to the SSO of the party that owns Natural Gas to transfer it to another party and a confirmation to the SSO from such other party of its intention to accept such Natural Gas.

To complete transfer of Natural Gas in gas storage, each party must submit on the transfer date its own trade notification to the SSO in electronic form through the SSO' IT platform. A trade notification has a standard form approved by the SSO, which transmits to the SSO the following information:

- details of an entity submitting a trade notification, including its EIC code;
- details of its counterparty, including its EIC code;
- purpose of the notification: transfer or acceptance of Natural Gas kept in storage;
- quantity of Natural Gas to be transferred;
- customs regime applicable to such Natural Gas.

The SSO verifies within two hours if transaction details specified in a pair of trade notifications match and if parties to a transaction have fulfilled all mandatory requirements. If the SSO

validates the transfer, it shall decrease the quantity of Natural Gas on the seller's storage account and increases the quantity on the purchaser's storage account respectively.

The Gas Storage System Code does not regulate when the title to Natural Gas shall pass under the CWS Transaction. Therefore, the parties to the CWS Transaction are advised to specifically define such moment in their contracts. As a matter of practice, the risk of loss and the title to Natural Gas pass when the SSO validates trade notifications of the parties and such approach was employed in clause 7 of the UA CWS Appendix.

## **2. GTA Report**

In relation to CWS Transactions, the SSO additionally requires the parties to execute a three-partite *Protocol on the Transfer and Acceptance in Storage of Natural Gas Placed in the Customs Warehouse Regime* ("GTA Report"), as per the standard form published by the SSO on its web site. The GTA Report specifies the quantity of Natural Gas transferred by the Parties under the CWS Transaction and is also used for further customs clearance procedures.

The SSO expects to receive a scan copy of the GTA Report executed by both parties before the transfer date to check whether all conditions for the CWS Transaction have been met. In any case, if the GTA Report is not provided until the end of the trade notifications verification period, the SSO shall reject the CWS Transaction.

The parties may execute and exchange originals of the GTA Report after the CWS Transaction is completed. The SSO would usually not execute a scan copy of the GTA Report but wait for the originals to be provided. However, upon request of either party the SSO may return an executed scan copy on the transfer date. For instance, that may be the case if the buyer intends to change the customs regime of Natural Gas (e.g., to import or re-export) before the parties will be able to execute and exchange original copies of the GTA Report.

According to the SSO, its IT platform may allow execution and submitting of the GTA Reports online in the nearest future. The UA CWS Appendix already accounts for that possibility.

## **E. Short haul capacity**

Ukrainian gas transmission system operator ("TSO") provides a possibility to place gas in the CWS using either a regular or a short haul transmission (entry/exit) capacity. A short haul capacity (official term "*capacity with restrictions*") has a lower transportation tariff, however it may only be used for the transit of Natural Gas through Ukraine (between its entry and exit border points) or for transportation of Natural Gas from the Ukrainian border to the CWS and back. Currently, the short haul tariff is only set for certain entry/exit points at the Western border of Ukraine.

Hence, in respect of the CWS, the short haul capacity is used either for the injection of Natural Gas into the UGSFs or for its withdrawal from UGSFs and re-export. A TSO customer would pay an additional fee in the case of (i) importation of Natural Gas placed in the CWS using the short haul capacity or (ii) re-exporting such Natural Gas through the cross-border points, for which the short haul capacity is not available.

The parties must therefore consider a potential liability (costs) of the buyer in connection with the CWS Transactions involving a short haul capacity.

The TSO provides a short haul capacity on a monthly or day-ahead interruptible basis. When nominating transportation of Natural Gas using the short haul capacity, shippers must receive a separate shipper code from the TSO.

## **F. Re-export**

Re-export is as a customs regime in which the goods previously brought into the customs territory of Ukraine are further transported outside its customs territory without payment of any customs duties and without application of mechanisms of the non-tariff regulation.

The customs legislation of Ukraine specifically prescribes to apply the re-export customs regime to foreign goods stored in Ukraine under the customs warehouse regime in the case of moving (“exporting”) them outside of Ukraine. Re-export of goods is exempted from Ukrainian VAT.

A CWS Transaction itself shall not affect a possibility to re-export Natural Gas placed into the CWS.

## **G. Tax implications**

Under a general rule, if Natural Gas is sold within the UGSFs by a non-resident entity, such activities give a rise for the permanent establishment in Ukraine. However, there is a specific exception from this rule for Natural Gas traded in the CWS.

If a non-resident entity were to sell Natural Gas in CWS to a Ukrainian entity for further circulation within Ukraine, there should be no VAT obligations arising for a non-resident. The Ukrainian entity, in turn, would be liable to pay import VAT directly to the state budget upon clearing the Natural Gas into regime of importation.

If the CWS Transaction is concluded between two non-resident entities and the customs regime does not change, neither of them shall have VAT liabilities.

The customs warehouse regime, nevertheless, does not exempt a non-resident from payment of a 20% VAT on any services provided by the Ukrainian TSO or SSO in connection with transportation of Natural Gas, its storage (including injection or withdrawal) in the CWS or change of the customs regime.

Please note that an overview of tax implications under CWS Transactions above intends to provide only a very general information and shall not be used as a complete tax advice or be relied upon. EFET recommends Parties to seek their own tax advice in relation to each specific CWS Transaction they intend to conclude.

### **III. Explanation of specific Provisions**

#### **A. UA Border Appendix**

##### **1. Clause 1**

1.1 EFET members decided to limit the range of any relevant Delivery Points to those situated at any EU-Ukraine border. The reason is that EFET is not monitoring the relevant legal framework applicable at any other border point between the Ukraine and any non-EU Member State.

##### **2. Clause 4 amending §6.3 (*Transfer of Rights*)**

2.1 In order to avoid unintended results to the question when title of the Natural Gas passes in particular in situations where Ukrainian law may prevail, the UA Border Appendix stipulates expressly that the risk of loss and the title shall pass at the delivery point.

2.2 Further Ukrainian custom law requires that the parties to a contract specify the terms of delivery in accordance with INCOTERM Rules. For deliveries of Natural Gas, the Incoterm rule *Delivery at Place* (“DAP”) is often specified, however other delivery terms are possible. Taking this into consideration and providing the users of the UA Border Appendix the greatest possible flexibility, the Incoterms applicable for any UA Transaction shall be specified in the Individual Contact.

##### **3. Clause 5 introducing a new §13A (*Reports*)**

3.1 In order to comply with UA customs law, the Party dealing with the custom formalities must be in the position to provide *originals* documents (Reports) certifying information concerning the transaction including but not limited to the quantity of Natural Gas

delivered and the value of such Natural Gas delivered to the relevant customs authority on or before the fifteenth (15<sup>th</sup>) day of the month following the Month of delivery.

- 3.2 As of the date of issuance of this guidance note it is mandatory to declare the Contract Quantity in cubic meter and the Contract Price in the contractual currency per cubic meter. Instead of determining a formula to convert MWh into cubic meter EFET Members have decided to rely for this conversion on the determination of the relevant Network Operator(s).
- 3.3 To comply with the statutory deadlines, it is essential that that counterparties process Reports without delay and return partially signed originals within the time frame provided by the UA Border Appendix. Although stamping of documents is legally only required, provided the applicable law in the jurisdiction where a Party is incorporated requires a corporate stamp, the experience of EFET Members trading already at the Ukraine border is however that it is common practice of UA custom authorities to require stamping by all Parties.
- 3.4 For customs formalities Parties should issue three (3) originals, it may however be that the Party incorporated in the Ukraine requires for internal purposes more (up to five (5)) originals. Such increase would have to be agreed bilaterally.

#### **4. Other clauses market participants may want to include in respect of specific UA Border Transaction**

- 4.1 EFET Members are made aware that Parties trading already at the UA border have confirmed that under certain conditions it is not uncommon to agree an additional relief from the contractual obligation to deliver or accept Natural Gas without the obligation to pay damages as set out below. Without prejudice to the general waiver, EFET recommends Parties to seek their own legal advice on the potential risk of incorporating such additional clause in any UA Border Transaction.

##### **“§7.6 Interruption:**

*A new “§7.6 Interruption” shall be applied as follows:*

*a) “**Interruption**” means that, save in case of Force Majeure or Transportation Failure the Physical Upstream Transporter and/or the Physical Downstream Transporter, as the case may be, has interrupted all or part of the capacities at the Delivery Point.*

*b) Without prejudice to the rights of either Party in terms of this §7 (**Non-Performance Due to Force Majeure**), in the event that Party books capacity for delivery or acceptance of Natural Gas under any Individual Contract and any Natural Gas flows under such capacity booking are interrupted according to the Physical Upstream Transporter and/or the Physical Downstream Transporter, then such Party shall be released from its obligations under the relevant Individual Contract in respect of the Natural Gas so affected including (without limitation) its obligation to deliver or accept such*

*Natural Gas. No breach or default on the part of either Party shall be deemed to have occurred. Neither Party shall be under any obligation to pay damages, costs or charges to the other in respect of the Natural Gas so affected.*

*c) Party, shall as soon as reasonably practicable after learning of any relevant Interruption notify the other Party of such Interruption and the Individual Contracts affected thereby and, to the extent then available, provide the Party with a bona fide nonbinding estimate of the extent of the Interruption and expected duration of Party's inability to perform.*

*d) Party shall provide to other Party, as soon as reasonably practicable, evidence of the relevant Interruption.”*

- 4.2 Please keep in mind physical interruptions did happen on the Ukrainian TSO side due to unscheduled maintenance, so EFET recommends careful assessment if the language that addresses that scenario in the EFET General Agreement covers the needs of the Parties from commercial and legal standpoint. EFET members should be advised that definition of the Transportation Failure, which covers maintenances (subject to certain further requirements/provisions), and potentially leads to implications under Force Majeure clause, requires firm capacity to be contracted for the purposes of the relevant IC.

## **B. UA CWS Appendix**

### **1. General comment about the language versions**

- 1.1. As a matter of Ukrainian law, a Ukrainian language version of the EFET contract, including the UA CWS Appendix and the Commercial Report (the GTA report must be bilingual by default) is generally required in transactions with counterparties incorporated in Ukraine. However, for the purpose of customs clearance and particularly re-export Ukrainian customs authorities would also ask for a Ukrainian version of the same even if the CWS Transaction involved only foreign entities. In this case, the Parties might not need to execute a Ukrainian language version of the contract, but merely produce a certified translation into Ukrainian.

### **2. Clause 2**

- 2.1 A CWS Transaction does not contemplate any physical transportation of Natural Gas. Consequently, the UA CWS Appendix operates the notion of “transfer” instead of “delivery” and substitutes all relevant terms and references accordingly. Any provisions of the EFET General Agreement affected by such modifications shall apply in full force and effect to the UA CWS Transaction, unless the UA CWS Appendix provides otherwise.

### **3. Clause 4**

- 3.1 As the CWS Transaction involves transfer of Natural Gas in a specific customs regime and is therefore performed under control of Ukrainian customs authorities, it shall be recorded in a written form, even if concluded between two entities incorporated outside of Ukraine.
- 3.2 Ukrainian law imposes certain currency control restrictions on Ukrainian counterparties in relation to making payments overseas in foreign currency. In this regard, where a CWS Transaction contemplates a Ukrainian entity purchasing Natural Gas from a non-resident entity, the parties are advised to clarify with the servicing bank of the Ukrainian counterparty any formal procedures, such as KYC checks, etc., which might affect compliance with the standard timeframe for returning of the pre-payment under §3.1. If any such bottlenecks are identified, the Parties may consider extending the standard timeframe or seek other solution which they may find appropriate under the given circumstances.

### **4. Clause 5 extending §21 (*Representations and Warranties*)**

- 4.1 EFET recommends adding a new representation and warranty of the Seller in connection with the specific responsibilities of the owner of goods placed into a customs warehouse regime, which are transferred from the seller to the buyer as a result of the CWS Transaction. This is an optional clause and the parties may elect not to apply it to a specific CWS Transaction in the Individual Contract.

### **5. Clause 6(c) replacing §4.1(a) (*Delivery and Acceptance and Net Scheduling Obligations*)**

- 5.1 Upon completion of the CWS Transaction, the buyer would be able to perform various operations with Natural Gas remaining under the customs warehouse procedure, such as, depending on the case, continuation of its storage in the CWS, re-export, import or sale. In each case, the buyer shall have a responsibility to comply with certain regulatory requirements and also incur certain expenses (e.g., transportation or storage costs, costs of customs clearance, taxes, fee of the TSO for switching from short haul to regular capacity, etc). The buyer shall be solely responsible for all such future liabilities, except for those arising in connection with the seller's breach of any rule or procedure upon placement of Natural Gas into the CWS and not informing the buyer about the type of transmission capacity used to deliver Natural Gas to the CWS. Furthermore, to avoid any misunderstanding, the Individual Contract shall specify whether Natural Gas was injected into the CWS under the short haul tariff.

## **6. Clause 7 amending §6.3 (*Transfer of Rights*)**

- 6.1 In order to avoid unintended results to the question when title of the Natural Gas passes in particular in situations where Ukrainian law may prevail, the UA CWS Appendix stipulates expressly that the risk of loss and the title shall pass at the transfer point Transfer Point immediately after the Gas Storage Operator validated the trade notifications of the parties.
- 6.2 Further Ukrainian custom law requires that the parties to a contract specify the terms of delivery in accordance with INCOTERM Rules. For deliveries of Natural Gas, the Incoterm rule *Delivery at Place* (“DAP”) is often specified, however other delivery terms are possible. Taking this into consideration and providing the users of the UA CWS Transaction the greatest possible flexibility, the Incoterms applicable for any UA CWS Transaction shall be specified in the Individual Contact.

## **7. Clause 8 introducing a new §13A (*Reports*)**

- 7.1 In order to comply with UA customs law, the Parties must execute with the SSO a report (GTA Report) certifying information concerning each transfer including but not limited to the quantity of Natural Gas transferred on the respective transfer date. An applicable requirement is described in Section II, D of these guidance notes. Execution of the GTA Report by each party is part of its Scheduling obligations.
- 7.2 The parties shall choose between them who shall prepare the GTA Report. However, if prepared by the buyer the seller must furnish a copy of the periodic customs declaration to the buyer with information about the relevant Contract Quantity. The parties shall make an election in the Individual Contract to that effect, if necessary.
- 7.3 The parties may send a draft of the GTA Report to the SSO for review and approval or if they are confident that all information is filled in correctly, proceed with its execution right away. An appropriate election shall be made in Part II of the UA CWS Appendix.
- 7.4. As already noted in the Section D.2 above, the SSO might provide a possibility to submit GTA Reports online and the procedure of executing and exchanging the GTA reports in §13A(3a) was drafted accordingly.
- 7.5 The parties shall execute a Commercial Report in respect of a certain period specified in the Individual Contract. The Commercial Report shall aggregate all transfers of Natural Gas being made in a such period and may serve as a basis for final settlements between the Parties. The Party dealing with any further custom formalities (import, re-export) must be in the position to provide *originals* of documents (Reports) certifying

information concerning the CWS Transaction including but not limited to the quantity of Natural Gas transferred and the value of such Natural Gas transferred to the relevant customs authority on the date of the customs clearance. Therefore, the Parties shall agree on the deadline for exchanging the originals of the Commercial Report on a case-by-case basis.

- 7.6 As of the date of issuance of this guidance note it is mandatory to declare the Contract Quantity in cubic meter and the Contract Price in the contractual currency per cubic meter. The Parties shall convert MWh into cubic meter according to the GCV value specified in the Individual Contract.
- 7.7 To comply with the statutory deadlines, it is essential that that counterparties process Reports without delay and return partially signed originals within the time frame provided by the UA CWS Appendix. Stamping of documents is legally only required, provided the applicable law in the jurisdiction where a Party is incorporated requires a corporate stamp, and in relation to entities incorporated in Ukraine – if shareholders agreed in constituent documents of a company to have a corporate stamp.

### **C. Recommended clauses for General Agreement**

The EFET Legal Opinion by CMS stipulates in point “Application of Foreign Law” that

*“... we note that under the Law of Ukraine “On Private International Law” dated 23 June 2005, as amended, the parties’ choice of foreign law to govern an agreement does not limit the effect of any mandatory rules of Ukrainian law.”*

This means that although for international trade contracts such as an EFET Agreement between a UA company and a company incorporated outside of Ukraine the law governing the contract can be chosen freely, certain clauses of the EFET General Agreement should however be amended to avoid conflicts or unintended interpretation in accordance with mandatory Ukraine law.

#### **1. §3.2 (Confirmations) and §3.3 (Objections to Confirmations)**

- 1.1 A process that caters for the oral conclusion of Individual Contracts does not provide the desired legal certainty even if confirmed afterwards in writing as Ukraine law does not recognise oral contracts between legal entities. EFET has been advised that it is required to conclude Individual Contracts in writing.
- 1.2 To limit the period between the oral agreement and the signature and exchange of originals of any written Individual Contract by both Parties, it is recommendable to agree the upfront exchange of any Individual Contract by email. Electronic exchange of

documents will only be recognised if expressly agreed as binding in the relevant contract, here the General Agreement, and does not replace the requirement to exchange originals. However, if expressly agreed in the General Agreement any Individual Contract becomes legally binding as soon as it has been signed by both Parties any exchanged via email.

- 1.3 Stamping of documents is in accordance with Ukrainian law legally only required, provided the applicable law in the jurisdiction where a Party is incorporated requires a corporate stamp. The experience of EFET Members trading already at the Ukraine border is however that UA companies commonly require stamped documents from its counterparties irrespectively of the legal requirement due to internal policies or common practice.

## **2. §3.4 (Authorised Persons)**

- 2.1 The question whether or not a person acting on behalf of a company has the capacity or authority to legally bind the company should be determined by the law of the company's country of incorporation. This applies in accordance with Article 26 of the Ukraine *Law on Private International Law* as well under English and German conflict of law policies. The governing law of the General Agreement must not be taken into consideration in this respect. That is, the question whether UA company has/ does not have capacity can only be determined under Ukrainian law.
- 2.2 At the same time the question what are the legal consequences of defects of capacity/authority to enter into a contract (i.e., whether the contract runs the risk of being invalidated on that basis) will be determined under the governing law of the contract (e.g., English or German law, which are optional for EFET). This follows from Article 33 of the Ukraine *Law On Private International Law*, which provides that the governing law of a contract shall also govern the questions of the contract's validity.
- 2.3 In other words, if it turns out that a UA counterparty lacked capacity to enter into an Individual Contract, the following needs to be analysed (from the standpoint of Ukrainian conflict of laws rules): (i) whether there was indeed a lack of capacity under UA law and (ii) whether such lack of capacity has any effect on the validity of the individual contract under the contract's governing law.
- 2.4 From the Ukrainian law perspective, a wording stating in §3.4 or the Agreement that the acting person is deemed to be authorized cannot cure any potential lack of capacity or somehow alter the above-described approach to determining capacity of the parties and the validity of the contract. Such provisions are of declarative nature, having no material impact on the contract or its parties. Parties are recommended to conduct authority and

capacity checks when concluding a General Agreement and each time thereafter when concluding an Individual Contract. This might be done by either adding a list of authorized persons or verifying the authority *in respect of each Individual Contract* separately.

- 2.5 If the UA counterparty lacked capacity when entering into an Individual Contract and German law has been elected as governing law of the Agreement, the consequences of such lack of capacity have to be assessed in accordance with §§ 177 and following of the *German Civil Code*<sup>1</sup>. The effectiveness of the Agreement and/or any Individual Contract depends on the ratification/approval of such Individual Contract by the UA company or revocation, if permissible, of the contract of the other company<sup>2</sup>.
- 2.6 If the UA counterparty lacked capacity when enter into an Individual Contract and English law has been elected as governing law of the Agreement, under conflict of law principles of English common law, parties must satisfy themselves that both the method of execution of the Individual Contract is valid and that the person executing it has the required authority to do so under local law of the company not being incorporated under English law. Additionally, it's important to check and be satisfied that all other formalities under local law (e.g. notarisation, apostillation or legalisation) have been complied with. This position has recently been confirmed by the English Court of Appeal in *Petroleum SA v SCU-Finanz AG [2015] EWCA Civ 144*.

Therefore, if an unauthorised person entered into an Individual Contract, Ukrainian law as being the local law of the relevant UA company would determine if the UA company is bound by the trade or not.

### **3. §10 (Term and Termination Rights) and §11 (Calculation of the Termination Amount)**

- 3.1 Despite the agreed law governing the EFET General Agreement, Ukrainian law could become relevant in case of an introduction of a bankruptcy proceeding against the Ukrainian counterparty to the EFET General Agreement, however it should not be relevant to cases when Ukrainian courts are not involved, i.e. when termination occurs for non-bankruptcy related reasons.
- 3.2 Ukrainian law generally allows contract parties to agree on the contract termination procedure and amounts, including damages, payable upon such termination. Under default rule, losses would be calculated on the basis of actual market prices; however, the parties are also allowed to use a reference price. The principle of the EFET General

---

<sup>1</sup> [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0521](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0521)

<sup>2</sup> Rauscher, Internationales Privatrecht pn. 1046.

Agreement is that gains and losses are determined in a commercially reasonable manner; thus, giving a full discretion to each contract party to refer to that price which it finds appropriate.

- 3.3 Based on the Law of Ukraine No. 738-IX “On Amending Certain Legislative Acts of Ukraine to Simplify Investment Attraction and Introduce New Financial Instruments”, dated 19 June 2020, a concept of close-out netting is currently provided under Ukrainian law but does not yet extend to over-the-counter commodities transactions. Thus, close-out netting entered into under the EFET General Agreement is currently unenforceable in a bankruptcy scenario.
- 3.4 Starting from 1 July 2021, close-out netting between the parties to a master agreement (or any other agreement providing for close-out netting) (the “**Close-out Netting Agreement**”) in relation to the commodities contracts/transactions to which that agreement mandatory apply, should become enforceable in a bankruptcy scenario, provided it is conducted (a) on the basis of a Close-out Netting Agreement entered into prior to the bankruptcy event and which provides for close-out netting, and (b) in relation to contracts/transactions entered into prior to the bankruptcy event. Nevertheless, there is a risk that, even after 1 July 2021, claw-back provisions of the Bankruptcy Code may still apply to transactions settled by way of close-out netting in case such transactions have been conducted by corporate entities other than banks. It is, therefore, recommended that the parties watch closely any further legislative developments, clarifications and/or court practice on this aspect.

#### **4. §23.2 (Notices and Communication)**

- 4.1 To enable the parties to validly exchange certain documents including Individual Contracts via email it is required that counterparties contractually agree this method of exchange and preferably a deemed receipt rule.
- 4.2 EFET Members decided to make use of this alternative method of communication in the new §13.A introduced by the UA Border Appendix and the UA CWS Appendix. In addition, §3.2 of the General Agreement as amended by the Recommended Clauses, foresees the upfront exchange of electronic copies of any Individual Contract.
- 4.3 Concerning the deemed receipt rule, the proposal follows the rules established for other methods of communication.

#### **5. Prepayment**

**a) *Suspension of Deliveries***

- 5.1 Users may want to consider implementing an additional suspension right if a Party does not comply with its prepayment obligations. In deviation to the standard suspension right that applies no earlier than three (3) Business Days after sending a written notice to the Defaulting Party does this additional suspension right cater for the immediate suspension without waiting period to accommodate short periods between Prepayment Due Date and contractual commencement of delivery.
- 5.2 No consistent opinion exists among EFET members if the suspension right shall be exercisable with or without prior notice. Users have to make their own decision which approach suits them considering internal processes, benefit of a communicated suspension date and time and other relevant aspects.

**b) *Invoice and Payment***

- 5.3 Due to the creditworthiness of Ukrainian companies EFET members already trading with Ukraine counterparties confirmed that prepayment is a common practice to minimise credit risks. Invoicing and payment cycles should be negotiated between the Parties to any Individual Contract and may take into consideration the Contract Quantity and duration of such Individual Contract.
- 5.4 EFET has been advised that no separate invoice for external costs (as mentioned in §6.6 of the Agreement) is legally required as long as the Parties agree that such costs can be invoiced together with any regular invoice. To avoid disputes EFET would suggest adding a precise reference to §6.6 (***Reimbursement of External Costs***) in §13.1 (***Invoices***).

**6. *Payment Netting***

- 6.1 Ukrainian statutory law allows payment netting (known as set-off) of mutual counterclaims (i.e. a statutory right to terminate two counter-claims without actual transfer of assets between parties) provided both claims are (i) mutual, (ii) homogenous, (iii) either due, have no set performance date or are to be performed on demand, and (iv) parties are not disputing the nature, content and performance requirements applicable to the claims.
- 6.2 Set-off shall be initiated by one of the parties by way of a set-off request and be properly formalised by a document evidencing the parties' agreement to set-off. Such document will serve as a ground for a Ukrainian servicing bank to discontinue control in relation to the obligations that have been so offset with respect to a Ukrainian counterparty's

compliance with the requirements of Ukrainian legislation regarding the terms of settlements under export/import transactions.

- 6.3 Importantly, in case of instability of the banking system, deterioration of the balance of payments of Ukraine, or threat to the banking and financial systems of Ukraine, the National Bank of Ukraine has the right to introduce various protection measures, including prohibition of netting (set-off) *under cross-border transactions*. Such statutory tools of the National Bank of Ukraine, mainly penalties, would be *imposed on the Ukrainian counterparty* to the contract.
- 6.4 Any protection measure may apply for six (6) consecutive months and be renewed every six (6) months but may not last for more than eighteen (18) consecutive months (starting from the day it was first introduced) during every twenty-four (24)-month period. EFET has been advised, that the National Bank of Ukraine has been introducing and withdrawing restriction of a cross-border netting a number of times.
- 6.5 With effect as of 1 July 2021, payment netting will be expressly provided for in the Ukrainian legislation. Thus, apart from traditional set-off, the payment netting will be also allowed by way of liabilities novation (replacement of old liabilities with new ones) and their further offset, as well as other forms, e.g. provided by the clearing rules.
- 6.6 Nevertheless, it is still recommended that the parties watch closely any restrictions introduced by the National Bank of Ukraine as discussed in paragraph 6.4 above since these may impact inter-alia the possibility of the payment netting.