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European Federation of Energy Traders
Amstelveenseweg 998
1081 JS Amsterdam
The Netherlands

Milan, 20 October 2017

General Agreement Concerning the Delivery and Acceptance of Electricity – 2017 Italian Opinion Letter

Dear Sirs,

A. Limitations of Opinions/Scope of Review

I. Introduction

On 20 December 2000, the European Federation of Energy Traders (**EFET**) published a General Agreement Concerning the Delivery and Acceptance of Electricity (version 2.1/December 20, 2000) and on 21 September 2007 published an updated version of the General Agreement (the **General Agreement**).

You have requested our opinion (the **2017 Opinion Letter**) on certain Italian law issues, in relation to the General Agreement, as set out in the outline of opinion as set out in italics below.

For the purpose of the 2017 Opinion Letter, we have reviewed:

1. EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published on 21 September 2007);

2. EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000)[1];

3. EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010);

4. EFET Credit Support Annex to the General Agreement (Version 1.0, published 5 April 2002)[2];

5. EFET Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012), (the **Allowances Appendix**);

6. Amendment Letter to Allowances Appendix Version 3.0/June 20 2008 to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012);

[1] This document has been superseded.
[2] This document has been superseded.

7. EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 3.0, published on 20 June 2008) [3];

8. EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2, published on 20 July 2005)[4];

9. EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 30 November 2006) [5];

10. EFET VAT Agreement for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and Natural Gas (published 20 November 2005) [6],

11. EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 24 June 2004 [7].

12. GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a), published 21 September 2007) (Version 1.0, published 11 September 2009);

13. EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013);

14. EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013); and

15. Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013);

For the purpose of Part C.VI only, we have reviewed:

16. EFET Electronic Confirmation Agreement (published on 28 June 2005);

17. Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012);

18. Confirmation of Allowance Transactions (including EUA, CER & ERU Transactions) to the Allowances Appendix to the EFET Power Master Agreement (Version 1.0, published 6 March 2008).

For the purpose of Part C.VII only, we have reviewed:

19. EFET Cross Product Payment Netting Agreement (Version 1, published on 20 October 2005);

20. EFET Master Netting Agreement (Version 1.0, published June 2010);

21. EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010);

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[3] This document has been superseded.
[4] This document has been superseded.
[5] We do not provide any opinion in respect of matters relating to taxation.
[6] We do not provide any opinion in respect of matters relating to taxation.
[7] This document is no longer in use.

22. EFET CPMA Cross-Product Master Agreement by The Bond Market Association (TBMA) (Version 1.0, published 16 February 2000);

23. EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003);

24. EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003);

25. EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011).

The 2017 Opinion Letter is confined to matters of Italian law as in force and construed at the date of its issuance. No opinion is given in respect of any matter relating to taxation.

In this 2017 Opinion Letter Italian legal concepts are expressed in English terms, not in their original Italian terms. Therefore, these concepts may not be identical to the concepts described by the same English terms as they exist under English law.

This 2017 Opinion Letter should be read in its entirety, and reading the Executive Summary or some Part of this 2017 Opinion Letter only is not a substitute for reading the information in the remainder of this 2017 Opinion Letter.

For ease of reference we attach a table of content at the end of the document.

II. Definitions

Any capitalised term not otherwise defined in this 2017 Opinion Letter has the following meaning:

2017 Competition Act means Italian Law No. 124 of 4 August 2017;

2017 Opinion Letter means this opinion letter;

AEEGSI means the Italian Electricity, Gas and Water Authority (*Autorità per l'energia elettrica,il gas e il sistema idrico*), established under Italian Law No. 481 of 14 November 1995;

Affiliates has the meaning given to it in the General Agreement;

Allowance means an allowance to emit one tonne of carbon dioxide (CO2) or equivalent during a specified period valid for the purposes of meeting the requirements of applicable law, including the ET Directive;

Allowances Appendix has the meaning given to it in Part A.I;

Automatic Termination has the meaning given to it in the General Agreement;

Banking Act means Italian Legislative Decree No. 385 of 1 September 1993, as amended;

Bersani Decree means Italian Legislative Decree No. 79 of 16 March 1999, as amended;

Civil Code means the Italian civil code, approved by Italian Royal Decree No. 262 of 16 March 1942, as amended;

Commercial Companies means partnerships or limited liability corporations incorporated under the laws of Italy as either an unlimited partnership (*società in nome collettivo*), a limited partnership (*società in accomandita semplice*), a joint-stock company (*società per azioni*), a limited partnership with share capital (*società in accomandita per azioni*) or a limited liability company (*società a responsabilità limitata*);

Commodity means electricity and/or Allowances;

Commodity Option means a transaction in which one Party grants to the other Party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of the Commodity at a specified strike price; the option will be settled by physically delivering the specified quantity of the Commodity in exchange for the strike price;

Commodity Swap means a transaction in which two parties exchange rights concerning Commodities reciprocally;

Commodity Transaction means a transaction in which one Party agrees to buy from or sell to the other Party a specified quantity of Commodity in exchange for payment of a specified price, which becomes due on the same day, two days later or on another agreed future date; the transaction will be settled by physical delivery of the specified quantity of the Commodity in exchange for the specified price and the Parties may agree that the specified price is based or dependent, at least partially, on the price for a specified security, different commodity or an interest rate;

Confirmation has the meaning given to it in the General Agreement;

Consob means the Italian Financial Services Authority (*Commissione nazionale per le società e la borsa*);

Core Provision has the meaning given to it in Part C.VII;

Costs, Gains and Losses has the meaning given to it in the General Agreement;

Credit Support Providers has the meaning given to it in the General Agreement;

Data Protection Code means Italian Legislative Decree No. 196 of 30 June 2003, as amended;

Debtor means an Italian Company or an Italian branch of an EC company in a distressed situation;

Decree No. 5 means Italian Legislative Decree No. 5 of 9 January 2006, as amended[8];

Decree No. 53 means Italian Law No. 53 of 20 March 2010;

Decree No. 82 means Italian Legislative Decree No. 82 of 7 March 2005, as amended;

Decree No. 83 means Italian Law Decree No. 83 of 22 June 2012;

Decree No. 95 means Italian Law Decree No. 95 of 6 July 2012, as converted with amendments in Law No. 135 of 7 August 2012;

Decree No. 134 means Italian Law Decree No. 134 of 28 August 2008, as converted with amendments in Law No. 166 of 27 October 2008;

Decree No. 163 means Italian Legislative Decree No. 163 of 12 April 2006 as amended;

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[8]It is worth mentioning that Decree No. 5 has introduced a systematic reform of the Insolvency Act, which came into force on 16 July 2006.

Decree No. 170 means Italian Legislative Decree No. 170 of 21 May 2004;

Decree No. 180 means Italian Legislative Decree No. 180 of 16 November 2015;

Decree No. 197 means Italian Legislative Decree. No. 197 of 9 July 2004;

Decree No. 267 means Italian Legislative Decree No. 267 of 18 August 2000 as amended;

Decree No. 270 means Italian Legislative Decree No. 270 of 8 July 1999, as amended;

Decree No. 347 means Italian Law Decree No. 347 of 23 December 2003, as converted, with amendments, in Law No. 39 of 18 February 2004, as amended;

Deliberation No. 111/06 means the AEEGSI Deliberation No. 111/06 of 17 November 2006, as amended;

Early Termination has the meaning given to it in the General Agreement;

EFET means European Federation of Energy Traders;

Election Sheet means the Election Sheet to the General Agreement;

Eligible Credit Support has the meaning given to it in the EFET Credit Support Annex;

Employees' Act means Law No. 300 of 20 May 1970;

ET Directive means Directive No. 2003/87/EC;

EU Energy Contracts means the contracts falling within the scope of application of the 2017 Competition Act, i.e. the wholesale energy products, as defined under REMIT, with the exception of contracts entered into with end customers regardless of their consumption capacity;

Executive Summary means the executive summary in Part C of this 2017 Opinion Letter;

Financial Act means Italian Legislative Decree No. 58 of 24 February 1998, as amended;

Financial Institution means a bank (*banca*, as defined in Article 1, first paragraph, letter (b), of the Banking Act), a financial intermediary (*intermediario finanziario*) enrolled in the register set out in Article 107 of the Banking Act[9], an intermediary company (*società di intermediazione mobiliare*) or an investment fund management company (*società di gestione del risparmio*);

General Agreement has the meaning given to it in Part A.I;

GME means the Italian Electricity Market Operator (Gestore dei Mercati Energetici S.p.A.) the joint-stock company assigned, under Article 5 of the Bersani Decree, with the economic management of the ME;

Insolvency Act means Italian Royal Decree No. 267 of 16 March 1942, as amended;

Insolvency Official means any of the following: insolvency official (*curatore*) in a bankruptcy proceedings (*fallimento*), judicial commissioner (*commissario giudiziale*) in a composition with creditors (*concordato preventivo*), liquidator commissioner (*commissario liquidatore*) in a

[9] A financial intermediary is a financial services provider.

compulsory administrative liquidation (*liquidazione coatta amministrativa*), and judicial commissioner (*commissario giudiziale*) or extraordinary commissioner (*commissario straordinario*) in an extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) or restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*);

Insolvency Proceedings means any of the proceedings set out in Appendix 1; for ease of reference we include in the definition of "Insolvency Proceedings" also a number of pre-insolvency proceedings, as described in Appendix 1;

Insolvency Regulation means Regulation No. 2015/848 of 20 May 2015;

Italian Party has the meaning given to it in Part A.IV;

Law No. 218 means Italian Law No. 218 of 31 May 1995;

Law No. 244 means Italian Law No. 244 of 24 December 2007;

Marzano Law means Italian Law No. 239 of 23 August 2004, as amended;

Material Adverse Change has the meaning given to it in the General Agreement;

Material Reason has the meaning given to it in the General Agreement;

ME means the electricity market (*mercato elettrico*) as described under Article 5 of the Bersani Decree, organised and managed by the GME;

MEF means the Italian Ministry of Economy and Finance (*Ministero dell'economia e delle finanze*);

MiFID means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID);

MiFID II means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;

MSE means the Italian Ministry of Economic Development (*Ministero per lo sviluppo economico*);

OM has the meaning given to it in Part C.IX;

Parties means the parties to a General Agreement;

Party A has the meaning given to it in Part B;

PCE has the meaning given to it in Part C.IX;

Regulation Rome I means the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, replacing the Convention on the law applicable to contractual obligations, opened for signature in Rome, on 19 June 1980;

REMIT means Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency;

Requesting Party has the meaning given to it in the General Agreement;

Scenario 1, **Scenario 2** and **Scenario 3** have the meanings given to, respectively, each in Part A.III.1, Part A.III.2 and Part A.III.3;

Settlement Amount has the meaning given to it in the General Agreement;

Terminating Party has the meaning given to it in the General Agreement;

Termination Amount has the meaning given to it in the General Agreement;

Terna means Terna S.p.A., the joint-stock company which, as of 1 November 2005, carries out the activities of transmission and dispatching of electricity, including the unified operation of the Italian National Transmission System (*rete di trasmissione nazionale*);

Transferor has the meaning given to it in the EFET Credit Support Annex;

Transferee has the meaning given to it in the EFET Credit Support Annex; and

Winding-up Directive means Directive 2001/24/EC.

In this 2017 Opinion Letter:

1. where an Italian term is written in italics or in italics and in brackets after an English term and there is any inconsistency between the Italian and the English terms, the meaning of the Italian term prevails;

2. any reference importing a gender includes the other gender;

3. except where the context otherwise requires, any reference to a § is to a § of the General Agreement and any reference to a Part is to a part of this 2017 Opinion Letter; and

4. headings do not affect the interpretation of this 2017 Opinion Letter.

III. Scenarios

In this 2017 Opinion Letter, we provide advice in respect of the following three scenarios:

1. as if Italian law governs the General Agreement (**Scenario 1**);

2. with respect to those insolvency and default-related issues identified in Part C.I, below, assuming a choice of either Italian law or another governing law, opinions regarding optimising the General Agreement for use with an insolvent party legally organised or incorporated in Italy (**Scenario 2**); and

3. if either German law remains the governing law of the General Agreement or the governing law of the General Agreement is a law other than the Italian one, opinions on the legal enforceability by Italian Courts in accordance with its own terms (**Scenario 3**).

IV. Potential Counterparties

This 2017 Opinion Letter is given in respect of potential counterparties to the General Agreement that are incorporated under Italian law, or having their centre of main interests in Italy, according to Article 3 of the Insolvency Regulation (each an **Italian Party**) as:

1. an unlimited partnership (*società in nome collettivo*) and a limited partnership (*società in accomandita semplice*), being the only partnerships (*società di persone*) that may be incorporated and carry out commercial activities under Italian law[10];

2. a joint-stock company (*società per azioni*), a limited partnership with share capital (*società in accomandita per azioni*) and a limited liability company (*società a responsabilità limitata*), being the only limited liability corporations (*società di capitali*) that may be incorporated under Italian law;

3. a bank (*banca*, as defined in Article 1, paragraph 1, letter (b), of the Banking Act);

4. a financial intermediary (*intermediario finanziario*) enrolled in the register under Article 107 of the Banking Act;

5. an Italian intermediary company (*società di intermediazione mobiliare*);

6. an Italian investment fund management company (*società di gestione del risparmio*);

7. an insurance company (*impresa di assicurazione*);

8. Italian publicly owned companies (i.e. corporations in which a public entity exercises a dominant influence);

9. Italian municipalities or other local authorities;

10. Italian associations of local government;

11. Italian public entities; or

12. an EU foreign entity subject to the Insolvency Regulation, having its centre of main interests in Italy.

This 2017 Opinion Letter is also given in respect of potential counterparties to the General Agreement that are:

1. a branch of an EU company established in Italy; or

2. a branch of an EU bank established in Italy.

Certain publicly owned companies namely those established with the specific purpose of accomplish public administration's needs and in which a public administration exercises a dominant influence, are subject to Legislative Decree No. 50/2016, implementing EU Directives No. 23, No. 24 and No. 25 of 2014, on public procurements. Indeed, according to this Decree, publicly owned entities cannot enter into supply agreements without carrying out a public procurement proceeding. This is also the general rule for all public entities. Please note that according to Article 1 of Decree No. 95, in relation to certain matters (including electricity and gas), the public administrations must delegate Consip S.p.A. (a publicly owned company which provides advice, assistance and IT solutions for innovation in the public administration) or the relevant regional purchasing entity (*centrale di committenza*) for the awarding of contracts for the supply of goods and services and for managing special agreements with suppliers for the purposes of rationalising spending. The rule above does not affect the possibility for the public administration to carry out a public procurement procedure on its

[10] Simple partnerships (*società semplici*) are not included in the scope of this 2017 Opinion Letter because they are used by undertakings involved in agricultural activities only and which elected not to be established in the form of Commercial Companies.

own or through another purchasing entity, provided that this causes a lower expenditure in respect of the one achievable entering into the agreements provided by Consip S.p.A. or by the regional purchasing entity. In such cases, the former contracts are to be subject to the condition subsequent for the contractor to adjust its considerations according to the conditions set out under a following agreement possibly entered into by Consip/regional purchasing entity (*centrale di committenza*) if providing a higher economic benefit. Failure to comply with the rule above may entail disciplinary liability of the public administration.

However, Article 13 of the same Legislative Decree No. 50/2016 sets forth that the mandatory public procurement proceedings do not apply, *inter alia*, in the event that the supplied goods are intended to be resold to third parties and the companies subject to Legislative Decree No. 50/2016 do not have exclusive or special rights to sell those goods or when other entities can sell the same goods to third parties at the same terms and conditions provided for in the supply agreement entered into by a publicly owned entity.

In the event of electricity and natural gas trading, we believe that both requirements for exemption are met: supplied electricity and natural gas are intended to be resold to third parties and there are no special or exclusive rights granted for the sale of Commodities. Moreover, other entities can operate on the same trading market and enter into supply agreements at the same terms and conditions as publicly owned entities or public entities (Italian trading market is a liberalised market according to Article 1, first paragraph, of the Bersani Decree and Article 2, second paragraph, letter (a), of the Marzano Law). As a result, Decree No. 50/2016 does not apply to publicly owned companies and public entities which enter into both the General Agreement and the Individual Contracts for pure trading purposes. Please note that, in respect of the purposes of this 2017 Opinion Letter, publicly owned companies are not subject to different regulations as privately owned entities. In relation to the peculiarities of public administrations (*amministrazioni pubbliche*), please refer to Part C.I.1.1.

V. Allowances Appendix

The Allowance Appendix is included in the scope of this 2017 Opinion Letter.

Under Annex I, Section C.11 of MiFID II Allowances fall within the category of financial instruments. Therefore, the legal nature of and, as a consequence, the regime applicable to Allowances, will change radically, including, without limitations, formalities for the validity of the contract, as soon as MiFID II will enter into force (i.e. 3 January 2018[11]).

VI. Product Coverage

This 2017 Opinion Letter is being given in respect of Commodity Transactions, Commodity Options and Commodity Swaps.

Under Italian law, a Commodity Transaction may be classified as either a forward sale agreement (*contratto di vendita a termine*)[12] or a supply agreement (*contratto di somministrazione*)[13]depending on the kind of needs the buyer intends to satisfy by entering into the Individual Contract. In particular, the distinction between the two types of agreements emerges when more than one delivery is scheduled in the same Commodity Transaction. The Individual Contract will be classified as a supply agreement if several deliveries are projected over the term of the Individual Contract to satisfy a continuous demand by the buyer[14]. On the other hand, a sequence of sale agreements will be entered into if each delivery is envisaged by the parties as a stand-alone and isolated transaction and

[11] MiFID II has been implemented in Italy with Legislative Decree 3 August 2017, No. 129.
[12] *Contratto di vendita a termine* is regulated by Article 1470 *et seq.* of the Civil Code.
[13] *Contratto di somministrazione* is regulated by Article 1565 *et seq.* of the Civil Code.
[14] This applies, for instance, if the relevant Individual Contract provides for daily deliveries for a certain period.

the purchaser does not have a continuous demand[15]. The legal implications stemming from either type of agreement are outlined in this 2017 Opinion Letter.

Under Italian law, a Commodity Option is classified as an option agreement under Article 1331 of the Civil Code, by which the writer grants to the holder the right, but not the obligation, to enter into a forward sale agreement (*contratto di vendita a termine*) or a supply agreement (*contratto di somministrazione*), during an agreed period. From an Italian law point of view, a Commodity Option is a separate agreement from the forward sale agreement or the supply agreement entered into on the exercise of the Commodity Option. Therefore, no forward sale agreement or supply agreement exists until the option has been exercised.

Under Italian law, a Commodity Swap may be construed as a "*permuta*" under Article 1552 of the Civil Code, given that a reciprocal exchange of property or other rights are envisaged. In this 2017 Opinion Letter, therefore, we do not refer to financial swaps.

Although the issue of activities reserved to financial intermediaries does not fall within the scope of this 2017 Opinion Letter, it is worth noting that Commodity Transactions classified as forward sale agreements, Commodity Options and Commodity Swap could be considered in specific cases as "financial instruments" if the conditions under Annex I Section C of MIFiD II (as from 3 January 2018) are met[16].

VII. Spot and Forward Contracts

Under § 6.3 and § 6.7 of the General Agreement, the Parties agree that ownership and risk in the commodities are transferred at the time of delivery. Therefore, since the Parties have specified a time for transfer of ownership[17], we consider that all Individual Contracts would be qualified as "forward" agreements under Italian law. In fact, under Italian law[18], while in "spot" sales, ownership is transferred at the moment the agreement is entered into (Article 1376 of the Civil Code), in "forward" sales, ownership and risk are transferred at a later time specified by the parties[19].

VIII. Addressees

This 2017 Opinion Letter is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by other person, entity or corporation whatsoever and may not be disclosed to any other persons without prior written approval by both EFET and Paul Hastings (Europe) LLP.

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[15] Court of Cassation No. 7380 of 4 July 1991; Court of Cassation No. 3280 of 18 May 1981; Court of Cassation No. 6864 of 17 November 1983. See also Gazzoni, *Manuale di diritto privato*, Naples, 2000, 1104; Torrente-Schlesinger, *Manuale di diritto privato*, Milan, 1995, 526. For instance, an Individual Contract providing for the transfer of Allowances on a certain date would be regarded as a sale rather than as a supply agreement.

[16] In particular, with respect to Commodities, the following points of Annex I, Section C are relevant in order to qualify a contract as a financial instrument: (i) options, futures, swaps, forward rate agreements and any other derivative contracts relating to (…) Allowances (…) (so-called C4 category); (ii) options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event (so-called C5 category); (iii) options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled (so-called C6 category); (iv) options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point (iii) and not being for commercial purposes, which have the characteristics of other derivative financial instruments (so-called C7 category); (iv) Allowances (so-called C10 category).

[17] This also applies to transactions under which Commodities must be delivered on the same day as the relevant Individual Contract was entered into. Indeed, due to the peculiar nature of electricity, there is always a time lag between the moment of entering into the Individual Contract and the relevant delivery.

[18] For the definition of "spot" contracts at EU level, see Parola, Miccoli, D*irettiva MiFID II: i nuovi confini tra prodotti energetici all'ingrosso, derivati su merci e strumenti finanziari e impatto sugli operatori*, in *Diritto del Commercio Internazionale*, 2015, 572.

[19] The concepts above must not be confused with those commonly used in the context of financial regulation (e.g. EMIR, MiFID II etc.).

B. Assumptions Necessary for the Opinion

For the purposes of providing this 2017 Opinion Letter, and without prejudice to all Parts of this 2017 Opinion Letter, we have made the assumptions listed in 1 to 12 below.

1. Two counterparties enter into the General Agreement and at least one of them is incorporated or organized or has its centre of main interest in Italy (**Party A**).

2. Party A is an entity listed under Part A.IV.

3. The relevant General Agreement is governed by the laws of Italy for the purpose of Scenario 1.

4. The General Agreement and any of the documents listed in Part A.I are enforceable under the laws of any jurisdiction (other than the laws of Italy) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

5. On the basis of the terms and conditions of the General Agreement and other relevant factors and acting in a manner consistent with the intentions stated in the General Agreement, the Parties over time enter into Individual Contracts.

6. The Core Provisions of the General Agreement and any of the documents listed in Part A.I, if applicable, have not been amended in any material respect.

7. Each Italian Party that is a Commercial Company has its main centre of interests in Italy.

8. The execution and delivery of the General Agreement and any of the documents listed in Part A.I, if applicable, including the documents and other confirming evidence exchanged between the Parties confirming the Individual Contracts, have been authorised by all necessary actions on the part of either Party.

9. At the time at which an Individual Contract is entered into under the General Agreement, neither Party is insolvent or has actual knowledge of the insolvency of the other Party. The General Agreement, any of the documents listed in Part A.I, if applicable, and all Individual Contracts are entered into prior to the formal commencement of Insolvency Proceedings against either Party.

10. Any payments made or security interest granted to one Party over any of the assets of the other Party were not received in contemplation of the latter Party's insolvency or with the intent to defraud that Party or that Party's creditors.

11. The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 does not apply to the General Agreement and to any of the documents listed in Part A.I or to any Individual Contract.

12. 13. Starting from 3 January 2018, the entering into Commodity Transactions, Commodity Options and Commodity Swap does not qualify as activities reserved to financial intermediaries (*riserva di attività*) under Article 18 of the Financial Act as the exemptions under Article 2, paragraph 1, of MiFID II as implemented by Article 4-*terdecies*, paragraph 1, of the Financial Act apply.

Please note that in this 2017 Opinion Letter, we do not express any opinion on the effects of any subsequent commencement of bankruptcy proceedings (*fallimento*) of a Debtor admitted to composition with creditors (*concordato preventivo*).

C. Opinion - Executive Summary

I. Enforceability of Close-out Netting Provisions

1. Enforceability of close-out netting provisions in case of Winding-up, Insolvency or Attachment and for non-insolvency related Material Reasons

If Italian law is the governing law of the General Agreement, close-out netting provisions would be generally enforceable.

In fact, no prohibitions apply with respect to non-insolvency related Material Reasons and, according to the 2017 Competition Act, close-out netting provisions set out in EU Energy Contracts are valid and enforceable also in insolvency scenarios.

On the contrary, with respect to those contracts which do not fall within the scope of application of the 2017 Competition Act (e.g. contracts entered into with end customers or with delivery outside the EU), the validity and enforceability of close-out netting provisions are mainly related to (i) the enforceability of Early Termination provisions arising as a result of insolvency (see point 2 below) and (ii) whether termination occurred before or after the opening of the proceedings. In particular, we cannot exclude the possibility that the limitations to enforcement of a damages claim resulting from insolvency-based termination may prevent the Terminating Party from receiving payment of the Termination Amount.

This is without prejudice to the right of the solvent party to enforce the set-off of its credits and debts which are due (even if not payable) *vis-à-vis* the insolvent party, according to Article 56 of the Insolvency Act.

If the governing law of the General Agreement is a law other than the Italian law, the same regime applies, unless the Debtor is an Italian bank, in which case the enforceability of the close-out netting provisions under §§ 10.3 and 11 would be assessed under the governing law of the General Agreement.

2. Enforceability of Early Termination provisions under the General Agreement arising as a result of an insolvency

A distinction must be drawn between EU Energy Contracts and contracts which do not fall within the scope of application of the 2017 Competition Act (e.g. contracts entered into with end customers or with delivery outside the EU).

In fact, with respect to the first category of contracts (i.e. EU Energy Contracts), under Scenarios 1, 2 and 3, we believe that the Early Termination provisions of the General Agreement would be valid and enforceable given that, according to 2017 Competition Act, close-out-netting provisions set out in EU Energy Contracts are valid and enforceable also in insolvency scenarios.

On the contrary, with regard to contracts which do not fall within the scope of application of the 2017 Competition Act, we believe that:

(a) if the Early Termination rights are triggered by the declaration of insolvency/bankruptcy or by the petition for a composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) pursuant to Article 186-*bis* of the Insolvency Act:

  (i) the provisions would be certainly void and not enforceable if they are construed as an express termination clause; and

(ii) there is a risk that the provisions would be considered void and not enforceable also if they are construed in terms of a right of withdrawal or condition subsequent on the basis of the argument that they have been construed as clauses aimed at avoiding the limitation of the Insolvency Act.

In addition to the bankruptcy proceedings pursuant to the Insolvency Act, the same opinion will also apply to all Insolvency Proceedings providing for an insolvency declaration/bankruptcy of the Debtor, albeit some peculiarities apply in respect of the effective date of the insolvency declaration which relate to the restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*) and the compulsory administrative liquidation (*liquidazione coatta amministrativa*).

In addition, it is possible that the Early Termination rights would be also considered by a Court void and not enforceable in case the Debtor enters into a composition with creditors with reserve (*concordato con riserva*);

(b) if the Early Termination rights are triggered by restructuring plans pursuant to Article 67, paragraph 3, letter d) of the Insolvency Act, the debt restructuring agreements (*accordi di ristrutturazione dei debiti*) pursuant to Article 182-*bis*, the composition with creditors (*concordato preventivo*), the composition with creditors with reserve (*concordati con riserva*) – and any other arrangements and agreements with creditors outside a specific insolvency tool, they could be valid and enforceable if they are construed either as discretionary or they are construed in terms of a right of withdrawal or condition subsequent. However, in absence of relevant case law, we are not in a position to totally exclude that a Court may apply a different interpretation.

3. *Risk of claw-back for Early Termination, close-out netting provisions and Termination Amount arising as a result of an insolvency*

With respect to EU Energy Contracts, under the 2017 Competition Act, in case of Insolvency Proceedings, the Insolvency Official, may challenge the reasonableness of the evaluation of the close-out netting amount within six months from the opening of the Insolvency Proceeding. However, the reasonableness is presumed in the event that the contractual clauses concerning the evaluation of the close-out netting amount are consistent with contractual schemes elaborated in the international practice as recognized by international representative associations (or in the event that such clauses include provisions on quotation provided by one or more independent entities recognized at international level). Therefore, the General Agreement being a standard contract drafted by an international representative association, the reasonableness of the evaluation of the Termination Amount is presumed. While we believe that the presumption is irrefutable, of course this does not rule out the possibility that the Insolvency Official proves that the terminating party deviated from the criteria set out under the General Agreement for the purpose of the calculation of the Termination Amount.

With respect to contracts which do not fall within the definition of EU Energy Contracts, if Italian law is the governing law of the General Agreement, claw-back actions in insolvency proceedings do not apply provided that:

(a) the above acts occurred before the claw-back periods[20] (please see Appendix 1; or

(b) the Terminating Party did not effect the above acts being aware of the Debtor's insolvency.

Where the Italian Party is a Commercial Company and the General Agreement is governed by a law other than the Italian law, the application of the Insolvency Regulation would disallow the claw-back so long as this would not be allowed under the governing law.

The same result generally applies under Article 95-*ter*, fourth paragraph, of the Banking Act implementing the Winding-up Directive in Italy in respect of an Italian Party which is a bank. However, Article 95-*ter*, second paragraph, of the Banking Act provides that, in case of a Debtor which is a bank the close-out netting provisions are subject only to the governing law of the relevant agreement. Therefore, in this case, Early Termination, close-out netting provisions and payment of Termination Amount could be clawed-back only if so provided by under the law of the General Agreement.

4. *Enforceability of Early Termination other than due to insolvency, limitations of liability and force majeure under the General Agreement*

If Italian law is the governing law of the General Agreement, Early Termination for non-insolvency Material Reasons, limitations of liability and force majeure are consistent with concepts specifically provided for under the Civil Code and, therefore, would be enforceable, with the exception of certain minor cautions described in this 2017 Opinion Letter.

If the governing law of the General Agreement is a law other than the Italian law, because the provisions on Early Termination for non-insolvency Material Reasons, limitations of liability and Force Majeure do not conflict with mandatory provisions of Italian law, the same conclusions would apply assuming that they are enforceable under the governing law of the General Agreement.

II. Multibranch Parties

Under the Insolvency Regulation, the Courts of the EU Member State within the territory of which the centre of Debtor's main interests is situated have jurisdiction to open Insolvency Proceedings according to the laws of that EU Member State. The law of the main insolvency proceedings will also apply to the Italian branch(es) of an EU company, unless "secondary insolvency proceedings", as defined under Article 3 of the Insolvency Regulation, are opened by Italian Courts, under Italian law[21].

According to Article 3 of the Insolvency Regulation, the secondary proceedings only concern Italian branch(es) of an EU company. Secondary insolvency proceedings may only be opened if:

(a) main proceedings have already been opened in the Member State where the centre of the Debtor's main interests is situated and the Insolvency Official in the main proceedings or any other person or authority (entitled under the Italian law) requests the opening of the secondary proceedings (in such cases, only bankruptcy proceedings (*fallimento*) may be opened); or

[20] However, even if effected before the claw-back periods, the acts could be clawed back with an ordinary claw-back action if the requirements listed in Part C.I.3.(a)(ii) are met.

[21] Court of Cassation No. 22093 of 29 October 2015.

(b) main proceedings cannot be opened under the laws of the Member State where the centre of the Debtor's main interests is situated; or

(c) main proceedings have not been opened and a creditor with its domicile or habitual residence in Italy, or whose claim arises from the operation of an Italian branch, requests that insolvency proceedings are opened in Italy.

If the centre of a Debtor's main interests is situated within the territory of a Member State, the Courts of another Member State shall have jurisdiction to open insolvency proceedings against that Debtor only if it possesses an establishment within the territory of that other Member State.

III. Collateral

Assuming that the laws of Italy govern the transfer of collateral, different remarks apply with respect to each Eligible Credit Support provided under the EFET Credit Support Annex.

Given that (i) the letters of credit are provided directly by the issuer to the beneficiary and (ii) pursuant to the definition provided in the EFET Credit Support Annex they are stand-by letters of credit, we believe that they would be qualified as an independent and autonomous agreement under which a Party (usually a bank) undertakes to pay a certain amount of money if so required by the relevant counterparty. Accordingly, we believe that under Italian laws this kind of collateral cannot be qualified as a security interest[22] .

Cash collateral consisting of the transfer of an amount of money to the Transferee might be construed as a full title transfer under:

(i) Decree No. 170, if the collateral is granted under an arrangement with a Financial Institution or another entity under Decree No. 170 and the arrangement provides for the transfer of ownership as collateral;

and (where Decree No. 170 does not apply)

(ii) Article 1851 of the Civil Code as an irregular pledge (*pegno irregolare*), in the event the Transferee is granted with a right to dispose of the collateral.

In both cases, the enforcement of the collateral will not be prejudiced by the commencement of an Insolvency Proceeding.

A cash collateral might be subject to claw-back if it was granted by the Debtor, acting as Transferor, within one year or six months, as the case may be, before the bankruptcy declaration of the Debtor under certain circumstances.

IV. Parent Company Guarantee

A parent company guarantee with the features described in Part C.IV would be considered, under Italian law, as an autonomous first demand guarantee (*garanzia autonoma a prima richiesta*), providing for an autonomous payment obligation on the guarantor and shall be qualified as opposed to the *fideiussione* governed by Articles 1936 *et seq.* of the Civil Code.

[22] A security interest provides its beneficiary with certain preferential rights in the disposition of the secured assets.

To be qualified as an autonomous first demand guarantee, it must state clearly that the guarantor will fulfil its obligation upon request and without possibility to raise any objection. No further specific formalities apply in order to create a valid parent company guarantee, with the exception of the relevance of the certainty of the date (*data certa*).

V. General Enforceability of the Agreement

Without prejudice to all Parts of this 2017 Opinion Letter, we are of the opinion that the General Agreement is legal, valid and binding under Italian law, even if a law other than the Italian one is the governing law of the General Agreement, in accordance with Law No. 218.

However, in Part IV we recommend including a number of statutory provisions if Italian law has been elected.

VI. Confirmation Practices

Italian law does not require the written form for the validity of:

(a) a forward sale agreement (*contratto di vendita a termine*) or a supply agreement (*contratto di somministrazione*) (which are the possible legal classifications for Commodity Transactions);

(b) an option agreement under Article 1331 of the Civil Code, by which one party grants to another party the right, but not the obligation, to enter into a forward sale agreement (*contratto di vendita a termine*) or a supply agreement (*contratto di somministrazione*) (which is the legal classification of Commodity Options); and

(c) a physical swap agreement ("*permuta*") where ownership rights on a Commodity are exchanged, as expressly provided under Article 1552 of the Civil Code.

Therefore, if Italian law is the governing law of the General Agreement, Individual Contracts may be concluded in any form, including verbally and electronically with no specific signature requirements. Furthermore, provided that the Parties do not include in an Individual Contract any provision to the contrary, the Individual Contract would be validly included in the General Agreement even if the Parties entered into it verbally or electronically without making any reference to the General Agreement[23].

If a law other than the Italian law is the governing law of the General Agreement, Individual Contracts are enforceable by Italian Courts if concluded in any form, provided that, alternatively:

(a) they may be executed in any form under the relevant governing law; or

(b) they may be executed in any form under the laws of the country in which they have been executed, in the event that the Parties are in the same country at the time of the execution; or

[23] However, although it could be burdensome from a practical standpoint, consideration should be given to execute each of the General Agreement and the Individual Contracts in the form (i) of a public deed (*atto pubblico*) under Article 2699 of the Civil Code or (ii) of a private deed with notarised signature (*scrittura privata autenticata*) under Article 2703 of the Civil Code. This would, in fact, attribute to the General Agreement and the Individual Contracts a certain date of law (*data certa*), which will allow these agreements to be asserted against third parties (especially in the context of Insolvency Proceedings).

(c) they may be executed in any form under the laws of one of the countries in which the Parties are at the time of execution, in the event that the Parties are in two different countries.

VII. Core Provisions

The following provisions of the General Agreement are so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.V:

(a) § 1.1 (Subject of the Agreement) with the exception of § 1.2 (Pre-Existing Contracts), to the extent that no terms of Pre-existing Contracts are inconsistent with any other Core Provision;

(b) § 4.1 (Delivery and Acceptance) and § 5.1 (Delivery and Acceptance Pursuant to an Option);

(c) § 7 (Non-Performance Due to Force Majeure) and § 8 (Remedies for Failure to Deliver and Accept);

(d) § 10.3 (Termination for Material Reason), § 10.4 (Automatic Termination), § 10.5 (Definition of Material Reason), and § 11 (Calculation of Termination Amount);

(e) § 12 (Limitation of Liability);

(f) § 13.2 (Payment) and § 13.3 (Payment Netting);

(g) §19 (Assignment); and

(h) any other provision referred to and all defined terms used (as set out in Annex 1 to the General Agreement) in the above Paragraphs.

VIII. Governing Law, Arbitration and Jurisdiction

Without prejudice to all Parts of this 2017 Opinion Letter, including, but not limited to, the assumptions listed in Part B, although the General Agreement is expressed to be governed by German law and disputes arising in connection with the Agreement are submitted to the jurisdiction of the German Institution of Arbitration (DSI), we believe that this choice of law and jurisdiction would generally be upheld by an Italian Court in accordance with Italian rules on jurisdictional competence and conflict of laws. The same conclusions would apply if the General Agreement were expressed to be governed by a law other than the Italian law (e.g. the laws of England and Wales) and disputes arising in connection with the General Agreement were submitted to the jurisdiction of an arbitration under different rules of arbitration (e.g. the Rules of the London Court of International Arbitration).

IX. Regulatory Regime

The purchase and sale of electricity are liberalised activities; however, under Deliberation No. 111/06, in order to be physically settled, all over-the-counter sales and purchases of electricity must be registered with GME by the relevant OMs (please see Part C.IX). In addition, Article 1, paragraph 80 *et seq*., of the 2017 Competition Act provides that the MSE, on the basis of a proposal of the AEEGSI[24], will establish a register of qualified sellers. In order to sell electricity to end customers, it will be necessary to enrol into the register above.

X. Recommended Amendments to the General Agreement

If the Parties wish to choose Italian law as the governing law of the General Agreement:

(a) they must include in the Election Sheet the provisions set out in Part C.V.5.(a) and C.V.5.(b)(i) to deal with Italian law provisions that cannot be contracted out of by the Parties;

(b) we would recommend including in the Election Sheet the provisions set out in Part C.V.5.(b)(ii) in order to improve the efficacy of certain provisions of the General Agreement; and

(c) for clarity purposes, we would suggest including in the Election Sheet the provisions set out in Part C.V.5.(b)(iii) to deal with implied mandatory Italian law provisions that would apply even in the absence of any specific Parties' provision.

If the Parties wish to choose a law other than Italian law as the governing law of the General Agreement, we would recommend including in the Election Sheet the provisions recommended in Part C.V.5.(a) to deal with the mandatory provisions of Italian law.

C. Opinion

I. Enforceability of Close-Out Netting Provisions

1. Winding up, Insolvency or Attachment

1. Brief general discussion of Italian insolvency laws, and any relevant terminology

(a) Insolvency of public administrations and Commercial Companies

As a general principle, public administrations (*pubblica amministrazione*) are not subject to bankruptcy[25]. In particular, for local authorities (*enti locali*) a special procedure is required by law (Decree No. 267) when there is a situation of inability of the relevant local authority to pay its debts regularly. The Minister of Interior must appoint a liquidator who proceeds with a complex procedure for payment of debts and financial restructuring. Different procedures apply for the composition with creditors with the payment of a sum ranging between 40% and 60% of the claims.

Insolvency Proceedings to which all Commercial Companies in Italy may be subject are briefly described in Appendix 1.

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[24] In this respect, the AEEGSI issued a consultation paper (No. 633/2017). The MSE shall establish the register within 90 days from 29 August 2017 (i.e. the date of entry into force of the 2017 Competition Act).

[25] According to some decisions, companies owned by public administrations should be nonetheless considered subject to the ordinary bankruptcy rules (see, *inter alia*, Court of First Instance of Foggia of 18 January 2012; Court of First Instance of Santa Maria Capua Vetere of 22 March 2012More specifically, the Court of Cassation, with decisions No. 22209 of 27 September 2013 and No. 24591 of 1 December 2016, confirmed that companies owned by public administration are generally subject to all the provisions of Civil Code regulating the corporations (*società di capitali*) and, as a consequence, to ordinary bankruptcy rules. The principles set forth by the Court of Cassation have finally been implemented by the Consolidated Act on Companies Owned by Public Administration (Decree No. 175/2016).

For Commercial Companies, the purpose of bankruptcy proceedings (*fallimento*) (under (i) of Appendix 1) is the liquidation of the insolvent Commercial Company, while the composition with creditors (*concordato preventivo*) (under (ii) of Appendix 1), debt restructuring agreements (*accordi di ristrutturazione dei debiti*) (under (iii) of Appendix 1), restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*) (under (v) of Appendix 1), composition with creditors with reserve (*concordato con riserva*) (under (vi) of Appendix 1) and composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) (under (vii) of Appendix 1) are aimed at the reorganisation and restructuring of businesses in financial crises. Extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) (under (iv) of Appendix 1) may be used to achieve either purpose.

Insolvency Proceedings under (i), (ii), (iii), (vi) and (vii) of Appendix 1are conducted solely by the competent Court, whilst Insolvency Proceedings under (iv) and (v) of Appendix 1 also require intervention of the administrative authority.

(b) Proceedings Specific to Financial Institutions

Under Italian law, Financial Institutions are subject to specific Insolvency Proceedings, which we summarise in Appendix 1.

(c) Italian Branches of EU Foreign Banks

Italian branches of EU foreign banks are subject to the home country control principle. Therefore, insolvency and restructuring proceedings are initiated and regulated under the laws of the bank's home country[26]. Article 95-*bis* of the Banking Act, inserted by Decree No. 197, establishes that "restructuring and liquidation proceedings of EU banks are governed by the law of the country in which the bank is established and are effective in Italy without need for further formalities".

As a consequence, insolvency of an EU bank's Italian branch will be exclusively assessed and governed by the law of the country in which the bank is established. The effect of this law is that any applicable proceedings must be automatically recognised in Italy. Exceptions to this principle, concerning the enforceability of the General Agreement and the Individual Contracts are examined below.

2. *Brief discussion of your jurisdiction's insolvency laws as they apply Commodity Transactions, Commodity Options and Commodity Swaps. Whether the different rules applicable to the different contracts above result in a splitting-up or segregation of the portfolio of Individual Contracts under a General Agreement into two or more "netting pools" of disparate treatment or limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the General Agreement*

(a) Forward Physically Settled Transactions

In general terms, under Italian law, the effects of bankruptcy (*fallimento*) and compulsory administrative liquidation (*liquidazione coatta amministrativa*)[27] on forward physically settled transactions are established in:

[26] Article 3 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001, implemented in Italy by Decree No. 197.
[27] These effects also apply to Financial Institutions by means of reference made by under Article 83 of the Banking Act.

- Article 72 of the Insolvency Act for outstanding agreements (*rapporti pendenti*); and

- Article 74 of the Insolvency Act for continuous or periodical performance agreements (*contratti ad esecuzione continuata o periodica*).

Since the aim of bankruptcy proceedings and compulsory administrative liquidation is the liquidation of the Debtor's assets, the purpose of Articles 72 and 74 of the Insolvency Act is to allow the Insolvency Official to free the Debtor's assets from unfavourable agreements and choose to perform only those agreements that might increase the Debtor's asset value.

In particular, under Article 72, the Debtor's insolvency declaration entails the automatic suspension of all outstanding agreements, until the Insolvency Official chooses whether to terminate or perform each of them (thus carrying out a “cherry-picking” among the agreements of the Debtor). Under Articles 72 and 74, an agreement is considered outstanding if the obligations of both parties provided for in the agreement have not been fulfilled yet[28].

The automatic suspension of the outstanding agreements does not apply if the Insolvency Official decides to keep (and if the competent Court authorises the Insolvency Official to keep) the Debtor provisionally operating pursuant to Article 104 of the Insolvency Act. In this case, all pending contracts continue (and, therefore, are not suspended) unless the Insolvency Official expressly declares to suspend the relevant performance or terminate the same.

The decision upon termination or performance of each agreement is subject to the authorisation of the creditors' committee. The non-insolvent party to an agreement may speed up the Insolvency Official's decision by making a request to the supervising judge for a term not exceeding 60 days by which time the Insolvency Official must decide whether to terminate or perform the agreement.

If the Insolvency Official elects to perform the agreement, the counterparty will have a preferred right to the payment with respect to other creditors. If, on the contrary, the Insolvency Official elects to terminate the agreement, the counterparty will have the right to be paid together with the other creditors under the *pari passu* principle. It is worth noting that in the latter case, the counterparty cannot claim for damages as a result of the election by the Insolvency Official to terminate the agreement.

In addition to Article 72, which may be considered a general provision regarding outstanding agreements, with specific reference to outstanding continuous or periodical performance agreements (such as supply agreements), under Article 74[29] of the Insolvency Act, if the Insolvency Official takes over the contract (i.e. take the Debtor's place), it must pay the entire agreed price for the goods already delivered or the services already performed.

On the contrary, the other party cannot terminate the agreement because of the bankruptcy, since under Article 72, sixth paragraph, of the Insolvency Act, all

[28] On the contrary, if the obligations of a party (e.g. deliveries) have been fulfilled but not those of the other party (e.g. the payment) the agreement is not outstanding.

[29] Although Article 74 of the Insolvency Act was amended with Legislative Decree No. 169 of 12 September 2007, its content was not dramatically changed.

clauses triggering termination of the agreement due of the bankruptcy are void (please refer to Part C.I.1.7).

The same above applies in compulsory administrative liquidation (*liquidazione coatta amministrativa*).

In composition with creditors (*concordato preventivo*), under Article 169-*bis* of the Insolvency Act[30], outstanding agreements (*contratti pendenti*) are not automatically suspended by virtue of the opening of the Insolvency Proceedings and neither the Debtor nor its creditors are entitled to terminate them based on such opening[31]. However, the Debtor has the right to ask the Court, following the inquiry of the counterparty and collection of the relevant information, to either (i) terminate pending contracts or (ii) suspend the performance of the agreements for a maximum of 60 days (with a further possible extension). In this case, the other party has the right to a compensation for damages.

This rule should also apply to the composition with creditors with a going concern (*concordato preventivo con continuità aziendale*). It is uncertain whether and to what extent the said provision – and, in particular, the right to terminate the contract – applies also to the composition with creditors with reserve (*concordato con riserva*). In extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) a different rule applies. Articles 50 and 51 of Decree No. 270 govern the effects of any kind of outstanding agreement as at the date the Debtor is admitted to the proceedings (i.e. the second phase, which starts after the insolvency declaration – *dichiarazione di insolvenza*). Under Article 50, the opening of the proceedings does not automatically suspend those agreements (as opposed to bankruptcy proceedings) which, therefore, continue to produce their effects unless the Insolvency Official may elect to terminate them. In this case as well, after the authorization to implement the extraordinary administration program, the counterparty may serve a notice on the Insolvency Official to the effect that the agreement will terminate automatically, unless the Insolvency Official elects to continue the agreement within 30 days. If the Insolvency Official takes the Debtor's place in the outstanding agreement, the above mentioned provisions set out in Articles 72 and 74 of the Insolvency Act apply.

As Article 50 of Decree No. 270 only concerns the second phase of the proceedings, the regime of outstanding agreements (*rapporti giuridici preesistenti*) between the Court's insolvency declaration (*dichiarazione di insolvenza*) and the admission to the proceedings is uncertain. In this respect, some scholars argue that the performance of an agreement during this period of time should be authorised by the supervising judge[32]. This could lead to significant delays in the performance of an agreement requiring particular rapidity from the parties. However, it is a consolidated principle that, in the event of the non-performance of an agreement by the Debtor (or by the Insolvency Official) during this period, the counterparty may suspend performance of its obligations and, in the opinion of some authors, may also elect to terminate the agreement[33]. On this subject, please also refer to Part C.I.1.3. For the sake of completeness, it is worth mentioning that Decree No. 134 clarified the interpretation of Article 50 stating that the performance of a contract by the extraordinary

[30] As amended by Law No. 132 of 6 August 2015.
[31] This has been affirmed by case law. See, for example, Court of Cassation No. 3683 of 8 June 1981 and Court of Cassation No. 8076 of 27 August 1997. See also Tribunal of Pistoia 9 September 2013.
[32] Proto, *Gli organi, gli effetti e l'accertamento del passivo,* in *Il fallimento e le altre procedure concorsuali,* edited by Luciano Panzani, VI, Turin, 2002, 182 *et seq*.
[33] Guglielmucci, *Lezioni di diritto fallimentare,* Turin, 2004, 133-137.

commissioner or the request of the extraordinary commissioner to the counterparty to perform the contract does not constitute a waiver of the right of the extraordinary commissioner to terminate the relevant contract. Accordingly, a contract should be considered pending until the extraordinary commissioner expressly declares its intention of assuming such a contract[34].

However, different regimes apply with respect to certain outstanding agreements. In particular, for the purpose of this 2017 Letter Opinion, the following exceptions are relevant.

<u>EU Energy Contracts</u>

First, under Article 1, paragraph 86, of the 2017 Competition Act, close-out netting provisions set out in EU Energy Contracts are valid and effective according to their terms, also in the event of the opening of a bankruptcy, economic-financial reorganization or winding-up proceedings, even of insolvency nature or pre-insolvency, with or without the divestment of the Debtor (thus, in all kind of Insolvency Proceedings).

EU Energy Contracts are defined as "Wholesale Energy Products" under REMIT with the only exception of contracts entered into with end customers regardless of their final consumption capacity. Therefore, on the basis of the definition of Wholesale Energy Products under REMIT, the special rule above applies to the following contracts and derivatives, irrespective of where and how they are traded (e.g. if over-the-counter, on exchanges etc.):

- contracts for the supply of electricity or natural gas where delivery is in the European Union;
- derivatives relating to electricity or natural gas produced, traded or delivered in the European Union;
- contracts relating to the transportation of electricity or natural gas in the European Union;
- derivatives relating to the transportation of electricity or natural gas in the European Union;

unless one party is an end-customer regardless of its final consumption capacity.

It is worth noting that the definition above does neither embrace Allowances nor contracts for the supply (or transportation) of electricity or natural gas with delivery outside the European Union (or derivatives relating to electricity or natural gas produced, traded or delivered in the European Union), which, therefore, do not benefit from the application of the 2017 Competition Act.

For the purposes of the 2017 Competition Act, under Article 1, paragraph 87, "close-out netting" clauses are either voluntary or automatic termination clauses and related obligations, upon the party owing the greater amount, to pay a net settlement amount, as resulting from the netting of the parties' position, stemming from the obligations which, by virtue of such clauses, have been accelerated and converted

[34] Court of Udine of 13 May 2011, Court of Rome No. 11324 of 5 June 2017,

into the obligation to pay an amount equal to their current estimated value, according to commercial reasonableness standards, or which are terminated and replaced with the obligation to pay such amount. This definition, therefore, applies to the Early Termination clause under the General Agreement and the related obligation to pay the Termination Amount.

In the event of opening of Insolvency Proceedings, the Insolvency Official, within six months from the opening of the proceeding, may claim the violation of the standards of reasonableness with regard to the commercial value in the event that the determination of the current estimated values intervened in the year before the opening of the Insolvency Proceeding. However, the reasonableness is presumed if the contractual clauses concerning the evaluation standards of the current estimated value are consistent with contractual schemes elaborated in the international practice as recognized by international representative associations (such as EFET) or in the event that such clauses include provisions on quotation provided by one or more independent entities globally recognized.

As a consequence, the General Agreement being a standard contract drafted by an international_representative association, the reasonableness of the evaluation of the Termination Amount is presumed.

In conclusion, both Early Termination and the close-netting provisions under the General Agreement are valid and enforceable with respect to those contracts which fall within the definition of EU Energy Contracts. In addition, the reasonableness of the evaluation of the Termination Amount is presumed.

<u>Forward agreements having a financial nature</u>

As a second exception to the general rule of the Insolvency Act, Article 76 of the Insolvency Act provides for the automatic termination of outstanding forward agreements having a financial nature traded on exchanges (*contratti di borsa a termine*). Under Article 203 of the Financial Act, the same rule applies to derivative contracts having a financial nature, securities lending and repo agreements. Therefore, this rule does not apply to forward transactions that are physically settled, to the extent that they do not constitute derivative financial instruments.

According to the rule above, if the relevant derivative financial instrument has a maturity date which falls after the bankruptcy declaration, the derivative financial instrument will be considered by operation of law terminated at the moment in which bankruptcy is declared. The positive differential, if any, between the contractual value of the commodities and their value at the date of the bankruptcy declaration is to be paid to the bankruptcy estate. However, if the differential is negative, it will be deemed as an unsecured credit and will be admitted as part of the bankruptcy liabilities (*passivo fallimentare*). It will also be subject to the bankruptcy proceedings. Therefore, the provisions stated under Article 76 of the Insolvency Act and Article 203 of the Financial Act prevent cherry-picking by the Insolvency Official in money transactions.

It is worth noting that Article 203 of the Financial Act does not apply to all financial instruments but only to those listed above (i.e. derivative contracts having a financial nature, securities lending and repo agreements). Therefore, although Allowances will be considered financial instruments when MiFID II will enter into force, they will not fall within the application of Article 203 of the Financial Act *per se* given that they are neither derivative contracts having a financial nature, securities lending nor repo agreements) On the contrary, derivative contracts on Allowances (as on any kind of Commodity) will be subject to the application of Article 203 of the Financial Act.

(b) Commodity Options

Different remarks have to be made in the case of options as opposed to forward transactions. An option is an agreement by which one party grants another party the right, but not the obligation, to enter into a sale and purchase agreement (either as seller or purchaser) during an agreed period. Italian Courts maintain that the option agreement is separate from the agreement entered by the exercise of the option. In particular, before the option has actually been exercised, the second agreement does not come into existence, since only one party's proposal has been put forward[35].

However, scholars argue that the effect of the commencement of Insolvency Proceedings (and, particularly, bankruptcy proceedings – *fallimento*) on an option must be evaluated by applying (by analogy) the rules that apply to forward transactions[36]. Accordingly, under bankruptcy proceedings the options will be suspended and:

- if the Debtor is the holder of the option, the Debtor's Insolvency Official may exercise the option and perform the resultant transaction; or
- if the Debtor is the writer of the option, the holder cannot exercise the option without the Insolvency Official's approval[37].

(c) Commodity Swaps

Under Italian Law, the same rules described under point (a) above apply.

In particular, if the Commodity Swap is a EU Energy Contract, it will be subject to the application of 2017 Competition Act.

If the Commodity Swap is not a EU Energy Contract but is a financial derivative instrument (*strumento finanziario derivato*) according to the definition established under the Financial Act[38], the provisions stated under Article 76 (*Contratti di borsa a termine*) of the Insolvency Act and Article 203 of the Financial Act would apply.

<u>In conclusion</u>:

if Italian law applies, there may be a need to splitting-up of Individual Contracts executed under a General Agreement into different "*netting pools*", given the different regimes describe below.

In particular, EU Energy Contracts are subject to the special rule under the 2017 Competition Act, according to which close-out netting provisions are valid and enforceable also in case of Insolvency Proceedings.

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[35] See, for example, Court of Cassation No. 873 of 14 February 1986; Court of Cassation No. 10649 of 13 December 1994; Court of Cassation No.18201 of 10 September 2004; Court of Cassation No. 15411 of 19 June 2013.

[36] Patti, *Nozione di rapporto in corso di esecuzione*, in *Il fallimento e le altre procedure* concorsuali, edited by Luciano Panzani, Turin, 2012, 313 *et seq*.

[37] This is confirmed by Bonsignori-Lardo-Lazzara, *I contratti nelle procedure concorsuali,* Milan, 1992, 46 and 47.

[38] Article 1, paragraph 2, of the Financial Act which refers to Annex I, Section C of the Financial Act.

Contracts which do not fall within the scope of application of the 2017 Competition Act do not benefit from the special regime indicated above. However, if those contracts are financial derivative instruments, securities lending agreements or repo agreements, they are automatically terminated upon the opening of the Insolvency Proceedings under Article 203 of the Financial Act[39].

However, we are of the opinion that having various netting pools does not jeopardise the close out netting of those transactions which belong to a pool eligible for close-out netting in case of Insolvency Proceedings.

3. *Opinion on whether close-out netting, Early Termination or the calculation and payment of the Termination Amount is voidable, challengeable or in any way deletable by a liquidator or any third party if insolvency procedures are opened*

(a) Italian Law Aspects

(i) 2017 Competition Act

Under the 2017 Competition Act, in case of Insolvency Proceedings, the Insolvency Official, may challenge the reasonableness of the evaluation of the close-out netting amount (i.e. under the General Agreement, the Termination Amount) within six months from the opening of the Insolvency Proceeding. However, the reasonableness is presumed in the event that the contractual clauses concerning the evaluation of the close-out netting amount are consistent with the contractual schemes elaborated in the international practice as recognized by international representative associations (or in the event that such clauses include provisions on quotation provided by one or more independent entities globally recognized). Therefore, the General Agreement being a standard contract drafted by an international representative association, the reasonableness of the evaluation of the Termination Amount is presumed. As clarified above, although we believe that the presumption is irrefutable, this does not rule out the possibility that the Insolvency Official proves that the terminating Party deviated from the criteria set out under the General Agreement for the purpose of the calculation of the Termination Amount.

(ii) Claw-back Action under Insolvency Proceedings (*revocatoria fallimentare*) for contracts other than EU Energy Contracts

For an overview of the principles applying to claw-back actions under Insolvency Proceedings (*revocatoria fallimentare*), please refer to Appendix 1. In particular, Article 67, second paragraph, of the Insolvency Act, which applies to all Insolvency Proceedings providing for an insolvency declaration (*dichiarazione di insolvenza*)[40], sets out that payments and acts for consideration (*atti a titolo oneroso*) and those creating pre-emption rights (*diritto di prelazione*) effected in the six months preceding the insolvency declaration may be clawed back by the Insolvency Official, within five years of the declaration, provided that the Insolvency Official proves that the other

[39] The same rule applies to forward financial contracts traded on exchanges under Article 76 of the Insolvency Act.

[40] Therefore, bankruptcy (*fallimento*) and, under certain circumstances, restructuring extraordinary (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*), extraordinary administration for large companies (a*mministrazione straordinaria delle grandi imprese in stato di insolvenza*), compulsory administrative liquidation (*liquidazione coatta amministrativa*),

party was aware of the Debtor's insolvency at the time the relevant payment or act for consideration was effected (constructive knowledge) [41].

As mentioned in Appendix 1, Courts establish constructive knowledge of the Debtor's insolvency by the counterparty on the basis of symptoms of insolvency. These are practical circumstances which include, *inter alia*, the duration of the relationship between the Debtor and the counterparty[42]. For this reason, the risk of claw-back under Article 67, second paragraph, of the Insolvency Act should be carefully considered.

(A) Risk of Claw-back for Early Termination

With respect to Early Termination it is worth distinguishing three cases: (i) Early Termination enforced by the Debtor before the insolvency declaration; (ii) Early Termination due to insolvency reasons; (iii) Early Termination due to Material Reason affecting the Debtor enforced before the insolvency declaration.

As to the first case, it is worth noting that scholars and case law hold that acts (including notices to the counterparty) that give rise to termination of an agreement, fall within the concept of acts for a consideration (*atti a titolo oneroso*) and may accordingly be clawed back by the Insolvency Official[43].

This applies to discretionary Early Termination rights classified as either an express termination clause (*clausola risolutiva espressa*) under Article 1456 of the Civil Code (please refer to Part C.I.1.7)[44] or as a right of withdrawal (*diritto di recesso*) under Article 1373 of the Civil Code (please refer to Part C.I.1.7)[45].

In relation to the enforceability of Early Termination due to insolvency reasons, please refer to Part C.I.1.7.

Finally, in relation to Early Termination due to a Material Reason affecting the Debtor which is enforced before the insolvency declaration, Article 72, fifth paragraph, sets out that a termination right before such moment is effective also *vis-à-vis* the Insolvency Official[46]. However, if with the termination the counterparty aims at obtaining the restitution of goods or payments or damages, the claim must be brought within the Insolvency Proceedings.

(B) Risk of Claw-back for Close-out Netting

Provided that the General Agreement[47] has been entered into at least six months prior to the insolvency declaration (*dichiarazione di*

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[41] Save for the exceptions under Article 67, third paragraph, of the Insolvency Act.
[42] See, for instance, Court of Cassation No. 1545 of 11 February 1995.
[43] This is confirmed by Jorio, *Le crisi di impresa. Il fallimento*, Milan, 2000, 462; Macchia, *Gli atti soggetti a revoca ai sensi dell'art. 67, secondo comma, legge fallimentare*, in *Il fallimento*, 1991, 958 and Maffei Alberti, *Il fallimento,* in *Giurisprudenza sistematica di diritto civile fondata da W. Bigiavi*, Turin, 1978, II, 373.
[44] Court of Genoa, 18 February 2005, in *Il fallimento*, 2006, 592; Court of Milan, 18 April 1994, in *Il fallimento*, 1994, 879; Court of Milan, 12 March 1981, in *Il fallimento*, 1982, 586.
[45] Court of Catania, 28 January 1988, in *Il diritto fallimentare*, 1989, II, 586.
[46] Provided that if the judicial demand for termination, where necessary, is registered with the public registry.
[47] Or the Individual Contract is the concept of a "single agreement" (please refer to Part C.I.1.10) is not accepted.

insolvenza), there would be no risk of claw-back of close-out netting. This is because the case law holds that if an agreement providing for contractual rights of set-off has been entered into prior to the six-month claw-back period, then it is of no legal significance that a set-off occurred during that period[48].

(C) Risk of Claw-back for Payment of the Termination Amount

The relevant provisions of Article 67, second paragraph, of the Insolvency Act could conceivably allow for the revocation of the payment of any net amount calculated as due by the Debtor in application of §§ 10.3(b) and 11 of the General Agreement, if paid within six months prior to the insolvency declaration (*dichiarazione di insolvenza*).

With regard to the enforceability of the Termination Amount to be paid as a consequence of an insolvency-related event, please refer to Part C.I.1.9.

(iii) General Claw-back Action (*revocatoria ordinaria*)

Article 2901 of the Civil Code provides for a general claw-back action (*revocatoria ordinaria*) which may apply, even outside of Insolvency Proceedings, to transfers of assets (*atti di disposizione del patrimonio*) provided that the following conditions are met:

- prejudice to creditors' interest;
- the transferor is aware of prejudice under the first bullet point above;
- the transferee is aware of prejudice under the first bullet point above or, if the transfer occurred before the debt arose, the transferee intentionally contributed to the prejudice under the first bullet point above (*partecipazione alla dolosa preordinazione*); and
- the transfer occurred in the five-year period before the commencement of the ordinary claw back action (*azione revocatoria ordinaria*).

(b) Insolvency Regulation

Article 7, second paragraph, letter (m), of the Insolvency Regulation states that the law of the Member State in which the Insolvency Proceedings were opened also determines the rules relating to "*the voidness, voidability or unenforceability of legal acts detrimental to all the creditors*" (including claw-back rules). Therefore, Italian law would apply in Italian Insolvency Proceedings, even if the General Agreement were governed by other than Italian law.

However, a rule favourable to governing law of EU Member State with a soft claw-back regime is set out in Article 16 of the Insolvency Regulation. Under this Article, the person beneficiary of an act that is detrimental to creditors may avoid the application of Italian law regarding detrimental acts, provided that the party proves

[48] Court of Cassation, No. 5612 of 16 September 1986, Court of Florence, 5 December 2007, in *Il Foro Italiano*, 2008, 633.

that the EU Member State law governing the General Agreement does not allow "*any means of challenging such acts in the relevant case*". In this case, the non-defaulting party must demonstrate to the Court that, under the law governing the General Agreement, the detrimental act cannot be clawed back and also that there are no other means by which the act can be avoided[49].

(c) Winding-Up Directive

Article 95-*bis* of the Banking Act, as introduced by Decree No. 197, implementing the Winding-Up Directive, establishes that "*restructuring and liquidation proceedings of EU banks are governed by the law of the country in which the bank is established and are effective in Italy without need for further formalities*". The home country law (also when concerning voidness and voidability of acts detrimental to creditors) will, therefore, apply in Italian Insolvency Proceedings.

However, Article 95-*ter*, fourth paragraph, of the Banking Act states that the person beneficiary of an act that is detrimental to creditors may avoid the application of Italian law regarding detrimental acts, provided that party proves that the governing law of the General Agreement does not allow any means of challenging such acts in the relevant case. In this case, the non-defaulting party must demonstrate to the Court that, under the law governing the General Agreement, the detrimental act cannot be clawed back and also that there are no other means by which the act can be avoided. This applies if the Debtor is a bank provided that the General Agreement is governed by non-Italian law.

The issue concerning the claw-back of the netting agreements (such as set out under §§ 10.3 and 11 of the General Agreement) entered into by EU banks must be separately discussed. Under Article 95-*ter*, second paragraph, of the Banking Act, these agreements are governed solely by the law of the contract which governs such agreements. This provision, which expressly derogates from Article 95-*bis* of the Banking Act (so excluding netting agreements from the scope of application of the home country law), seems also derogate from Article 95-*ter*, fourth paragraph, of the Banking Act, which provides for the application of the *lex contractus* under certain conditions.

As a result, close-out netting and payment of the Termination Amount, as set out under §§ 10.3 and 11 of the General Agreement, may be clawed back only under the governing law of the General Agreement. Article 95-*ter*, second paragraph, of the Banking Act, however, would not cover the issue concerning the claw-back of the Early Termination, which cannot be considered part of a netting agreement and, therefore, would remain subject to Article 95-*ter*, fourth paragraph, of the Banking Act.

In conclusion:

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that Early Termination, close-out netting and payment of the Termination Amount cannot be clawed back by an Insolvency Official with respect to EU Energy Contracts.

[49] De Cesari, *Commento all'articolo 13* in De Cesari - Montella, *Le procedure di insolvenza nella nuova disciplina comunitaria*, Milan, 2004, 174 *et seq*.

In addition, with respect to agreements to which the 2017 Competition Act do not apply, we are of the opinion that Early Termination, close-out netting and payment of the Termination Amount may not be clawed back by an Insolvency Official provided that:

(i) the above mentioned acts occurred before the above-mentioned claw-back periods[50]; or

(ii) the Terminating Party is able to prove that it did not effect the above mentioned acts being aware of the Debtor's insolvency (please refer to Parts B.9 and B.10).

Scenario 2

(i) If an Italian Party is a Debtor, the same opinion under Scenario 1 above will apply provided that the General Agreement is governed by Italian law.

(ii) If the Debtor is an Italian Commercial Company and the General Agreement is not governed by Italian law, by virtue of Article 7, second paragraph, letter (m), of the Insolvency Regulation, the same opinion under Scenario 1 above would apply, provided that under Article 16 of the Insolvency Regulation the Terminating Party may avoid application of Italian law by proving that the governing law of the General Agreement does not allow either a claw-back action or any other means by which the act can be avoided (in the latter case, the governing law of the General Agreement will apply)[51]. In respect of an Italian Party which is a bank (*banca*), the same rule applies under Article 95-*ter*, fourth paragraph, of the Banking Act implementing the Winding-up Directive in Italy. However, as regards and limited to the claw-back of the close-out netting and of the payment of the Termination Amount, Article 95-*ter*, second paragraph, of the Banking Act would apply. Under this rule, the close-out netting and the payment of the Termination Amount may be clawed back only under the governing law of the General Agreement.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, the same opinion under (ii) of Scenario 2 above will apply.

4. *Please clarify whether or not there is a distinction in time with respect to a creditor's rights between:*

(a) *the filing of proceedings seeking a judgment of insolvency;*

(b) *a bankruptcy Court recognising the filing of proceedings seeking a judgment of insolvency;*

(c) *the date on which a bankruptcy Court determines a party first becomes insolvent; and*

[50] However, even if effected before the claw-back periods, the acts could be clawed back with an ordinary claw-back action if the requirements under Part C.I.3(a)(ii) are met.

[51] De Cesari, *Commento all'articolo 13*, in De Cesari-Montella, *Le procedure di insolvenza nella nuova disciplina comunitaria*, Milan, 2004, 174 *et seq*.

(d) *any other stage of the proceedings where a creditor's rights may be affected.*

The filing of a petition for bankruptcy (*istanza fallimento*) does not have any effect on the position of the Debtor's creditors and counterparties (except as regards issues related to Article 72, sixth paragraph, of the Insolvency Act – see Part C.I.1.7). Likewise, during the period after the filing of the petition, during which time the Court investigates whether the Debtor is insolvent, creditors are not directly affected by the pending proceedings. As already mentioned in the brief description of the Insolvency Proceedings (please refer to Part C.I.1), the moment relevant to the position of creditors and counterparties is the date of the insolvency declaration (*dichiarazione di insolvenza*). From that moment, under Article 52 of the Insolvency Act, the *pari passu* principle applies and no activity may be carried out by a creditor or counterparty that could affect the Debtor's assets (including commencement of enforcement proceedings or commencement of other lawsuits before other Courts). It must be noted, however, that the filing of a petition for bankruptcy, if known by the third party, may be considered as evidence of the fact that such third party was aware of the insolvency status of the Debtor in case of claw back actions against transactions or payments executed after such filing but before the insolvency declaration.

The Banking Act makes specific reference to this part of the Insolvency Act in respect of compulsory administrative liquidation (*liquidazione coatta amministrativa*). However, in the event of compulsory administrative liquidation, effects start from the date of installation of liquidator(s) (*commissario liquidatore*), under Articles 83 and 85 of the Banking Act.

With respect to composition with creditors (*concordato preventivo*), composition with creditors with reserve (*concordato preventivo con riserva*) and composition with creditors with a going concern (*concordato preventivo con continuità aziendale*), from the date the Debtor files a petition for admission to these proceedings, even prior to the Court's decree of admission, creditors and counterparties are prevented from commencing enforcement actions and precautionary measures against the Debtor (please refer to Parts C.I.1.1. and C.I.1.2). Also, the Debtor cannot pay any creditor for sums due before the filing of the relevant petition, unless so authorised by the Court.

In relation to extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) and restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*), a creditor's or Debtor's petition for admission to proceedings has no effect on the enforceability of Early Termination rights or on the calculation and payment of the Termination Amount, similar to bankruptcy proceedings. The first act which could potentially affect outstanding agreements (*rapporti giuridici preesistenti*) is an insolvency declaration under Article 3 of Decree No. 270. However, also in this case the filing of the relevant petition, if known by the other party, may be considered as evidence of the fact that such party was aware of the insolvency status of the Debtor in case of claw back actions against transactions or payments executed after such filing but before the insolvency declaration.

5. *We are also interested in whether the insolvency law provides for a "safe harbour" for certain derivatives or other categories of transactions and whether the EFET contract types would benefit from such provision(s).*

As anticipated under Part C.I.1.2.(a), specific regulations apply to EU Energy Contracts and certain financial instruments.

With respect to EU Energy Contracts the enforceability of close-out netting clauses also in Insolvency Proceedings is expressly set out under the 2017 Competition Act.

With respect to forward financial contracts traded on exchanges, as well as derivative financial instruments, securities lending agreements and repo agreements, under Article 76 of the Insolvency Act and Article 203 of the Financial Act, respectively, those contracts are automatically terminated as of the date on which bankruptcy is declared[52].

In addition, specific rules apply with respect to the close-out netting provisions under Decree No. 170, implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 (so-called Collateral Directive). Under Article 7 of Decree No. 170, read in conjunction with Article 1, first paragraph, lett. f), close-out netting provisions can take effect in accordance with their terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of financial collateral arrangements and agreements including financial collateral arrangements. For the purpose of Decree No. 170, a financial collateral arrangement is a title transfer financial collateral arrangement or a security financial collateral arrangement provided that the parties are:

(i) public authorities;

(ii) a central bank;

(iii) a Financial Institution;

(iv) a central counterparty, settlement agent or clearing house; or

(v) any other legal person provided that the counterparty is an entity under points (i)-(iv) above.

Moreover, Article 9, third paragraph, of Decree No. 170 specifically sets out that, unless so provided by the parties, Articles 76 of the Insolvency Act and Article 203 of the Financial Act do not apply to financial collateral arrangements. This means that they continue to be valid and effective despite the bankruptcy of a party.

Certain authors argue that the scope of application of Article 7 of Decree No. 170 is indeed broader than the one referred above, since it applies to all kind of contracts including close-out netting provisions, at least if they have a financial nature, when entered into with a Financial Institution or another entity listed above[53]. However, we note that this opinion is not supported by any case law and it seems to be in contrast with Article 1, first paragraph, lett. f), which, in defying "close-out netting"

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[52] The same above applies in compulsory administrative liquidation (*liquidazione coatta amministrativa*), unless the Insolvency Official requests to continue the activity of the company

[53] See Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 165.

provisions clearly refers exclusively to financial collateral arrangements and agreements including financial collateral arrangements.

5.cont' *We would also like to know whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.). In addition, please provide a general description of limitations in your jurisdiction, if any, applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the General Agreement; (b) between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the General Agreement.*

Pursuant to the Insolvency Act, all the insolvency/bankruptcy judicial actions concerning a company must be publicised by means of the recording of the measure with the competent Companies' Registry in order to allow third parties to constantly verify the relevant Debtor's situation. The list of the measures that must be recorded and publicised include, *inter alia*, the opening or the re-opening of insolvency proceedings (*apertura del fallimento and riapertura del fallimento* under Articles 17 and 121, respectively, of the Insolvency Act), revocation of insolvency proceeding (Article 18), appointment or substitution of the Insolvency Official (Articles 37 and 37*bis*), temporary execution of business activity (Article 104) and discharge of the bankruptcy (Article 119). It is worth noting that opening of insolvency proceedings is usually published also on the website of the relevant Court for an easier public knowledge.

With reference to set-off right, in order to point out possible limitations applicable to the enforcement thereof, it is advisable to distinguish between two separate sets of circumstances: (i) set-off executed in an insolvency related scenario and (ii) set-off executed in a non-insolvency related scenario.

(a) Set-off Executed in Insolvency Related Scenarios

If a set-off is executed in insolvency related scenarios, the provisions under Article 56 of the Insolvency Act apply. Please note that Article 56 is a mandatory provision and, therefore, cannot be derogated by the Parties. Article 56 of the Insolvency Act, which applies to all Insolvency Proceedings, is favourable to a creditor that owes a debt to the insolvent party that can be set-off against a debt that it is owed by the insolvent party (prior to the bankruptcy declaration). In practice, the creditor is afforded a significant exemption from the *pari passu* principle, because the creditor will not have to be ranked with all the other creditors in Insolvency Proceedings to recover the debt. In particular, Article 56 of the Insolvency Act provides that the set-off right is applicable to the credits payable before the bankruptcy declaration and to the credits not yet payable as of the date of the bankruptcy declaration unless acquired during the year preceding or after that declaration.

In this respect, it is worth noting that, some legal scholars and a line of case law[54] argue that insolvency set-off is quite different from the legal set-off under Article 1243, *et. Seq.* of the Civil Code since the insolvency set-off is applicable not only to homogeneous credits but also between non-pecuniary and pecuniary credits and that

[54] See Court of Cassation No. 8322 of 16 August 1990; Court of Cassation No. 775 of 16 November 1999.

debts which becomes due and payable after the insolvency declaration[55] may be included within the debts/credits subject to the right of set-off. By virtue of the interpretations above, the scope of insolvency set-off would be broadened granting, therefore, a higher level of protection to the creditor's claims.

If the set-off produces a positive differential in favour of the creditors, it must be characterised as unguaranteed credit (*credito chirografario*) in the bankruptcy procedure. Whenever the relevant differential is negative, the creditor must pay the relevant amount into the bankruptcy estate.

No specific rules apply with respect to set-off with Affiliates or Credit Support Providers and, therefore, no particular recommendations can be given in this respect.

(b) Set-off Executed in Scenarios Unrelated to Insolvency

If the set-off is between the Parties in a non-related insolvency scenario, the provision mentioned under paragraph (a) above do not apply. In such scenario, if Italian law is the governing law, the Parties may agree and insert a provision, describing, *inter alia*, the conditions applicable to voluntary set-off scheme (*compensazione volontaria*) pursuant to Article 1252 of the Civil Code. Accordingly, the Parties regulate their own positions, establishing in advance the terms and conditions applicable in case of set-off. Whenever the Parties have not in place any covenant regarding voluntary set-off, the rules provided under Article 1241, *et seq*. of the Civil Code (*compensazione legale*) may apply. Legal set-off extinguishes the relevant debts from the date they were formed. In particular, legal set-off takes place only between two debts whose object is a sum of money or a quantity of fungible goods of the same kind (e.g. electricity, gas, Emission Allowances) and which are equally liquidated and collectable. Such set-off must be enforced by the Parties, and it is not to be enforceable by litigation. Notwithstanding the foregoing legal set-off, according to Article 1246 of the Civil Code, cannot be executed with regard to the following claims:

(i) claims for the restitution of goods, of which the owner had been unjustly deprived;

(ii) claims for the restoration of things which had been deposited or lent for use;

(iii) claims which had been declared exempt from attachment (*credito dichiarato impignorabile)*;

(iv) prior waiver by the Debtor;

(v) prohibitions established by law.

Under Italian law, voluntary set-off, established by the relevant parties contractually, does not affect third parties, who are not privy to the relevant agreement. For this reason, the Parties cannot set-off debts affecting third parties without their prior consent.

[55] The debt must be due (*liquido*) and payable (*esigibile*).

6. *Assuming the Parties have not specified that Automatic Termination (as defined in § 10.4 of the General Agreement) applies, are the provisions of the General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the General Agreement enforceable under the laws of Italy or is there a risk that (i) the entering into the General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?*

As explained above, under the 2017 Competition Act close-out netting provisions can take effect in accordance with their terms notwithstanding the commencement of Insolvency Proceedings. Close-out netting provisions are defined as either voluntary or automatic termination clauses. Therefore, the early Termination Notice cannot be challenged by the Insolvency Official.

On the contrary, a distinction must be made with respect to agreements other than EU Energy Contracts.

In general terms, the discretionary termination rights under the General Agreement may, from time to time, be deemed both an express termination clause (§3(a)(i)(A)) (*clausola risolutiva espressa*) or a right of withdrawal (*diritto di recesso*), as better specified in Part C.I.1.7.

If the Material Reason relevant for agreements other than EU Energy Contracts is insolvency based, in case of an express termination clause the termination right will certainly not be enforceable after the insolvency declaration in light of Article 72, sixth paragraph, of the Insolvency Act, which considers void any clause providing for the termination of the agreement due to insolvency. However, even if construed as a right of withdrawal, there is a risk that a Court interprets Article 72, sixth paragraph of the Insolvency Act widely, considering the right of withdrawal comparable to the termination for the purpose of the provision at issue; also in this case, therefore, the right of withdrawal will not be enforceable after the insolvency declaration (please also refer to Part C.I.1.7.(c)).

Furthermore, the enforcement of this right before the insolvency declaration but after the filing of the petition for the declaration of insolvency may be challenged by the Insolvency Official. In fact, it could be held that the exercise of a termination right is made upon an event which preludes to a declaration of insolvency with the fraudulent aim of preventing the application of the insolvency laws. In this view, there is a serious risk that termination might be considered to be fraudulent as prohibited by Article 1344 of the Civil Code, and, consequently, it might be challenged by the competent Insolvency Official.

For the same reason, we cannot exclude that clauses set out in agreements other than EU Energy Contracts providing termination of the agreement tied to the presentation of a petition for a declaration of insolvency may also be void.

7. *Assuming the Parties have elected Automatic Termination to apply, are the provisions of the General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the General Agreement enforceable under the laws of Italy or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?*

Similarily to what has been described in Part C.I.1.6 above, while with respect to EU Energy Contracts the Early Termination (either automatic or voluntary) cannot be challenged by the Insolvency Official, certain distinctions must be made with respect to agreements other than EU Energy Contracts.

In this respect, before dealing with the subject of enforceability of insolvency based Early Termination rights under Italian law, it might be useful to consider the Italian legal qualifications of discretionary and automatic Early Termination rights set out in the General Agreement (§§ 10.3 and 10.4). This is necessary to understand the effects on the General Agreement and the Individual Contracts which stem from the exercise of Early Termination rights resulting from insolvency-based Material Reasons (see Part C.I.1.7.(c)).

(a) Early Termination – Discretionary Termination Rights

Italian law provides for several termination remedies an agreement in the event of a party's default.

The first remedy by which the non-defaulting party may terminate an agreement is to apply for judicial termination (*domanda di risoluzione per inadempimento*) under Article 1453 of the Civil Code. This remedy may be enforced provided that the claimed breach is material (*di non scarsa importanza*) with respect to the interest of the non-defaulting party (Article 1455 of the Civil Code).

The second way to terminate an agreement is by issuing a notice of default (*diffida ad adempiere*) under Article 1454 of the Civil Code. In the event of a material breach under Article 1455 of the Civil Code, the non-defaulting party may send a notice of default to the other party requesting it to remedy the default within an reasonable period and advise the defaulting party that failure to perform the obligation within the given term will result in termination of the agreement by operation of law.

The parties may also agree that, in the event of certain events of default, which must be specifically set out in the agreement, the agreement will terminate, under Article 1456 of the Civil Code (*clausola risolutiva espressa*). In this case, the agreement will terminate by operation of law, without the need for an application to the Court or a notice to remedy default, from the moment the non-defaulting party notifies the defaulting party of its intention to exercise the clause[56].

It is important to note that an express termination clause cannot be stipulated in respect of a generic default by either party. On the contrary, reference to a specific party's default (or several specific party's defaults) is a necessary requirement for the

[56] Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 346. This has been confirmed by case law, including Court of Cassation No. 26508 of 17 December 2009; Court of Cassation No. 5702 of 11 April 2012; Court of Cassation No. 9488 of 18 April 2013; Court of Cassation No. 20854 of 2 October 2014.

express termination clause to be effective under Article 1456 of the Civil Code[57]. Moreover, scholars hold that an express termination clause can be stipulated only in respect of a party's actual default, not in respect of a party's risk of default. For instance, an express termination clause cannot cover the potential worsening of either party's financial condition since (according to the principle set out above) an express termination clause can only operate for a breach that has actually occurred[58].

On this subject, please also note that, as opposed to what is required by the Civil Code in the event of judicial termination and termination by notice of default, the party which intends to terminate the agreement by exercising its rights under the express termination clause does not need to provide evidence that the breach was a material breach of the agreement (as provided by Article 1455 of the Civil Code). This is because, by stipulating the events included in the express termination clause, the parties recognised in advance the materiality of the breach to which the clause applies.

The effects of an express termination clause are different depending on the structure of the agreement providing for such clause. In agreements providing for instantaneous performance (such as a sale agreement), the enforcement of the clause enforcement has retroactive effect (Article 1458 of the Civil Code), so that the parties return to the same position as they were upon entering into the agreement. Instead, in agreements which must be continuously or periodically performed (such as a supply agreement), termination due to enforcement of the express termination clause has no effect on obligations which have already been performed. Therefore, for Individual Contracts which refer to continuous or periodic deliveries, this principle is likely to apply (please refer to Part A.VI.).

Finally, the parties may agree that, regardless of the occurrence of any event of default, one party is given the right of withdrawal (*diritto di recesso*) from the agreement, upon a prior notice. Article 1373 states that, when an agreement provides for instantaneous performance, a party may withdraw before the parties have started performance of the agreement (unless otherwise provided in the agreement). Under an agreement providing for continuous or periodical performance, a party may withdraw after performance of the agreement has started. Withdrawal in these circumstances does not affect the prior performance of any obligation or the performance of an ongoing obligation that a party has commenced but not yet completed. Furthermore, the right of withdrawal does not imply, *per se*, that the other party must pay the withdrawing party damages. So that large autonomy is given to the parties in tailoring the right of withdrawal, the parties may contract out of the provisions of Article 1373 by providing for liquidated damages (*clausola penale*) on exercise of the right of withdrawal and/or by providing for retroactive effect.

With respect to the General Agreement, the discretionary termination under § 10.3 (i.e. ordinary termination) could be construed as either a right of withdrawal from the agreement or an express termination clause.

On the other hand, discretionary termination under § 10.3 may not be classified as judicial termination, because this kind of termination may only be enforced by a judicial claim. Likewise, it is not a termination by notice of default, because of the

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[57] Court of Cassation 20854 of 2 October 2014 and Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 342.

[58] See Pajardi-Paluchowski, *Manuale di diritto fallimentare*, Milan, 2008, 463; Guglielmucci, *Commento all'art. 72*, in *Il nuovo diritto fallimentare*, edited by A Iorio and M. Fabiani, Turin, 2006, p. 1132.

absence of a requirement to request remedy of the breach under § 10.3(b) of the General Agreement.

Instead, both a right of withdrawal and express termination clause are remedies the features of which are consistent with the discretionary Early Termination mechanism set forth by § 10.3(b).

On one side, it could be argued that the General Agreement provides for either Party's right of withdrawal on occurrence of Material Reasons set forth under § 10.5 of the General Agreement. This right of withdrawal, exercisable by serving the Early Termination notice, would be compliant with Article 1373 of the Civil Code, since:

(i) in Commodity Transactions classifiable as sale agreements (*contratti di compravendita*), the right of withdrawal would necessarily be exercised in the period of time ranging between the Commodity Transaction entering into and the relevant settlement; and

(ii) in Commodity Transactions classifiable as supply agreements (*contratti di somministrazione*), the right of withdrawal would not have an effect on past Commodity's deliveries: this is implicitly provided for by § 10.3 of the General Agreement, which clause, by stating that all obligations between the Parties are released and replaced by the duty to pay the Termination Amount, does not purport a duty for the Parties to mutually return already delivered Commodities and already paid amounts.

On the other side, the Termination Notice may also be construed as the notice of exercise of the express termination. In this case, the termination would also be effective from the date of exercise, without any difference from the right of withdrawal. In particular, under Commodity Transactions classifiable as supply agreements, Early Termination would not have effect on past performances, but it would only operate for the future. Although the effects of the express termination and the right of withdrawal are substantially equivalent, nevertheless a distinction must be drawn depending on whether the Material Reasons triggering the discretionary termination right are based on either Party's default or on other reasons. In particular, note that, as previously mentioned, the construction as an express termination clause is not consistent with Material Reasons triggering discretionary termination right that are based (not on either Party's default in respect of the General Agreement or any of the Individual Contracts, but) on a mere risk of default, or a default in respect of agreements other than the General Agreement or the Individual Contracts. In fact, these kind of events fall outside the scope of default set out in Article 1456 of the Civil Code.

Therefore, we believe that discretionary termination for the Material Reasons listed under §§ 10.5(a), 10.5(d) and 10.5(f) is to be classified as an express termination clause, whilst discretionary termination for other reasons listed in § 10.5 (including insolvency-based material reasons under § 10.5(c)) amount to a right of withdrawal.

(b) Early Termination – Automatic Termination Rights

Different considerations apply in respect of Automatic Termination.

Under Italian law, we believe that an Automatic Termination may be classified as a condition subsequent (*condizione risolutiva*), according to Article 1353 *et seq.* of the Civil Code.

A condition subsequent, governed by Article 1353 *et seq*. of the Civil Code, is a future and uncertain event upon the occurrence of which the agreement is terminated, without the need for any notice by the non-defaulting party to the other party, as it is provided under § 10.4 of the General Agreement. The termination of an agreement by virtue of a condition subsequent results in, unless otherwise agreed upon by the parties or implied by the nature of the agreement, the full "retroactivity of the effects" to the date at which the agreement was entered into (Article 1360, first paragraph, of the Civil Code), so that the parties must render each other all delivered goods (or the equivalent in cash) and price paid in exchange. While retroactive effects apply to instantaneous effect agreements (such as a sale agreement), this rule does not operate in the event of continuous or periodical performance agreements (such as supply agreements) in accordance with Article 1360, second paragraph, of the Civil Code.

Although not expressly provided for by the Civil Code authoritative scholars and the most recent case law also recognise the lawfulness of express termination clauses with specific waiver to the notice of enforcement. These are referred to under the name of "automatic termination clause" ("*clausola risolutiva automatica*")[59]. This has the same structure of the express termination clause governed by Article 1456 of the Civil Code, except for the non-defaulting party notice, which is not necessary for the clause to operate. As a consequence, the agreement shall be considered terminated with effect from the date of default, instead of the date of notice. However, according to some other older decisions, a communication expressing the willingness to terminate the agreement seems to be considered a requisite to enforce the termination right under Article 1456 of the Civil Code[60].

(c) Early Termination – Insolvency-Based Material Reasons

Article 72, sixth paragraph of the Insolvency Act, as introduced by Decree No. 5, sets forth that "*contractual clauses providing for the termination (*risoluzione*) of the contract as a consequence of the insolvency declaration are void (*inefficaci*)*".

This rule introduces to the Italian legal system the principle that the Insolvency Official's power to elect which outstanding agreements to perform and which to terminate cannot be contracted out by the parties (in substance, carrying out “cherry-picking” among the agreements of the Debtor);.

A provision similar to Article 72, sixth paragraph, of the Insolvency Act has been introduced under Article 186-*bis* of the Insolvency Act, which refers only to the composition with creditors with a going concern (*concordato preventivo con continuità aziendale*). However, according to a first degree decision, such effect would also apply to the composition with creditors with reserve (*concordato con riserva*).

The rationale behind the provision of Article 72, sixth paragraph, and Article 186-*bis* of the Insolvency Act is twofold:

(i) it allows the receiver to decide to either continue or terminate certain contractual relationships of the insolvent debtor, since such decision would be adversely affected if the contract could be terminated by the other party; and

[59] Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 347; Court of Cassation No. 19230 of 29 September 2015
[60] Court of Cassation No. 26508 of 17 December 2009; Court of Cassation No.18920 of 31 August 2009; Court of First Instance of Milan of 17 February 2011.

(ii) it is a well-established principle that the insolvency is a circumstance that, although preventing the fulfilment by a party of its contractual obligations, is not considered a default by the insolvent debtor (as it would be the case of a breach of a contract).

According to certain scholars[61], the scope of the new rule is subject to a wide interpretation. This kind of interpretation relies on the view that the word "termination" (*risoluzione*) is not used in the law with its technical meaning (i.e. termination of an agreement arising out of one party's default), but it refers to any type of contractual dissolution (i.e. also arising from reasons other than one party's default, such as, for instance, right of withdrawal and condition subsequent)[62].

However, according to a merit decision[63], a provision whereby the insolvency/bankruptcy of the Debtor is construed as a condition subsequent (*condizione risolutiva*), whose occurrence automatically triggers the expiration of the agreement, would not be subject to the rule set out in Article 72, sixth paragraph, of the Insolvency Act. This ruling was supported by the argument that in such circumstance the provision would not imply the breach of a contract by the Debtor.

In this view, in a insolvency scenario and in a composition with creditors with a going concern (*concordato preventivo con continuità aziendale*):

(i) the rule will certainly apply to clauses providing for the "automatic termination clauses" ("*clausola risolutiva espressa*") tied to one party's declaration of insolvency; in these clauses, the termination of the agreement would be an automatic consequence of the declaration of insolvency;

(ii) in the opinion of some authors, the rule will also invalidate a right of withdrawal (*diritto di recesso*) tied to one party's declaration of insolvency, because the exercise of such a right could prejudice the Insolvency Official's power of choice[64]; and

(iii) in light of the principle above, despite the existence of a positive merit decision, it is also doubted whether a Court would support the interpretation that the rule does not apply to a condition subsequent (*condizione risolutiva*).

In light of the above-mentioned principles, there is a risk that clauses providing for the termination of the agreement tied, not to the declaration of insolvency, but to the presentation of a petition (either by the Debtor or its creditors) for the declaration of insolvency may also be void under Article 1344 of the Civil Code. In fact, they could be construed as clauses aimed at avoiding Article 72, sixth paragraph, of the Insolvency Act[65].

On these grounds, limited to agreements other than EU Energy Contracts a detailed analysis of the insolvency-based Material Reasons is necessary, in order to define which would and which would not be enforceable under Italian law. To this aim, the

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[61] See, in particular, Guglielmucci, *Commento all'art. 72*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Turin, 2006, p. 1132 *et seq.*; Patti, *I rapporti giuridici preesistenti nella prospettiva della liquidazione fallimentare*, in *Il Fallimento*, 2006, p. 877 and Daniele Vattermoli, *Commento all'art. 72*, in *La riforma della legge fallimentare*, Torino, 2006, p. 423 *et seq.*

[62] Guglielmucci, *Commento all'art. 72*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Turin, 2006, p. 1132.

[63] Tribunale di Messina, 2 July 2009.

[64] Vattermoli, *Commento all'art. 72*, in *La riforma della legge fallimentare*, Torino, 2006, p. 424.

[65] Under Article 1344 of the Civil Code an agreement (or, indeed, a clause) is void when it is intended to avoid a mandatory rule.

following Material Reasons under § 10.5(c) may be held to be insolvency-based: §§ 10.5(c)(ii), 10.5(c)(iii), 10.5(c)(iv) and 10.5(c)(vi) (please note that § 10.5(c)(viii) is also relevant, but it operates by way of reference to the other Material Reasons). For ease of explanation, we analyse each of these Material Reasons out of order.

§ 10.5(c)(iv)

If interpreted under an Italian insolvency law perspective, the first part of this Material Reason ("*institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights*") seems to refer to the opening of Insolvency Proceedings providing for a declaration of insolvency. This clause would not be consistent with Article 72, sixth paragraph of the Insolvency Act. Therefore, it would not be enforceable under Italian law if it is construed as an express resolution clause and there is a risk that would not be enforceable also if was construed as a right of withdrawal or as a condition subsequent.

The second part of this Material Reason ("*a petition is presented for its winding-up or liquidation*") relates to the mere presentation of a petition for winding-up or liquidation. To the extent that these petitions are presented for reasons of insolvency (e.g. a petition is presented to open bankruptcy proceedings), there is a serious risk that Article 72, sixth paragraph of the Insolvency Act will apply.

Indeed, the presentation of such a petition may be considered as a demonstration of the worsening of a Party's financial status and of a high risk of insolvency. Therefore, from this perspective, one could argue that Early Termination would be enforceable, because it would protect the non-insolvent Party's interest in terminating an agreement with a Party that is no longer reliable.

However, it could be held that the exercise of Early Termination rights is acting upon an event which preludes to a declaration of insolvency with the fraudulent aim of preventing the application of Article 72, sixth paragraph of the Insolvency Act.

In this view, there is a serious risk that Early Termination, either automatic or discretionary, may be considered as a fraudulent clause, which, as such, is prohibited by Article 1344 of the Civil Code.

§ 10.5(c)(vi)

To the extent that this Material Reason refers to the commencement of Insolvency Proceedings providing for an insolvency declaration, this Material Reason is subject to Article 72, sixth paragraph of the Insolvency Act. In this respect, the same considerations with regard to § 10.5(c)(iv) apply.

To the extent that this Material Reason refers to the commencement of other Insolvency Proceedings providing for the appointment of external administrators (e.g. extraordinary administrators (*amministrazione straordinaria*) for Banks), Early Termination rights exercisable as a result of this Material Reason would be valid and enforceable in accordance with their terms.

§ 10.5(c)(iii)

This Material Reason, when interpreted from an Italian insolvency law perspective, mainly refers to the hypothesis of admission (or Debtor's filing of a petition to be admitted) to compositions with creditors.

With respect to composition with creditors (*concordato preventivo*) under Article 160 *et seq*. of the Insolvency Act, this kind of proceedings does not involve an insolvency declaration. Consequently, Article 72, sixth paragraph of the Insolvency Act will not apply. In this respect, however, there is significant literature to the effect that the *pari passu* principle (which, ideally, governs proceedings providing for a declaration of insolvency) also applies to a composition with creditors, notwithstanding the absence, in this case, of an insolvency declaration. The *pari passu* principle cannot be violated by individual claims for damages or restitution[66]. Therefore, to the extent that Early Termination is acted upon with the aim of bringing a claim for damages or restitution (such as claims for the payment of the Termination Amount under § 10.3 of the General Agreement), it would not be enforceable in a composition with creditors.

On the other hand, according to some case law, the non-defaulting party is prohibited from commencing or continuing any enforcement proceedings against a Debtor under composition with creditors, but it is nevertheless entitled to pursue actions for the termination of the relevant agreement under a specific contractual provision[67].

Therefore, with regard to this matter, a definite response cannot be given, and we cannot exclude that Early Termination rights will not be enforceable upon admission (or Debtor's filing of a petition to be admitted) to a composition with creditors.

With respect to the composition with creditors with a going concern (*concordato preventivo con continuità aziendale*), Article 186-*bis* of the Insolvency Act expressly sets out that termination clauses related to opening of the proceedings are void.

According to a recent first degree decision[68], such effect would also apply to the composition with creditors with reserve (*concordato con riserva*).

<u>§ 10.5(c)(ii)</u>

As to this insolvency-based Material Reason, we note that the termination of the Agreement is not directly related to the insolvency declaration, nor to the presentation of a petition for insolvency declaration. On the contrary, the termination effect is linked to events preceding the insolvency declaration and the relevant petition, such as the insolvency itself, the admission of insolvency by the insolvent Party and the insolvent Party's inability to pay its own debts.

In this respect, we believe that this clause should be interpreted as either a right of withdrawal to the benefit of the non-insolvent Party, or as a condition subsequent. The rationale of Early Termination exercised as a result of this Material Reason would be protecting the Terminating Party from a counterparty that is no longer reliable.

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[66] Patti, *Rapporti pendenti nel concordato preventivo riformato tra prosecuzione e scioglimento*, in *Il Fallimento*, 2013, 267; Patti – Dimundo, *I rapporti giuridici pendenti nelle procedure concorsuali minori*, Milan, 1999, 109 *et seq*.

[67] Court of Cassation No. 6809 of 21 July 1994. Ambrosini, *Gli effetti dell'ammissione al concordato e i contratti in corso di esecuzione*, Vol. *Le altre procedure concorsuali*, in *Trattato di Diritto Fallimentare*, edited by Vassalli – Luiso - Gabrieli, Turin, 2014, 306 *et seq*.; Guglielmucci, *Lezioni di diritto fallimentare,* Turin, 2012, 342 *et seq*.; Censoni, *Commento all'art. 168*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Bologna, 2006, 2417 *et seq.*

[68] The Court of Appeal of Milan with decision No. 580 of 4 February 2015 stated that the principle set out under Article 186-*bis* of the Insolvency Act also applies to the composition with creditors with reserve (*concordato con riserva).*

As the insolvency declaration is not referred to, we believe that Article 72, sixth paragraph of the Insolvency Act would not apply to this clause. This represents for us a significant point in favour of the validity and enforceability of the Early Termination with respect to this Material Reason.

However, it is possible that a Court may interpret the same clause differently. In particular, there is a risk that an Early Termination exercised as a result of this Material Reason could be considered to be an express termination clause or an "automatic termination clause". By adopting this construction, the Court would not uphold the exercise of Early Termination: as explained, an express termination clause can only refer to a party's actual default, not to a party's risk of default.

This conclusion, however, would be different if (A) the insolvency referred to in § 10.5(c)(ii) results in an actual default in respect of the General Agreement (and/or to any Individual Contract), or (B) the non-terminating Party declares its inability to fulfil the obligations under the General Agreement (and/or any Individual Contract). In both cases, Early Termination would be enforceable regardless of its interpretation.

Finally, with respect to this Material Reason, it must be considered that, in addition to the contractual remedies and protections granted to the non-insolvent Party under the General Agreement, Article 1186 of the Civil Code provides that, when a term for the fulfilment of an obligation is set by the parties, the creditor may require accelerated fulfilment of the obligation (*decadenza dal beneficio del termine*) in the event of the Debtor's insolvency. This implies that the obligation is immediately due and payable, irrespective of the term's expiration.

<u>In conclusion:</u>

Scenario 1

With regard to EU Energy Contracts the Early Termination rights under the General Agreement are enforceable even if insolvency-based.

With respect to non-EU Energy Contracts, we are of the opinion that with regard to the Material Reasons that are insolvency-based (*i.e.* §§ 10.5(c)(ii), 10.5(c)(iii), 10.5(c)(iv) and 10.5(c)(vi)):

(i) if the Early Termination rights are triggered by either the declaration of insolvency/bankruptcy of the Debtor, or the petition for a composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) pursuant to Article 186-*bis* of the Insolvency Act:

A. the provisions would be certainly void and not enforceable if they are construed as an express termination clause; and

B. there is a risk that the provisions would be considered void and not enforceable also if they are construed in terms of a right of withdrawal or condition subsequent on the basis of the argument that they have been construed as clauses aimed at avoiding the limitation of the Insolvency Act.

In addition to the bankruptcy proceedings pursuant to the Insolvency Act, this opinion will also apply to all Insolvency Proceedings providing for an insolvency declaration/bankruptcy of the Debtor, albeit some peculiarities apply in respect of the effective date of the insolvency declaration which relate to the restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*) and the compulsory administrative liquidation (*liquidazione coatta amministrativa*). In the former Insolvency Proceedings the effects of the insolvency declaration are "retrospective" to the date on which the MSE decree opens the proceedings, issued 15 days earlier (Article 4, first paragraph, of Decree No. 347), whilst in the latter Insolvency Proceedings, according to Articles 83 and 85 of the Banking Act, the above-mentioned effect shall apply to Individual Contracts existing at the date of liquidators' installation (*insediamento dei commissari liquidatori*) and, and, in any case, starting from the third day after the decision of the court opening the compulsory administrative liquidation.

Furthermore, according to a recent merit case-law, the early termination rights may be also considered void and not enforceable in case the Debtor enters into a composition with creditors with reserve (*concordato con riserva*).

(ii) if the Early Termination rights are triggered by a restructuring plans pursuant to Article 67, paragraph 3, letter d) of the Insolvency Act, the debt restructuring agreements (*accordi di ristrutturazione dei debiti*) pursuant to Article 182-*bis*, the compositions with creditors (*concordati preventivi*), – and any other arrangements and agreements with creditors outside a specific insolvency tool could be valid and enforceable if they are construed either as discretionary or they are construed in terms of a right of withdrawal or condition subsequent. However, in absence of case law, we are not in a position to exclude that a Court may apply a different interpretation.

Scenario 2

Irrespective of the governing law of the General Agreement, if an Italian Party to the General Agreement is subject to Insolvency Proceedings, the same opinion under Scenario 1 above would apply. In fact, the Insolvency Regulation would apply. In particular, Article 7, second paragraph, letter (e), of the Insolvency Regulation subjects the effects of Insolvency Proceedings on "*current agreements to which the Debtor is party*" to the law of the Member State where the proceedings are opened (i.e. Italy).

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, in the event that a Party is declared insolvent in Italy, the same opinion under Scenario 2 above would apply. Indeed, also in this case, Article 7, second paragraph, letter (e), of the Insolvency Regulation would apply.

8. *Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the General Agreement or upon other events not specified therein? Would it be necessary or advisable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the General Agreement to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable in respect of §10.5(c)(iv), what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency Courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing §10.4 of the General Agreement to implement such optimal termination timing*

From an Italian law point of view, we have no specific recommendations on making Automatic Termination operative *vis-à-vis* a Party incorporated or organised in Italy.

Nevertheless, as a general remark, we note that by electing Automatic Termination, the Party could not decide from time to time to enforce or not the termination of the relevant agreement.

On the other hand, from a practical point of view, it must be noted that if certain Individual Contracts are EU Energy Contracts (in relation to which either a voluntary or an Automatic Termination would be enforceable) while other are not EU Energy Contracts but are financial derivatives contracts or other agreements to which Article 76 of the Insolvency Act or Article 203 of the Financial Act apply (e.g. derivatives on Allowances), those latter Individual Contracts would be nonetheless automatically terminated upon opening of an Insolvency Proceeding. Therefore, if the Automatic Termination is not elected, it could be the case that while certain Individual Contracts are terminated by operation of law on the date of opening of the Insolvency Proceedings, the other contracts are terminated only after a Termination Notice (in case of EU Energy Contracts).

9. *Are the provisions in § 11 of the General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Italy or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?*

(a) Italian Law Aspects

Close-out netting is provided for under § 10.3(b) of the General Agreement. According to this provision, "with effect from the Early Termination Date all further payments and performance in respect of all Individual Contracts shall be released (and not merely suspended) and existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay damages for non-fulfilment to the other Party in an amount (if any) calculated in accordance with § 11.1 (the "**Termination Amount**")". Termination Amount is the sum of all Settlement

Amounts, i.e. Costs, Gains and Losses (as "*determined in a commercially reasonable manner*").

The Termination Amount mechanism set out in §§ 10.3 and 11 of the General Agreement may be classified as a liquidated damages clause (*clausola penale*). Under Article 1382 of the Civil Code, the parties to an agreement may agree that, in the event of one party's failure to fulfil certain obligations that party must pay to the other party an amount provided for in the agreement. Stipulation of liquidated damages (*penale*) is intended, on the one hand, to avoid the non-defaulting party having to prove the damage suffered and, on the other hand, to limit damages to an amount predetermined in the agreement. However, the parties are free to agree on the payment of damages in addition to the liquidated damages amount[69].

Likewise, in the event of termination, the General Agreement provides for an "*obligation of one party to pay damages for the non-fulfilment to the other party in an amount (if any) calculated in accordance with § 11.1*" (i.e., the Termination Amount) and, consistent with Article 1382 of the Civil Code, this obligation (A) replaces all amounts recoverable by either party on termination, and (B) limits damages to the Termination Amount.

It is important to mention that if the Italian law is the governing law of the agreement, a Court may reduce liquidated damages *ex officio* when, having regard to the affected party's interest in the fulfilment of the obligations, the amount is manifestly excessive (*manifestamente eccessiva*) (Article 1384 of the Civil Code). Given the classification as liquidated damages, the Termination Amount calculated under § 11.1 in principle could be reduced if the relevant Court would deem that the Termination Amount was manifestly excessive in respect of the Terminating Party's interest. However, given that the definition of Costs, Gains and Losses seems to reflect the damages effectively suffered by the non-defaulting party, we believe that the risk of reduction of the Termination Amount is remote.

In addition, we note that § 11.2 does not precisely determine the amounts referred to as Costs, Gains and Losses. The General Agreement only sets out a list of probable costs, or refers to present values of gains and losses, as "determined in a commercially reasonable manner". The effect of this may be that the non-defaulting Party may, in fact, have to prove the damage suffered (under Italian law, actual damage (*danno emergente*) and loss of profits (*lucro cessante*)) in order to precisely determine Costs, Gains and Losses under the Agreement. From a practical point of view, this could make it burdensome for the non-defaulting Party to enforce the Termination Amount.

From a legal point of view, the sum of all Settlement Amounts, which may be either positive or negative, may be classified as a voluntary set-off provision (*compensazione volontaria*), by which non-monetary debts (such as claims arising out of an obligation of physical delivery as opposed to an obligation to pay a price) are converted into monetary debts (please refer to Part C.I.1.5).

This kind of clause, therefore, is legitimate under Italian Law.

[69] Liquidated damaged clauses are not valid to the extent that they limit liability for gross negligence or wilful misconduct (Article 1229 of the Civil Code).

In addition, with particular regard to an insolvency scenario the reasonableness of the Termination Amount mechanism is presumed with respect to EU Energy Contracts (please see Part C.I.1.2(a) and Part C.I.1.3)

With respect to agreements other than EU Energy Contracts, under Article 56 of the Insolvency Act, as we noted in Part C.I.5.cont', the solvent party is entitled to set-off its credits and debts which are due (even if not payable) *vis-à-vis* the insolvent party. This provision constitutes an exception to the *pari passu* principle, which is a fundamental pillar of the Italian insolvency law.

If the set-off produces a positive differential in favour of the creditors, this would amount to an unsecured credit (*credito chirografario*) in the bankruptcy procedure. Whenever the relevant differential is negative, the creditor must pay the relevant amount into the bankruptcy estate.

(b) Insolvency Regulation

Under Article 9 of the Insolvency Regulation, "*the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the Debtor, where such a set-off is permitted by the law applicable to the insolvent Debtor's claim*". Certain commentators have queried whether Article 9 of the New Insolvency Regulation thus ensures the enforceability of close-out netting in all proceedings to which it applies.

However, Article 7, second paragraph, letter (e), of the Insolvency Regulation provides that the law of the State where the proceedings were opened governs the effects of the proceedings on current agreements to which the Debtor is party. We do not believe that the exercise of Early Termination rights in relation to an Individual Contract can be considered as merely a question of whether or not the relevant claim has matured for the purposes of claiming a set-off right. This view appears to be consistent with the drafting of the General Agreement, which provides for close-out netting only in respect of Early Termination.

(c) Winding-up Directive

The Winding-up Directive, as implemented in the Banking Act, includes a number of derogations from the basic rule that the law of the home Member State of a European bank governs the effect of insolvency proceedings in relation to that bank. Most significantly, for the purposes of §§ 10.3 and 11 of the General Agreement, Article 95-*ter*, second paragraph, of the Banking Act provides that "netting agreements shall be governed by the law of the contract which governs such agreements". This means that if the Debtor is an Italian bank, clauses regarding netting shall be assessed under the law of the contract regardless of the nationality of the Debtor. If the Parties elected the Italian law, the remarks under (a) would apply.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the General Agreement, close-out netting provisions would be enforceable. However, in insolvency scenarios (see Part C.I.1.7), the validity and enforceability of close-out netting provisions are mainly related to (i) the enforceability of Early Termination provisions arising as a result of insolvency and (ii) whether termination occurred before or after the opening of the proceedings.

In particular, the Early Termination provision and, consequently, the close-out netting provisions are enforceable with respect to EU Energy Contracts.

On the contrary, with respect to agreements other than EU Energy Contracts we cannot exclude the possibility that the limitations to enforcement of a damages claim resulting from insolvency-based termination may prevent the Terminating Party from receiving payment of the Termination Amount.

This is without prejudice to the right of the solvent party to enforce the set-off of its credits and debts which are due (even if not payable) *vis-à-vis* the insolvent party, according to Article 56 of the Insolvency Act.

Scenario 2

(i) If a Debtor is subject to Insolvency Proceedings and the General Agreement is governed by Italian law, the same opinion expressed under Scenario 1 above will apply.

(ii) If a Debtor that is an Italian Commercial Company is subject to Insolvency Proceedings and the Agreement is governed by a non-Italian law, the same opinion expressed under Scenario 1 above will apply, regardless of the potential application of the Insolvency Regulation;

(iii) If a Debtor is an Italian bank, we are of the opinion that Article 95-*ter*, second paragraph, of the Banking Act would apply and therefore the enforceability of the close-out netting provisions under §§ 10.3 and 11 would be assessed under the governing law of the General Agreement.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, in the event that an Italian Party is subject to Insolvency Proceedings, the same opinions expressed under Scenario 2 above will apply.

10. Do the laws of Italy recognize that the close-out netting provisions in § §§ 10 to 11 of the General Agreement apply to all Individual Contracts? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in Italy, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the General Agreement might impact termination and close-out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous Partial Close-Out

§ 1.1 of the General Agreement states that "*all Individual Contracts and this General Agreement shall form a single agreement between the Parties*". Therefore, we believe that an Italian Court cannot ignore the Parties' explicit intention to recognise a single agreement relationship (*collegamento negoziale*) between the General Agreement and all Individual Contracts. However, this must be separately assessed in respect of each of the three scenarios considered in this 2017 Opinion Letter.

Even in the absence of specific statutory rules on the relationship between two or more agreements, the Courts have developed rules for the treatment of such agreements. In particular, under case law, when the parties decide to establish a relationship between agreements in order to pursue a common economic goal, events (including termination events) affecting one agreement automatically affect all other related agreements as well[70].

As far as we are aware, there is no case law applying the single agreement relationship to the termination of agreements under Insolvency Proceedings[71]. Nevertheless, since no reason exists to apply different principles, we are of the view that the exercise of Early Termination rights with respect to the General Agreement would result in the termination of all Individual Contracts existing at the time that the General Agreement is terminated.

In this vein, we maintain that a reference to this concept and, namely, the reference under § 1.1 of the General Agreement, is necessary to hold that a single agreement relationship between the General Agreement and all Individual Contracts exists (please refer to Part B.6 and Part C.VII).

Moreover, if the non-defaulting Party were unable, or in any event failed, to terminate the General Agreement before or upon admission of the Italian Party to Insolvency Proceedings, or if Early Termination rights exercisable as the result of insolvency-based Material Reasons under § 10.5(c) should be deemed unenforceable (please refer to our opinion under Part C.I.1.7.(c) with respect to agreements other than EU Energy Contracts), then the question which is raised is whether the Insolvency Official would be entitled to make an election to continue only some of the outstanding Individual Contracts and elect to terminate the others.

On this point, there is substantial authority in both Italian legal theory and case law to the effect that an Insolvency Official must take contractual arrangements entered into by the Debtor as it finds them and may not disregard or purport to modify contractual provisions which affect the rights of the bankrupt.

Traditionally, there were often believed to be certain exceptions to the principle that the Insolvency Official must take agreements as he found them: in particular, it was often held that the Insolvency Official was entitled to modify or disregard those contractual provisions which are incompatible with the Insolvency Proceedings, such as an arbitration clause or a prohibition against sale by the Debtor. More recently, however, both the case law and legal theory have reinforced the general rule, and this concept seems unaffected by the recent reformulation of Article 72 of the Insolvency Act[72] [73].

In relation to the restructuring extraordinary administration proceedings and to the amendments introduced for these proceedings by Decree No. 134, we believe that Decree No. 134 does not introduce a material risk of cherry-picking for Individual

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[70] Court of Cassation No. 12567 of 8 July 2004; Court of Cassation No. 7640 of 16 May 2003; and Court of Cassation No. 4645 of 27 April 2004. With particular respect to termination events, see Court of Cassation No. 8844 of 28 June 2001; Court of Cassation No. 8410 of 25 August 1998; Court of Cassation No. 4820 of 25 September 1984; and Court of Bari 19 August 1994.

[71] In Court of Cassation No. 1807 of 28 January 2013 the single agreement concept was recognised but in favour of the insolvency estate, which provided evidence that the relationship between two agreements (which were considered a single agreement) was made by the parties with the specific aim of circumventing the *pari passu* parinciple.

[72] In the words of one Italian legal scholar, "The insolvency official cannot modifiy the agreement: it is entitled to terminate the agreement or to continue it as a whole", Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 161-162; Alessi, *L'amministrazione straordinaria delle grandi imprese*, Milano, 2000, 162; Ferrara, *Il Fallimento*, Giuffré, 1995, p. 377.

[73] The Court of Cassation (No. 11216 of 14 October 1992) has provided further support for this view by holding that a bankruptcy liquidator (*curatore*) is bound by an arbitration clause contained in an agreement for which he elects to continue performance under Article 72 of the Insolvency Act. See also Court of Cassation No. 6165 of 17 April 2003; Court of First Instance of Reggio Emilia No. 816 of 2 December 2005

Contracts documented under a single General Agreement. As discussed above under Appendix 1, Decree No. 134 broadens the scope of the powers of the extraordinary commissioner of identifying business lines, parts of business lines, single assets and single contracts for sale. However, these powers seem to have been included in Decree No. 134 primarily for the purposes of facilitating transfer of part of a business and dealing with employee rights related to such transfers. Though there is no relevant case law for the time being on this, we believe that these provisions could not be construed as giving new powers to the extraordinary commissioner allowing the extraordinary commissioner to elect which contracts to terminate under a General Agreement, disregarding the Parties' express intention to recognise a single agreement relationship (*collegamento negoziale*) between the General Agreement and all Individual Contracts.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that:

(i) § 1.1 of the General Agreement is necessary to hold that a single agreement relationship (*collegamento negoziale*) between the General Agreement and all of the Individual Contracts exists; in light of that provision, the Individual Contracts cannot be severed or terminated from the General Agreement without affecting the single agreement concept (please also refer to Part C.V.5.(b)(ii)(A));

(ii) as a consequence, the exercise of Early Termination rights with respect to the General Agreement would result in the termination of all Individual Contracts existing at the time that the General Agreement is terminated; and

(iii) the single legal agreement architecture of the General Agreement would also be binding on any Insolvency Official and precluding any right to elect to continue only a portion of the Individual Contracts outstanding and, as a consequence, an Insolvency Official would be bound to respect the single agreement concept and could not elect to perform less than all of the Individual Contracts.

Scenario 2

(i) If an Italian Party is a Debtor, the same opinion under Scenario 1 above would apply provided that the General Agreement is governed by Italian law.

(ii) On the other hand, we cannot exclude that the Italian Courts will rule in a different way if an Italian Party is a Debtor but the General Agreement is governed by a law other than Italian law. The termination of all Individual Contracts by operation of the Early Termination of the General Agreement depends on the existence of a single agreement relationship (*collegamento negoziale*) which is a matter of interpretation of the agreement. Since Article 12, first paragraph, letter (a), of Regulation Rome I states that an agreement is interpreted according to its governing law, an Italian Court would rule applying the law governing the General Agreement.

For instance, a non-Italian governing law could provide particularly strict criteria for the contemplation of a single agreement relationship, so that reference under § 1.1 of the General Agreement to the single agreement concept could not be sufficient to ensure that such a relationship is established.

If this is the case, the Italian Courts, by applying the above mentioned rule of Regulation Rome I, would be bound to those restrictive rules. As a consequence, the exercise of Early Termination rights may not result in the termination of all Individual Contracts. Likewise, the Insolvency Official could be entitled, on one side, to perform only a portion of the Individual Contracts outstanding and, on the other side, to enforce the Early Termination of the remaining Individual Contracts.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, the same opinion under (ii) of Scenario 2 above would apply.

11. Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Italy or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

Under bankruptcy proceedings (*fallimento*), debts denominated in a foreign currency and owed by an entity subject to Insolvency Proceedings, are required to be converted into the lawful currency of Italy at the exchange rate prevailing on the date the insolvency declaration (*dichiarazione di insolvenza*) is made. This result follows from the application of either of Article 52 or Article 59 the Insolvency Act, although there is some debate among legal scholars as to which of the above-mentioned provisions applies to debts owed in a foreign currency[74].

Article 59 of the Insolvency Act provides that debts which are not yet due, and which have as their object a tender of value based on items other than "money" (which, according to certain legal scholars, would include a foreign currency amount), may be admitted to the proceedings according to their value at the date of insolvency declaration. Other legal scholars reject the applicability of Article 59 to a debt owed in foreign currency. However, Article 52 of the Insolvency Act provides, in any event, for the application of the *pari passu* principle, thus precluding any alteration in the debt claimed by any creditor (due, for instance, to exchange rate fluctuations) after the date of the insolvency declaration. These rules are mandatory provisions of Italian law, which will, accordingly, overrule any contractual provision to the contrary, regardless of the governing law of the General Agreement.

Therefore, the Termination Amount owed, under §§ 10.3(b) and 11.1 of the General Agreement, by a Debtor subject to Insolvency Proceedings in Italy must be

[74] In the absence of specific case law, as clarified by Vassalli – Luiso – Gabrielli (*Trattato di Diritto Fallimentare*, Turin, 2014, 92) it is uncertain whether Article 59 of the Insolvency Act can also be applied to debts in a foreign currency. Some scholar considers that debts in a foreign currency are pecuniary debts (*debiti pecuniari*) and therefore regulated by Article 55. See, Inzitari, *Sub Articolo 59*, in *Il nuovo diritto fallimentare*, edited by Jorio, 2007,833. To the contrary, Tedeschi, *Manuale del nuovo diritto fallimentare*, Padova, 2006, 249.

converted into Euro at the exchange rate prevailing on the date the insolvency declaration is issued.

Article 52 and Article 59 of the Insolvency Act do not apply to extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) or restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*).

For proceedings involving composition with creditors (*concordato preventivo*), Article 59 of the Insolvency Act is recalled by Article 169 of the Insolvency Act. Therefore, such provision will also apply in this circumstance but the reference value shall be the one at the date of filing of the composition with creditors proposal.

Since Article 59 deals with claims involving items other than money, one could construct an argument – based on certain scholars' view – that it does not apply to debts in a foreign currency. However, certain court precedents, although dated, seem to confirm that receivables not past due (*non scaduti*) relating to a cash in foreign currency are to be accepted as liabilities (*ammessi al passivo*) at the value determined on the basis of the exchange rates applicable at the date of declaration of bankruptcy[75].

Ultimately, as for any other claim, also these payments will be made to creditors in accordance with the provisions of the composition with creditors plan, as approved by the Court and by the creditors. Therefore, one should also refer to the terms of the composition plan to ascertain how claims in foreign currency must be dealt with. It is understood that the composition plan can not envisage payments, nor calculations for payments, that go against what is set forth in the law, and creditors are entitled to oppose a composition with creditors plan if this happens.

12. *Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?*

Pursuant to insolvency laws, claims deriving from termination and close-out right are deemed as unsecured claims (*crediti chirografari*). Therefore, the relevant non-insolvent party will have the right to be paid together with the other creditors under the *pari passu* principle.

For sake of clarity, please consider that Articles 111, first paragraph, and 111-*bis* of the Insolvency Act provide that the sums resulting from the liquidation of assets are used to paid the relevant creditors in the following order:

(i) super priority claims (*crediti prededucibili,* i.e. those claims rank first against all other creditors - e.g. costs and expenses for the management of the insolvency proceedings, fees for the Insolvency Official and other professionals, credits arising in connection with the performance of contracts continued by Insolvency Official);

[75] Tribunal of Bologna, 17 September 1984 and Tribunal of Florence, 3 December 1997.

(ii) secured claims (*crediti privilegiati*, i.e. guaranteed by pledge, mortgage, special lien – *privilegio speciale* – or general lien – *privilegio generale*); please note that, despite they rank after super priority claims, in case of sale of pledged or mortgaged assets the relevant proceeds are primarily allocated to the relevant pledgee or mortgagee as secured creditor, who therefore comes first with respect to the super priority creditors;

(iii) unsecured claims (*crediti chirografari*), proportionally to the quota on the basis of which each creditor was admitted to the final list of creditors.

No special rules apply for creditors which are financial institutions (with respect to financial collateral arrangements please see Part C.I.1.5).

2. Termination for Non-Insolvency Based Material Reasons

1. Please discuss and advise on the issues outlined above under Parts C.I.1.9, C.I.1.10 and C.I.1.11 in the context of non-insolvency related Material Reasons, as well as the following question: are the rights of the Terminating Party to terminate and close-out the Agreement enforceable in accordance with the terms of the General Agreement, irrespective of the insolvency of Party A?

(a) *Non-Performance.*

(b) *Cross Default and Acceleration.*

(c) *Failure to Deliver or Accept.*

(d) *Excessive Force Majeure.*

(e) *Breach of Representation or Warranty.*

(i) Early Termination

Depending on the nature of the relevant Material Reason, a Material Reason may be classified as:

- a right of withdrawal (*diritto di recesso*) under Article 1373 of the Civil Code; or
- an express termination clause (*clausola risolutiva espressa*) under Article 1456 of the Civil Code; or
- a condition subsequent (*condizione risolutiva*) under Article 1353 *et seq.* of the Civil Code.

For a general overview of these legal concepts and the relevant consequences for the Agreement, please refer to Part C.I.1.7.

(ii) Close-out netting provisions

For the legal classification of close-out netting provisions as voluntary set-off (*compensazione volontaria*), please refer to Part C.I.1.9.

In conclusion:

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that Early Termination for non-insolvency Material Reasons and close-out netting correspond to concepts specifically provided for under the Civil Code and, therefore, would be enforceable under Italian law. It is, however, important to note that the Material Reason set out in § 10.5(a) ("any other material obligation") is drafted in a general way and hence could be ineffective as express termination clause (therefore, with no need to prove the materiality of the default(please refer to Part C.I.1.7.(a)). Therefore, we would recommend amending this clause in the Election Sheet by listing specific events of default, if any, which for the parties are so serious to justify the termination of the agreement.

Scenario 2

Not applicable.

Scenario 3

If a law other that the Italian one is the governing law of the General Agreement, the enforceability of Early Termination for non-insolvency Material Reasons and close-out netting will be assessed by Italian Courts in accordance with the rules of the relevant governing law of the General Agreement.

II Multibranch Parties

1. Italian Multibranch Party

Please base your opinion also on the following additional assumptions: Party A has entered into Individual Contracts under the General Agreement through offices in Italy as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Italy. Please discuss and advise on the following issues: i) Would there be any change in your conclusions reached under Part C.I.1 or Part C.I.2 above based upon the fact that Party A has conducted business under the General Agreement on a multibranch basis prior to its insolvency? Would the General Agreement be treated as a single unified agreement by the Italian receiver under the laws of Italy, regardless of the treatment of the General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?

and

2. Foreign Multibranch Party

a corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country ("Country H") other than Italy has entered under the General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Italy (the "Italian Branch"). After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

Based on the assumptions above, please discuss and advise on the following issues:

1. *Would there be separate proceedings in Italy with respect to the assets and liabilities of the Italian Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Italy defer to the proceedings in Country H, so that the assets and liabilities of the Italian Branch would be handled as part of the proceedings for Party F in Country H?*

   Different rules govern the insolvency of Italian branches of EU Commercial Companies. This matter is regulated by the Insolvency Regulation.

   Under the Insolvency Regulation, Courts of the EU Member State within the territory of which the centre of Debtor's main interests is situated have jurisdiction to open Insolvency Proceedings according to the laws of that EU Member State. The laws of the main insolvency proceedings will also apply to the Italian branch(es) of an EU company, unless "secondary insolvency proceedings" are opened by Italian Courts, under and regulated by Italian law.

2. *Could local creditors of the Italian Branch initiate separate proceedings in Italy even if the relevant authorities in Italy did not do so? If there were separate proceedings in Italy with respect to the assets and liabilities of the Italian Branch, would the receiver or liquidator in Italy and the Italian Courts, based on the facts above, include Party F´s position under the General Agreement, in whole or in part, among the assets of Italy and, if so, would the receiver or liquidator and the Italian Courts recognize the close-out netting provisions of the General Agreement in accordance with their terms?*

   According to Article 3 of the Insolvency Regulation, the secondary proceedings only concern the Italian branch(es) of an EU Commercial Company. Secondary insolvency proceedings may only be opened if:

   - main proceedings have already been opened in the EU Member State where the centre of the Debtor's main interests is situated and the Insolvency Official in the main proceedings or any other person or authority (entitled under the Italian law) requests the opening of the secondary proceedings (in such cases, only bankruptcy proceedings (*fallimento*) may be opened); or

   - main proceedings cannot be opened under the laws of the EU Member State where the centre of the Debtor's main interests is situated; or

   - main proceedings have not been opened and a creditor with its domicile or habitual residence in Italy, or whose claim arises from the operation of an Italian branch, requests that insolvency proceedings are opened in Italy.

   Pursuant to Article 3, second paragraph, of the Insolvency Regulation if the centre of a Debtor's main interests is situated within the territory of an EU Member State, the Courts of another EU Member State shall have jurisdiction to open insolvency proceedings against that Debtor only if it possesses an establishment within the territory of that other EC Member State. In this case, the effects of those proceedings shall be restricted to the assets of the Debtor situated in the territory of the latter EU Member State. Accordingly, pursuant to Article 6 of the Insolvency Act, the local creditor of the Italian Branch may initiate the proceedings. However, please note that if the main proceedings have already been opened in the EU Member State where the centre of the Debtor's main interests is situated, any subsequent proceedings opened in another EU Member State must be deemed as secondary insolvency proceedings. Consequently, according to Article 37 of the Insolvency Regulation, secondary insolvency proceedings may be requested either by the liquidator in the main proceedings or by any other person or authority empowered to request the opening of insolvency proceeding under the law of the EU Member State within the territory of which the opening of secondary proceedings is requested.

If there were separate proceedings in Italy with respect to the assets and liabilities of the Italian Branch and the proceedings constitute secondary insolvency proceedings, Italian law will be applicable. In this case, Italian Courts will apply the rules established under the Insolvency Act.

3. *The most significant problem arising would be if an Italian receiver, liquidator or Court considering a single General Agreement were to require a counterparty of the Italian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Italian Branch to the liquidator or receiver of the Italian Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same General Agreement. In considering this issue, please assume that close-out netting under the General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.*

In light of the remarks under Part C.II.2 above, in determining whether Italian law is applicable, it is worth analysing two possible situations: (i) the close-out has been enforced in accordance with the law of Country H before the opening of the Italian secondary proceedings; and (ii) the close-out has not been enforced at the moment which the Italian secondary proceedings are opened.

(i) In the first case, if close-out has been enforced by the competent Insolvency Official in Country H before the opening of Italian secondary proceedings, the Italian Insolvency Official may consider only the possible termination amount. Accordingly, being this amount ruled by the governing law of the contract and regarding only the original Party of the General Agreement, and not possible foreign branches, it will not be subject to the jurisdiction of Italian Courts.

(ii) If the close-out has not been enforced by a the competent Insolvency Official in Country H before the opening of Italian secondary proceedings, there is the risk that the Italian Insolvency Official might deem the Individual Contracts executed between the Italian Branch of Party F and its relevant counterparty as an independent agreement and, therefore, the provisions under Article 72 of the Insolvency Act would apply. In this case, the Insolvency Official, subject to the approval of the creditors' committee, may terminate the relevant Individual Contract and seek the payment of the positive mark-to-market, if any, from the relevant counterparty.

4. *Please also assume instead that Party F has no branch located in Italy, but has assets in Italy*

Pursuant to Article 3, second paragraph, of the Insolvency Regulation, if the Party F has no branches located in Italy, Italian Courts will have no jurisdiction to open secondary proceedings. However, if the assets subject to the main proceeding consist of Italian real estate the Court of the main proceedings will apply Italian Law to the real estate holdings.

III Collateral

Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral. The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency. Please discuss and advise on the following issues:

(a) Under the laws of Italy, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

Under Article 51 of Law No. 218 the possession, the ownership and other rights in rem (*diritti reali*) on movables and immovable assets are governed by the law of the State in which such goods are located (*lex rei sitae*).

(b) Would the laws of Italy characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?

We assume that the question only refers to the cash collateral considering the letter of credit would not per se imply any transfer of ownership.

If the collateral is granted under an arrangement with a Financial Institution or another entity under Decree No. 170 and the cash collateral provides for the transfer of ownership as collateral, under Article 6, first paragraph, under Decree No. 170, it shall be considered effective according to the term of the agreement, regardless of its qualification.

Where Decree No. 170 does not apply to the collateral, it is worth noting that under the Civil Code, cash collateral consisting of the transfer of a certain amount of money to the Transferee to secure the performance of the obligations under the relevant transaction could be construed as an irregular pledge (*pegno irregolare*) provided that the pledgee is allowed to use the assets, being obliged to return to the pledgor a corresponding amount. This interpretation is supported by the uniform interpretation by the Court of Cassation[76].

The fungible nature of the cash and the express right to use it implies an unconditional transfer of the ownership[77].

More questionable is the qualification of a cash collateral consisting of the transfer of a certain amount of money into a bank account held by a third party (i.e. the account bank) in the name of the Transferee. In fact, it is arguable that in order to constitute an irregular pledge, it would be necessary to have a coincidence between the pledgee and the depository[78]. If this is not the case, the cash collateral could be construed as a security deposit at a third party (*deposito cauzionale presso terzi*) or a pledge over receivables (*pegno su crediti*) depending on the specific agreement reached by the parties. It has also been argued that in this case, the cash collateral must be qualified as irregular pledge formed

[76] See Court of Cassation No. 202 of 14 May 2001; Court of Cassation No. 23164 of 11 October 2013 and Court of Cassation No. 16618 of 8 August 2016.
[77] See Court of Cassation No. 7262 of 22 March 2013 and Court of Cassation No. 16618 of 8 August 2016.
[78] Bontempi, *Diritto bancario e finanziario*, 2016, 406, nt. 17.

by the functional relationship (*collegamento negoziale*) between the pledge agreement and the deposit agreement[79]. In particular, given the fungible nature of the money, the deposit would be in the form of an irregular deposit (*deposito irregolare*), under Article 1782 of the Civil Code, with the consequence that a transfer of ownership effectively occurs but in favour of the depository, which is then obliged to return to the pledgor or to the pledgee in the event of pledgor's default, a same amount.

(c) Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Italy necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?

According to Italian law, if Party B receives absolute ownership in the collateral, no further action has to be taken to ensure the relevant title.

The same applies also if the cash collateral is granted under an arrangement with a Financial Institution or another entity under Decree No. 170 and the transfer of ownership is provided. However, the transfers of collateral pursuant to Decree No. 170 must comply with the following requirements:

(i) the financial collateral arrangement shall be executed in writing;

(ii) the provision of the financial collateral shall also be evidenced in writing. The evidence shall provide the identification of the date. To this end it is sufficient a registration into the account managed by a Financial Institution and the registration of cash on the relative account.

(d) What is the effect, if any, under the laws of Italy of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

According to the Italian case law, the Parties may establish a contractual substitution right of the collateral (*patto di rotatività*). According to some case law[80], this substitution right must provide that the substitutive Eligible Credit Support has a maximum value equal to the value of Eligible Credit Support originally provided. If the substitutive Eligible Credit Support has a value above the value of the original Eligible Credit Support, it may be possibly subject to claw-back action.

If the collateral is granted under an arrangement with a Financial Institution or another entity under Decree No. 170, such Decree expressly sets out the legitimacy of clauses providing for substitution of collateral, according to which the parties can substitute all or part of the collaterals, within the value of the original collateral. In this respect, for the purpose of possible claw-back actions, the provision of the collateral pursuant to a substitution clause shall not be considered as a new collateral and it is considered as it was provided on the date of the original collateral (Article 9, second paragraph, letter (b) of Decree No. 170).

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[79] Gatti, *Pegno irregolare e fallimento del debitore*, *Rivista del Diritto Commerciale*, 2000, 117.

[80] See Court of Cassation No. 10685 of 27 September 1999 and Court of Cassation No. 16914 of 11 November 2003. Court of Cassation No. 4507 of 5 March 2004 clarifies that if such a provision is not expressly set out by the parties, this mechanism is not compatible with the irregular pledge. Court of Cassation No. 25796 of 22 December 2015 clarifies that the substitution shall be considered effective starting from the date of the original financial collateral arrangement.

(e) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the General Agreement together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the General Agreement is valid and enforceable in Italy insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the General Agreement as "other amounts payable"?

Under both an irregular pledge and Decree No. 170, the Transferee has only the obligation to return to the Transferor the value of the collateral transferred which exceeds the underlying debt.

(f) Are the rights of Party B enforceable in accordance with the terms of the General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?

The rights of Party B arising from the stand-by letter of credit Eligible Credit Support under the EFET Credit Support Annex may be enforced notwithstanding the insolvency of Party A.

With respect to cash collateral, assuming that this is qualified as an irregular pledge, the case law confirmed that in case of an irregular pledge (*pegno irregolare*), no any further action has to be taken by the Transferee to enforce its right even in the context of Insolvency Proceedings, since the pledgee has already absolute ownership of the fungible goods covered by the pledge[81].

Articles 4 and 7 of Decree No. 170 expressly provide for enforcement of the collateral and close-out netting notwithstanding the commencement of insolvency proceedings[82].

(g) Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

Cash collateral might be subject to claw-back if it were granted by the Debtor, acting as Transferor, within one year or six months, as the case may be, (in this respect please see Part C.I.1.(a)(i)) before the bankruptcy declaration of the Debtor[83].

(h) Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Italy in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under b) above?

[81] See Court of Cassation (s.u.) No. 202 of 14 May 2001; Court of Cassation No. 23164 of 11 October 2013;
[82] EU Court of Justice C-156/15 of 10 November 2016 recognises the right of Party B to enforce the collateral, irrespective of the insolvency of Party A, at the following conditions: (i) cash collateral transferred on the relevant bank account before or on the date of the insolvency declaration and (ii) Party B ignoring the insolvency of Party A as at the date of the transfer.
[83] See Court of Cassation No. 16618 of 8 August 2016.

In general terms, the EFET Credit Support Annex is an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

However, with respect to financial collaterals granted under Decree No. 170, not only the EFET Credit Support Annex must be executed in writing but also the transfer of collateral shall be proved by the registration into the accounts held by Financial Institutions.

(i) Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

Please refer to Part C.VI.1(a) on the relevance of the certainty of the date (*data certa*).

IV. Parent Company Guarantee

The two questions below concern the enforceability of a Credit Support Document (as defined in the General Agreement), which is a Parent Company Guarantee, based the following Assumptions:

(i) With respect to a Party (the "Principal Obligor"), the parent company of that party[84] *(the "Guarantor") undertakes to pay when and if the Principle Obligor fails to pay any amounts when due pursuant to the terms of the General Agreement (including any applicable grace period) ("Default");*

(ii) The other, non-defaulting, Party and the beneficiary under the guarantee (the "Beneficiary") may demand payment from the Guarantor of any outstanding amount pursuant to section 1 above, immediately upon the occurrence of the Principal Obligor's Default without having to first take any action against the Principal Obligor, in particular, without having to: (A) make any demand to the Principal Obligor, other than issuing the initial invoice in accordance with the terms of the General Agreement; (B) take any legal action against the Principal Obligor; or (C) file any claim in the Principal Obligor's insolvency.

(iii) Upon the receipt of the Beneficiary's demand, a copy of the unpaid invoice and any breakdown of any additional outstanding amounts due to the Beneficiary, such as late payment interest, the Guarantor shall promptly pay the amount specified in the demand to the Beneficiary.

(iv) The liability of the Guarantor under the guarantee is limited to that of the Principal Obligor under the General Agreement and any cap set out in the guarantee document.

(v) The guarantee is provided in the form of a written document signed by an authorised representative of the Guarantor.

(vi) The guarantee is governed by Italian law and any disputes in connection with or claims under the guarantee are to be referred to and resolved by the courts of Italy.

(vii) The Guarantor has provided an address that the Guarantor can be served at in Italy but is not necessarily established in Italy.

(a) Are there any specific statutory formalities that should be (or recommendable as good practice for the benefit of the Beneficiary) complied with in order to create a valid guarantee document?

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[84] We understand that the terms "parent company" mean controlling shareholder.

On the basis of the assumptions above, no specific formalities apply. However, please refer to Part C.VI.1(a) on the relevance of the certainty of the date (*data certa*)[85].

(b) Are there any specific statutory provisions that should be expressly set-aside, varied or referred to, or any specific statement/wording based on any such statutory provisions that should be expressly included, in the document of the guarantee in order to increase the chances of an effective enforcement of the guarantee as may be expected by the Beneficiary based on the assumptions?

The Civil Code provides a certain regime applicable to the guarantee (*fideiussione*) under Articles 1936 *et seq*. This regime is different from the one applicable to the so-called "autonomous first demand guarantee" (*garanzia autonoma a prima richiesta*). The latter kind of guarantee has been recognized by case-law although it is not set out under the Civil Code and provides for a more robust protection of the Beneficiary. More particularly, as main differences, (i) while under a "*fideiussione*" the Beneficiary first needs to demand payment to the Principal Obligator and then may demand payment to the Guarantor, this does not apply if a first demand or an autonomous first demand guarantee is granted; in addition, (ii) under a "*fideiussione*" the Guarantor may raise the same objections which the Principal Obligor can raise; this principle does not apply with respect to an autonomous first demand guarantee.

According to the most recent case-law[86], the autonomous guarantees is not a special kind of "*fideiussione*" but another kind of agreement, characterized by the autonomy and independence of the Guarantor's obligation from the Principal Obligor's obligation. Therefore, in order to grant an autonomous guarantee, it is not necessary to waive expressly from the various provisions of the Civil Code applicable to the "*fideiussione*". On the contrary, the guarantee must state clearly that the Guarantor will fulfil its obligation upon request and without possibility to raise any objection[87].

V. General Enforceability

1. *Is the General Agreement and any of the Annexes (including the EFET Credit Support Annex) enforceable under the laws of Italy in accordance with its own terms*?

   Without prejudice to all Parts of this 2017 Opinion Letter, including, but not limited to, the assumptions listed in Part B, we are of the opinion that the General Agreement is legal, valid and binding under Italian law, even if a law other than the Italian one is the governing law of the General Agreement, in accordance with Law No. 218.

2. *Enforceability of Force Majeure Provisions (§ 7)*

   Italian law does not provide for general force majeure relief. However, under Article 1218 of the Civil Code a party that did not perform its contractual obligation properly may not be held liable for damages if it proves that the non-performance or

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[85] It is worth mentioning that the assumptions under (i) and (iv) are of particular relevance. In fact, under Italian law, granting guarantees amounts to a financial activity which, therefore, is reserved to financial institutions; the reserved activity principle do not apply if the Guarantor is a parent company of the Principal Obligor. In addition, under Italian law, if the guarantee covers future obligations, the guarantee is valid provided that a maximum guaranteed amount is set out under the guarantee.

[86] See, *inter alia*, Court of Cassation (s.u.) No. 3947 of 18 February 2010.

[87] It is also possible to issue a "*fideiussione*" with a waiver from specific provisions of the Civil Code. In this case, the obligation will still qualify as a "*fideiussione*".

the delay was due to circumstances out of that party's control that made performance of the obligation impossible.

In addition:

- under Article 1463 of the Civil Code, the party excused from performing its obligations due to supervening impossibility may not enforce the counterparty's performance of that party's corresponding obligations;
- under Article 1256 of the Civil Code, an obligation is extinguished when its performance becomes definitively impossible due to a reason not attributable to the affected party;
- under Article 1256 of the Civil Code, if the impossibility is only temporary, the party is not liable for the delay provided that the obligation is prevented until, taking into consideration the source of the obligation or the nature of the subject matter, that party may no longer be held liable to perform the obligation or the creditor has no longer interest in the performance; and
- under Article 1464 of the Civil Code, if performance of an obligation has become partially impossible, the other party is entitled to a corresponding reduction and it may also withdraw from the agreement if it lacks a material interest in partial performance.

Because Article 1218 of the Civil Code provides for a very tight test, in the Italian legal market, it is not uncommon to contract out of the statutory regime and introduce *ad hoc* force majeure clauses to mitigate the party's contractual liability. This is considered lawful unless the requirements set out in Article 1229 of the Civil Code are not complied with (please refer to Part C.V.4.(a)). In particular, force majeure relief may not result in limiting a party's liability for gross negligence (*colpa grave*), wilful misconduct (*dolo*) or violation of obligations arising from public policy rule (*violazione di obblighi derivanti da norme di ordine pubblico*).

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that the Force Majeure provisions under §7 of the General Agreement do not conflict with Article 1229 of the Civil Code and would, therefore, be enforceable under Italian law in accordance with its own terms.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, we are of the opinion that the Force Majeure provisions under §7 of the General Agreement do not conflict with Article 1229 of the Civil Code (which is a mandatory provision of Italian law within the meaning of both Article 9 of the Regulation Rome I and Article 17 of Law No. 218) and would, therefore, be enforceable by Italian Courts in accordance with its own terms.

3. *Enforceability of remedies for non-performance (§8)*

The compensation for damages in case of failure to deliver or to accept electricity set out in §§ 8.1 and 8.2 of the General Agreement, may be classified as a liquidated damages clause (*clausola penale*).

With regard to the function of a liquidated damages clause (*clausola penale*) please refer to Part C.I.1.10.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that the compensation for damages under § 8 of the General Agreement would be enforceable. A Court may reduce liquidated damages *ex officio* under Article 1384 of the Civil Code when, having regard to the affected party's interest in the fulfilment of the obligations, the amount is manifestly excessive (*manifestamente eccessiva*) (please refer to Part C.I.1.10). However, given that the compensation set out in §§ 8.1 and 8.2 of the General Agreement seems to reflect the actual damages suffered by the non-defaulting party, the risk of reduction seems remote.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, the compensation for damages under § 8 of the General Agreement would be enforceable by Italian Courts. Although Article 1384 of the Civil Code cannot be derogated by the Parties and there is little case law in respect to its nature as a mandatory rule under Article 9 of the Regulation Rome I and Article 17 of Law No. 218, it seems that an Italian Court cannot reduce the liquidated damages pursuant to Article 1384 of the Civil Code if the agreement is not governed by the Italian law[88], but an assessment on the basis of the governing law shall be made.

4. *Enforceability of limitation of liability (§12)*

(a) General Enforceability of Exclusion of Liability

Limitations of liability under Italian law are enforceable provided that the requirements set out in Article 1229 of the Civil Code are complied with. In particular, under Article 1229:

- any agreement which, in advance, excludes or limits the liability of a party for fraud (*dolo*) or gross negligence (*colpa grave*) is void; and
- any agreement which, in advance, excludes or limits a party's liability in cases in which the act of that party or its representative (*ausiliari*) amounts to a violation of obligations arising from public policy rules (*violazione di obblighi derivanti da norme di ordine pubblico*) is also void.

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[88] Court of First Instance of Rovereto of 15 March 2007.

In conclusion:

Scenario 1

If Italian law is the governing law of the General Agreement, we are of the opinion that the exclusion of liability under § 12.2 of the General Agreement would be enforceable. However, for the sake of clarity, we recommend integrating § 12.4 by expressly referring to the requirements under Article 1229 of the Civil Code.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, the exclusion of liability under § 12.2 of the General Agreement would be enforceable by Italian Courts. However, given the mandatory nature of Article 1229 of the Civil Code, under both Article 9 of the Regulation Rome I and Article 17 of Law No. 218, we recommend integrating § 12.4 by expressly referring to the requirements referred to above.

(b) Enforceability of Limitation of Consequential Damages and similar types of liabilities (§12.3, § 12.4)

Under Article 1218 of the Civil Code, a defaulting party is liable to pay damages which, under Article 1223 of the Civil Code, include both the actual loss (*danno emergente*) and the loss of profits (*lucro cessante*) insofar as these are an "immediate and direct consequence of the default". Therefore, "indirect and/or consequential damages" referred to in § 12.3(a) of the General Agreement are not recognised under the Italian Civil Code.

In conclusion:

Scenario 1

If Italian law is the governing law of the Agreement, we are of the opinion that the limitation of "indirect and/or consequential damages" under § 12.3 of the General Agreement would be redundant since, under Italian law, only damage which is an "immediate and direct consequence" of the default may be recovered by the non-defaulting Party. Furthermore, also the limitation of "loss of profit, goodwill, business opportunity or anticipated saving" would only be relevant (and enforceable) to the extent that this kind of damage is an "immediate and direct consequence" of the default.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, we are of the opinion that the enforceability of the limitation of consequential damages and similar types of liabilities under §§12.3 and 12.4 of the General Agreement will be assessed by Italian Courts in accordance with the rules of the relevant governing law of the General Agreement.

(c) Enforceability of the Duty to Mitigate.

A statutory duty of mitigation is set out in Article 1227 of the Civil Code under which:

- if the negligence of the non-defaulting party has contributed to the damage, compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it; and

- compensation is not due for damage that the non-defaulting party could have avoided by using reasonable care (*ordinaria diligenza*).

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the Agreement, we are of the opinion that the duty to mitigate damages under § 12.5 of the General Agreement is consistent with the provisions under Article 1227 of the Civil Code and would, therefore, be enforceable.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the Agreement, we are of the opinion that the enforceability of the duty to mitigate damages under § 12.5 of the General Agreement will be assessed by Italian Courts in accordance with the rules of the relevant governing law of the General Agreement.

5. Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?

(a) Necessary Amendments Regardless of the Choice of Law

Regardless of the governing law of the General Agreement, the Parties must deal with relevant provisions of the Employees' Act for the purpose of recording telephone conversations.

The Employees' Act applies if the employment agreement is governed by the Italian law or in any event if the job is usually carried out in Italy.

In those instances, the Parties must include in the Election Sheet the following amendment to the General Agreement:

(i) after the words "officers and employees to such recording" in the third and fourth lines of § 23.1, the words "and, if Italian Law No. 300 of May 20, 1970 is applicable to a Party, also the consent of trade unions, pursuant to

Article 114 of the Italian Legislative Decree No. 196 of June 30, 2003 and Article 4 of Italian Law No. 300 of May 20, 1970"[89] are added;

In addition, if personal data of natural persons[90] are processed, *inter alia*, information about the processing (*informativa*) must be given to and the prior consent must be obtained by the owner of the personal data under the Data Protection Code. The Data Protection Code applies to processing of personal data carried out by a party established in Italy and to the process of personal data carried out by a party which is established in a non-EU country with instruments which are located in Italy (save if such instruments are used only for the transmission to another EU country).

(b) Amendments to the General Agreement Given a Choice of Italian Law

(i) Necessary Amendments

If the Parties wish to choose Italian law as the as the governing law of the General Agreement, they must deal with Italian law provisions which cannot be contracted out of by the Parties.

In particular, the Parties must deal with Articles 1341 and 1342 of the Civil Code, which require the specific and separate approval in writing of certain contractual conditions if the agreement is a standard contract or has been drafted by one party only; in this respect, the following special clause for approval of standard contractual conditions should be added after the signatures for the execution of the General Agreement:

"Pursuant to Articles 1341 and 1342 of the Italian Civil Code, each Party acknowledges that it has examined the content of the Agreement and specifically approves in writing the following clauses: § 3.3 (***Objections to Confirmation***); § 7.2 (***Release from Delivery and Acceptance Obligations***); § 8 (***Remedies for Failure to Deliver or Accept***); § 9 (***Suspension of Delivery***); § 10.1 (***Term***); § 10.2 (***Expiration Date and 30 Day Termination Notice***); § 10.3 (***Termination for Material Reason***); § 10.4 (***Automatic Termination***); § 10.5 (***Definition of Material Reason***); § 11 (***Calculation of the Termination Amount***); § 12.2 (***Exclusion of Liability***); § 12.3 (***Consequential Damage and Limitation of Liability***); § 13.6 (***Disputed Amounts***); § 15.3(c) (***Dealer Fallback***); § 19.1 (***Prohibition***); § 20.1 (***Confidentiality***); § 22.2 (***Arbitration***)";

we recommend that this clause is specifically and separately executed by the Parties after the execution of the General Agreement in the Election Sheet.

(ii) Recommendations for the Improvement in Efficacy of Certain Provisions of the General Agreement when the Parties Have Chosen Italian Law as Governing Law

(A) § 1.1 (Subject of Agreement)

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[89] Please note that the failure to comply with Article 4 of Italian Law No. 300 of May 20, 1970 is considered a criminal offence and is punished either with a fine or with the imprisonment up to one year.

[90] With the amendments by Italian Legislative Decree No. 69 of 28 May 2012, the Data Protection Code no longer applies to data of legal persons; therefore, information on processing does not need to be given to legal persons.

To make the single agreement clause more robust, thus reducing the Insolvency Official's ability to cherry-pick among the Individual Contracts under Article 72 of the Bankruptcy Act, we would recommend that in § 1.1 after the words "All Individual Contracts and this General Agreement shall form a single agreement between the Parties (collectively referred to as the **"Agreement"**)" in the second last sentence the words "and the Parties would not enter into any Individual Contracts if this was not the case" shall be inserted so that the entire § 1.1 reads as follows:

"This General Agreement (which includes its Annexes, the election sheet (**"Election Sheet"**)) governs all transactions the Parties shall enter into for the purchase, sale, delivery and acceptance of electricity (each such transaction being an **"Individual Contract"**). All Individual Contracts and this General Agreement shall form a single agreement between the Parties (collectively referred to as the **"Agreement"**) and the Parties would not enter into Individual Contracts if this was not the case. The provisions of this General Agreement constitute an integral part of each Individual Contract."[91]

(B) § 9 (Suspension of Delivery or Acceptance)

With respect to supply agreements (*contratti di somministrazione*), Article 1565 of the Civil Code requires the non-defaulting party to give an adequate (*congrua*) notice to the other Party before suspending the supply in the event of defaults of lesser importance (*lieve entità*). In order to make the suspension remedy set out in § 9 fully effective (also in respect of defaults of lesser importance), we would recommend that at the end of § 9, a new sentence is added as follows:

"To the extent that the above defaults may be considered of lesser importance ("*lieve entità*") for the purposes of Article 1565 of the Italian Civil Code, the Parties acknowledge and agree that the aforementioned term of three (3) Business Days is adequate ("*congruo*").".

(C) § 13.5 (Default Interest)

In light of applicable usury interest regulations, after the words "at the Interest Rate" in the second line of § 13.5 the words "provided, however, that the Interest Rate does not exceed the maximum rate permitted at the date of payment and relative to the reference category under Italian Law No. 108 of March 7, 1996." shall be inserted so that the entire § 13.5 reads as follows:

"Overdue payments shall accrue interest from, and including, the Due Date to, but excluding, the date of payment, at the Interest Rate provided, however, that the Interest Rate does not exceed the maximum rate permitted at the date of payment and relative to the reference category under Italian Law No. 108 of March 7, 1996. For

[91] This wording is also consistent with § 1.1 of the General Agreement Concerning The Delivery And Acceptance Of Natural Gas (version 2.0/January 6, 2003).

this purpose the "**Interest Rate**" shall be the rate of interest specified in the Election Sheet."

(D) § 14 (VAT and Taxes)

To clarify that the Agreement is subject to registration tax (*imposta di registro*) only in the event of use[92] and at a fixed rate, at the end of § 14.4 a new § 14.5 (Registration Expenses) shall be added as follows:

"**§ 14.5 Registration Expenses:** The Agreement shall be subject to registration only in the event of use (*caso d'uso*) under Article 5, second paragraph, of Italian Presidential Decree No. 131 of 26 August 1986. The registration tax is, however, payable at a fixed rate pursuant to Article 10, sub-§ B of the Tariff, second part, attached to the above Italian Presidential Decree, since the related performance shall be subject to VAT."

(E) § 18.1 (Provision of Financial Statements)

An extension of the 120-day term may be convenient in light of Article 2364 of the Civil Code as amended by the Italian corporate law reform[93]. Therefore, in § 18.1(a) the number "120" in the first line shall be deleted and replaced by the number "180", so that the entire § 18.1(a) reads as follows:

"(a) within 180 days following the end of each fiscal year, a copy of such other Party's, or for such period the other Party's obligation are supported by a Credit Support Provider or if it is a party to a Control and Profit Transfer Agreement, its Credit Support Provider's or its Controlling Party's, as the case may be, annual report containing audited consolidated financial statements for such fiscal year, and".

Furthermore, in respect of § 18.1(b), it is important to note that under Italian law there is not a legal obligation to produce either quarterly reports or quarterly consolidated financial statements save for the listed companies, which must produce quarterly and six-months reports.

(F) Control and Profit Transfer Agreement and other German law concepts

The German legal concept of Control and Profit Transfer Agreement is not applicable under Italian law and, therefore, to the extent that neither Party is subject to this kind of agreement, the Parties may consider deleting it throughout the General Agreement. In this vein, we would also recommend deleting the representation under § 21(l).

(G) § 21 (Representation and Warranties)

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[92] This tax is due whenever the agreement is filed with a public authority (e.g. before a Court in the context of litigation).
[93] Italian Legislative Decree No. 366 of 17 January 2003.

We suggest inserting a specific representation by which each Party declares that it qualifies as a wholesale customer (*cliente grossista*) under the Bersani Decree. This is aimed at avoiding the application of certain mandatory provisions applicable to end customers (*clienti finali*) and the need to be enrolled in the register of qualified sellers to be established by the MSE under the 2017 Competition Act.

In particular, we suggest adding a new paragraph at the end of § 21, reading as follows:

"Each time it enters into an Individual Contract, [Party A/Party B/each Party] represents and warrants to the other Party that it is qualified as a wholesale customer (*cliente grossista*) within the meaning of Article 2.5 of the Italian Legislative Decree No. 79 of March 16, 1999.".

(H) § 22.2 (Arbitration)

It could be useful, given a choice of Italian law, to provide for an arbitration clause referring the settlement of disputes arising out of the General Agreement to an arbitration chamber based in Italy[94].

In this respect, it must be noted that Article 15 of Decree No. 53 repealed Article 3, paragraphs 19 and 20, of Law No. 244 which prohibited the public administrations (*pubbliche amministrazioni*) listed in Article 1, paragraph 2, of Italian Legislative Decree No. 165 of 2001 (including State and local administrations), companies entirely or for the majority owned by those entities, public economic entities (*enti pubblici economici*) and companies entirely or for the majority owned by those public economic entities to enter into contracts providing for arbitration clauses. Therefore, arbitration clauses may apply also to contracts with the entities above[95].

On the contrary, with specific reference to agreements entered into between a company directly or indirectly owned by a public entity and a public administration, Article 4 of Decree No. 95 prevents, upon nullity of the agreement, the inclusion of arbitration clauses. Decree No. 95 also establishes that starting from the date of its entry into force (i.e. 7 July 2012), any arbitration clause set out in those agreements shall lose its effectiveness, save for those cases where the arbitration committee was already established in respect to a specific dispute.

(iii) <u>Clarification in Light of Certain Mandatory Provisions of Italian Law</u>

Certain Italian law provisions (which are also considered mandatory within the meaning of Article 17 of Law No. 218[96]) would apply regardless of any Parties' contrary provisions, and also in the absence of any Parties'

[94] Possible models of arbitration clause are available on the website www.camera-arbitrale.com.
[95] For certain public entities and public companies the prior authorisation of the executive body may be required and special rules set out in Legislative Decree No. 50/2016 apply (e.g. a register of arbitrators eligible for the appointment is established). For certain formalities a body established at the national anti-bribery authority must be involved.
[96] See Part C.V.4.(a).

provisions to deal with. These include Article 1229 of the Civil Code, which provides for certain limits in respect of contractual limitations of liability (please refer to Parts C.V.2 and C.V.4).

We would recommend that, for purposes of clarity, the Parties deal with the provision above by including in the Election Sheet the following amendment to the General Agreements, whether or not such General Agreement is governed by Italian laws:§ 12.4 is amended by moving the word "or" from the end of § 12.4(b) to the end of § 12.4(c) and by adding a new § 12.4(d) as follows:

> "(d) gross negligence or violations arising under public policy ("*violazione di obblighi derivanti da norme di ordine pubblico*")".

VI. Confirmation Practices

1. Requirements relating to applicable procedure formalities in the formation of legally binding Individual Contracts and in a Confirmation complying with the procedural laws of Italy in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the Agreement

(a) *Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g. execution in writing, signature, registration or notarisation?*

It is a general principle of Italian law that the formation of an agreement between two or more parties is not subject to specific formalities, unless otherwise provided for by the parties or by law. This means that the parties may enter into an agreement either verbally or electronically (i.e. point and click procedure, electronic mail etc.), unless the law requires specific formalities (e.g. a public deed is required for the purchase of real estate, for the incorporation of a limited liability company etc.).

Italian law does not require written form for:

- a forward sale agreement (*contratto di vendita a termine*) or a supply agreement (*contratto di somministrazione*) (which are the two possible legal classifications for Commodity Transactions);
- an option agreement under Article 1331 of the Civil Code, by which one party grants to another party the right, but not the obligation, to enter into a forward sale agreement (*contratto di vendita a termine*) or a supply agreement (*contratto di somministrazione*) (which is the legal classification of Commodity Options) if the option and the subsequent forward are not a financial instrument;
- a swap agreement, if the contract is not a financial instrument.

With respect to Allowances, once MiFID II will enter into force, they will be considered as financial instruments (*strumento finanziario*). In this respect, Article 23 of the Financial Act sets out that all contracts related to investment services related to financial instruments must be in writing and, therefore, duly signed; otherwise they are void[97].

However, according to recent case law[98], it is generally accepted that the provision of Article 23 of the Financial Act requires the written form only for master agreements and not for individual contracts, which are executed on the basis of a master agreement[99].

Although this case-law does not specifically refers to Allowances (given that they will be financial instruments only starting from 3 January 2018), we assume that this approach will presumably be confirmed for Individual Contracts relating to Allowances from 3 January 2018[100].

Therefore, a verbal agreement is sufficient for the formation of a legally binding Individual Contract. From 3 January 2018 we assume that also Individual Contracts related to Allowances can be executed verbally.

In any event, only with a certain date of law (*data certa*) the General Agreement and the Individual Contracts can be asserted against third parties. Under Italian law, in the event of the Debtor's declaration of insolvency, the non-insolvent counterparty must be able to demonstrate, in order to be admitted to the list of creditors, that the agreement entered into with the Debtor may be asserted against third parties, i.e. it was concluded before the declaration of insolvency.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the General Agreement, Individual Contracts may be concluded in any form, including verbally and electronically, with no specific signature requirements. Furthermore, provided that the Parties do not include in an Individual Contract any provision to the contrary, the Individual Contract would be validly included in the General Agreement even if the Parties entered into it verbally or electronically without making any reference to the General Agreement.

However, with the aim of attributing to the General Agreement and the Individual Contracts a certain date of law (*data certa*), which will allow these agreements to be asserted against third parties (especially in the context of Insolvency Proceedings), we suggest to execute each of the General Agreement and the Individual Contracts in the form of either (i) a public deed (*atto pubblico*) under Article 2699 of the Civil Code or (ii) a private deed with notarised signature (*scrittura privata autenticata*) under Article 2703 of the Civil Code. Alternatively, other circumstances could grant the Individual Contracts a certain date of law (*data certa*), such as

[97] Exceptions may be granted by Consob with respect to certain contracts. However, so far no special rules have been issued with respect to Allowances.
[98] Court of Cassation , no. 3950 of 29 February 2016 and Court of Cassation, no. 19759 of 9 August 2017.
[99] In addition, the requirement of a written form currently applies only contracts in which one of the parties is a retail client according to Article 37 of the Consob Regulation (*Regolamento Intermediari*), adopted with Resolution n. 16190 of 29 October 2007, relating to the activity of financial intermediaries. In particular, contracts between professional clients (in our case, "*negoziatori per conto proprio di merci e strumenti derivati su merci*"), i.e. traders dealing without the intermediation of a financial services provider does not necessarily need to be entered into written agreements.
[100] _In this 2017 Letter Opinion we do not make reference to obligations stemming from Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)..

sending the signed Individual Contracts by mail provided that the postmark is on the document or by creating an electronic document with a timestamp.

We believe that when MifiD II will enter into force also Individual Contracts related to Allowances can be concluded orally provided that the General Agreement must be executed in writing.

Scenario 2

Not applicable.

Scenario 3

If a law other than the Italian one is the governing law of the General Agreement, the Regulation Rome I will apply. Under Article 11 of the Regulation Rome I:

- an agreement concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the governing law of the agreement or of the law of the country where it is concluded; and

- an agreement concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the governing law of the agreement or of the law of one of those countries.

Accordingly, until 3 January 2018 Individual Contracts may be concluded in any form, provided that, alternatively:

(i) they may be concluded in any form under the governing law; or

(ii) they may be concluded in any form under the laws of the country in which they have been concluded, in the event that the Parties are in the same country at the time of conclusion; or

(iii) they may be concluded in any form under the laws of one of the countries in which the Parties are at the time of conclusion, in the event that the Parties are in two different countries.

(b) At what point in time does an Individual Contract agreed upon verbally become legally enforceable?

In accordance with Article 1326 of the Civil Code, an agreement is formed and becomes legally enforceable when the offeror becomes aware of the acceptance of the other party. The acceptance must conform to the proposal or, otherwise, it is deemed to be a new offer.

Therefore, a Confirmation is not a requirement for the formation of an Individual Contract agreed upon verbally, which is already, *per se*, legally enforceable. The Confirmation only provides evidence that the Parties have entered into an Individual Contract.

(c) *Does failure to object to incorrect terms in a received constitute "acceptance" of those terms? If so, is there a relevant time period?*

Under Italian law, silence is normally not sufficient to form a legally binding agreement since it is not considered a valid way of demonstrating the intention of a party to enter into an agreement. However, Courts and legal scholars consider silence as acceptance when an obligation to reject the proposal is imposed by either the nature of the transaction or by trade practice. In these circumstances, the failure to communicate rejection of the proposal may be considered as acceptance of an amendment to an Individual Contract previously entered into verbally[101].

Therefore, while under § 3.3 of the General Agreement, the Parties undertake to promptly review the Confirmation terms and to notify the other Party of any inconsistency with the terms applicable to the Individual Contract without delay, we cannot exclude the possibility that a Court may consider the failure to object to incorrect terms as an acceptance of those terms.

As far as the objection time period is concerned, clause § 3.3 of the General Agreement states that the Party must "promptly" review the Confirmation terms and notify the other Party of any inconsistency "without delay". In this respect, we believe that a Court would carry out a case-by-case assessment and apply the general good faith criteria.

(d) *Is reference to the relevant General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?*

Unless the Parties have agreed in writing to adopt a specific procedure to both enter into the Individual Contract and to include them in the General Agreement, because Italian law does not require specific formalities to be complied with for the formation of Individual Contracts (please refer to Part C.VI.1.(a)), these are validly included in the General Agreement regardless of their form (including the form of the reference to the General Agreement).

With regard to the evidence of an Individual Contract entered into and making reference to the General Agreement verbally, Article 2721, first paragraph, of the Civil Code provides that evidence from witnesses is not admissible when the value of the subject matter exceeds Euro 2.58. However, as stated in Article 2721, second paragraph, of the Civil Code, Courts have the discretion to admit (and regularly exercise this discretion) evidence from witnesses beyond this limit, taking into account the nature of the parties, the nature of the agreement and other circumstances.

Moreover, Italian Courts and legal scholars consider a master agreement (*contratto normativo*) as an agreement which does not give rise to any immediate obligation, but sets out the general terms and rules governing certain potential future transactions between the parties.

Authoritative legal theory states that, for the valid inclusion of a single transaction in the master agreement, it is not necessary that the parties

[101] Court of Cassation No. 6162 of 16 March 2007, Court of Cassation No. 3403 of 20 February 2004, Court of Cassation No. 5363 of 14 June 1997, Court of Cassation No. 8191 of 22 July1993.

expressly refer to the master agreement or attach the text of the master agreement to the agreement of the single transaction. The integration between the master agreement and the single transaction operates provided that each party does not express any intention to the contrary in the single transaction.

In light of the above, we are of the opinion that an Italian Court would consider the General Agreement as a master agreement and, consequently, would consider the Individual Contracts validly included in the General Agreement even if the Parties entered into them verbally and without making reference to the General Agreement, provided that the Parties do not include in an Individual Contract anything inconsistent with the applicability of the General Agreement. Therefore, a subsequent Confirmation of the Individual Contract stating the intention of the Parties to include the Individual Contract in the General Agreement does not constitute a requirement for its valid inclusion.

2. *Means of Evidence*

Assuming there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in Court: (i) taped recording; (ii) witness' statement; (iii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

With regard to the taped recording, according to § 23.1 of the General Agreement, each Party is entitled to record telephone conversations held in connection with the General Agreement. This question must be analysed in light of both the Data Protection Code and the Employees' Act.

(i) Data Protection Code[102]

The following definitions under the Data Protection Code are relevant to this question:

- "personal data" means any information relating to natural persons that are or can be identified, even indirectly, by reference to any other information (i.e. name, surname, address);
- "process" means any operation or set of operations, carried out with or without the help of electronic or automated means, concerning the collection, recording, organisation, keeping, […] of personal data;
- "data controller" is the entity or the natural person processing personal data; and

[102] Please note that this 2017 Opinion Letter only covers the current applicable provisions under the Data Protection Code while it does not cover the requirements set forth by Regulation (EU) n. 679/2016 which will apply from May 2018.

- "data processor" is the entity or the natural person processing personal data on behalf of the data controller, following its instructions.

The data controller must:

- inform the data subject to whom personal data refers in advance of, *inter alia,* the purpose, methods of data processing, the name of the data processor and the rights granted to the data subject under Article 7 of Data Protection Code (e.g. the right to have access to the data and the right to object to the process of his or her data for direct marketing purposes); and

- obtain the prior consent of the data subject to the processing of his or her personal data.

As to the second bullet point above, the consent to the processing of personal data is not required if the data is processed, among other things:

- to execute or perform the agreement entered into by the data controller and the data subject; and/or

- to comply with specific requests made by the data subject prior to entering into an agreement.

Please note that the data controller should only record and store personal data for the time necessary for the purposes for which the personal data is processed.

In light of the above, if the recording of a telephone conversation relating to an Individual Contract involves the collection and recording of personal data of a natural person, the recording Party should, *inter alia*:

- inform such natural person of the processing (i.e. recording) of its personal data, including information on the purpose and methods of such processing;

- obtain the natural person’s consent to the recording of its personal data (unless one of the exemptions mentioned above applies); and

- comply with the specific rules and regulations issued by the Data Protection Authority (e.g. implementing ad hoc policies and procedures, which describe the processing operations and inform the natural persons involved).

(ii) The Employees' Act

The Data Protection Code expressly states that the distance monitoring of employees is governed by Article 4 of the Employees' Act.

Article 4 of the Employees' Act contains a general ban on the use of audio-visual devices and other devices for the purpose of monitoring the activities of an employee at a distance. Monitoring devices required due to organisational or production needs, health and safety requirements, or protection of company’s assets may only be installed following agreement between the employer and the labour unions or, failing agreement, in accordance with the Labour Inspectorate's (*Ispettorato del Lavoro*) instructions. This restriction does not apply to tools which are employed by the employees to work (e.g. computer, tablet or mobile) or which are employed by the employer to record employees' access to and presence at the workplace. In any case, the information gathered pursuant to the Employees' Act can be employed only if the processing operations are conducted in compliance with the Data Protection Code.

In light of the above, under the Employees' Act, the employer is not entitled to install devices that permit a third party to "listen" to the "content" of telephone calls between its employees and its clients.

With reference to the General Agreement, with the consent of the labour unions to install devices to "listen" to the "content" of telephone calls between employees and clients, a Party may record those telephone conversations, on the assumption that such recording is conducted in compliance with the Data Protection Code. In any case, *inter alia*, the Party must inform the employees of the recording of telephone conversations and obtain their consent according to the privacy provisions mentioned under (i) above. In particular, the consent to the recording of the telephone conversation must be given by the person who is being recorded and, therefore, it is not possible for the Party to give that consent on behalf of its employees.

Therefore, it is advisable to include in the Election Sheet a new clause similar to that recommended under Part C.V.5.(a).

Moreover, it is worth mentioning that under Article 2712 of the Civil Code a taped recording may be considered as evidence if the person against whom the recording is offered does not challenge its conformity to the facts actually occurred.

Article 2712 of the Civil Code is applicable also to transmission of documents via fax.

With reference to witness statement, please refer to Part C.VI.1.(d).

With reference to the electronic exchange of data as a valid means of entering into an Individual Contract under the General Agreement please refer to Part C.VI.1.(a).

With reference to the admissibility as evidence of a confirmation by electronic exchange of data under Italian law, the rules on electronic documents (*documenti informatici*) would apply. In this respect, the level of admissibility will depend on the legal classification of the electronically transmitted confirmation under Decree No. 82. In particular, this Decree draws a distinction between an: (i) an electronic document signed by way of advanced electronic signature (*firma elettronica avanzata*)[103], qualified

[103] The advanced electronic signature (*firma elettronica avanzata*) is a kind of electronic signature created by means that only the signatory may control and which allows to verify whether after the signature the datas have been modified.

electronic signature (*firma elettronica qualificata*)[104] or digital signature (*firma digitale*)[105]; (ii) an electronic document signed by electronic signature (*firma elettronica*)[106]; and (iii) an electronic document (*documento informatico*)[107] that is not signed by the parties (e.g. e-mail, point-and-click).

An electronic document signed by way of advanced electronic signature (*firma elettronica avanzata*), qualified electronic signature (*firma elettronica qualificata*) or digital signature (*firma digitale*) provides (where compliant with the applicable requirements) conclusive evidence of the provenance of the declarations in the document by the person who signed the document, notwithstanding the possibility that the signatory may refuse to recognise his or her signature. In particular, the person against whom the declaration is offered is admitted to give evidence concerning whether or no he or she used the electronic signature device. Moreover, an electronic document signed by way of advanced electronic signature, qualified electronic signature or digital signature, when compliant with technical requirements set forth by Article 71 of Decree No. 82, satisfies the written form requirement.

The digital signature or any other kind of electronic signature may be attested by a notary or by another government official. In this case the signature has the value of notarised signature (*firma autenticata*) under Article 2703 of the Civil Code.

The validity of an electronic document signed by electronic signature (*firma elettronica*) may be evaluated by Courts on a case-by-case basis, taking into consideration the objective features of quality, security, integrity and non-modifiability of the document (e.g. a document to which access is restricted and which consequently may not be modified by an unauthorised third party). An electronic document signed by electronic signature does not satisfy the written form requirement.

No weight of evidence is attributed to an electronic document that is not signed by the parties. As clarified above, this does not mean that the Individual Contract is not valid, given that no requirements of forms apply with respect to Individual Contracts.

VII. Core Provisions

1. *Would any of the elections contemplated by the General Agreement or any of the Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting)? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent*

Without prejudice to all Parts of this 2017 Opinion Letter, including, but not limited to, Part A.I. and the assumptions listed in Part B, we are of the opinion that no elections contemplated by the General Agreement or any of the annexes change the substance of our conclusions reached under Parts C.I or C.II.

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[104] The qualified electronic signature (*firma elettronica qualificata*) is a kind of electronic signature obtained through an IT procedure which guarantees the univocal provenance from the signatory.
[105] The digital signature (*firma digitale*) is based on a pair of asymmetric keys system.
[106] The electronic signature (*firma elettronica*) is a series of electronic data used as an IT authentication method.
[107] The electronic document (*documento informativo*) is the IT representation of acts, facts, or data legally relevant.

2. *Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "**Core Provision**")?*

Without prejudice to all Parts of this 2017 Opinion Letter, including, but not limited to, Part C.V.5 of this 2017 Opinion Letter, we have identified the following Core Provisions:

(a) § 1.1 (Subject of the Agreement) with the exception of § 1.2 (Pre-Existing Contracts), to the extent that no terms of Pre-existing Contracts are inconsistent with any other Core Provision;

(b) § 4.1 (Delivery and Acceptance) and § 5.1 (Delivery and Acceptance Pursuant to an Option);

(c) § 7 (Non-Performance Due to Force Majeure) and § 8 (Remedies for Failure to Deliver and Accept);

(d) § 10.3 (Termination for Material Reason), § 10.4 (Automatic Termination), § 10.5 (Definition of Material Reason), and § 11 (Calculation of Termination Amount);

(e) § 12 (Limitation of Liability);

(f) § 13.2 (Payment) and § 13.3 (Payment Netting);

(g) §19 (Assignment); and

(h) any other provision referred to and all defined terms used (as set out in Annex 1 to the General Agreement) in the above Paragraphs.

3. *Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "**CPMA**") change the substance of your conclusions reached under Part C.I or C.II such as, but without limitation, by invalidating the netting provisions in the General Agreement due to its inclusion under the broader netting provisions of the CPMA?*

The inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA would not change the substance of our conclusions reached under Part C.I or Part C.II.

In fact, if the General Agreement was included in the above mentioned agreements, the remarks made in relation to the single agreement relationship (*collegamento negoziale*) would apply (please refer to Parts C.I.1.5.(b) and C.I.1.10).

VIII. Governing Law, Arbitration and Jurisdiction

1. *Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§22) be upheld in Italy and what would be the consequence if it were not?*

With reference to upholding a choice of a law other than Italian law, please refer to Part C.V.1.

Without prejudice to all Parts of this 2017 Opinion Letter, including, but not limited to, the assumptions listed in Part B, we are of the opinion that, in accordance with Article 4 of Law No. 218 and, with respect to EU Member States, Regulation (EU) No. 1215/2012 of 12 December 2012, the submission to the jurisdiction of a non-Italian Court or arbitration tribunal, where the matter would be otherwise subject to Italian jurisdiction, would be upheld by Italian Courts provided that:

- the agreement conferring jurisdiction is in writing or evidenced in writing or in a form which accords with practices which the parties have established between themselves; and
- the dispute relates to rights which a party is entitled to dispose of (*diritti disponibili*)[108].

IX. Regulatory Regime

1. *Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant General Agreement or of the Individual Contracts?*

Under Article 1, first paragraph, of the Bersani Decree and Article 2, second paragraph, letter (a), of the Marzano Law the purchase and sale of electricity are liberalised activities, provided that public service obligations are complied with in accordance with applicable laws.

However, in order to sell electricity to end customers[109], it will be necessary to be enrolled into the register of qualified sellers which the MSE shall establish under Article 1, paragraph 80 *et seq*., of the 2017 Competition Act. In particular, the MSE will set up the register of the qualified sellers on the basis of a proposal of the AEEGSI[110]

In addition, in order to be physically settled, all bilateral agreements (as well as the underlying delivery and offtake profiles) must be registered through an "energy accounts" system (*piattaforma dei conti energia a termine* – **PCE**) managed by GME (acting on behalf of Terna)[111]. Therefore, regardless the nationality of the Parties, if the physical settlement occur in Italy, such registration is due.

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[108] Article 4 of Law No. 218 also provides that the choice of a law other than Italian law where the matter would be otherwise subject to Italian jurisdiction is not effective if the nominated non-Italian Court or Arbitration Tribunal denies jurisdiction or may not rule on the dispute. This is to avoid that the matter will not be settled.

[109] Commodity trading with an Italian counterparty other than an end customer does not require any authorisation provided that it does not fall within the scope of the reserve of activity under Article 18 of the Financial Act (please refer to Part A.VI).

[110] In this respect, the AEEGSI issued a consultation paper (No. 633/2017). The MSE shall establish the register within 90 days from 29 August 2017 (i.e. the date of entry into force of the 2017 Competition Act).

[111] See Article 16 of Deliberation No. 111/06.

Only market operators (*operatori di mercato* – each an **OM**) are entitled to operate (i.e. to file bilateral agreements and profiles) on the PCE[112]. In addition to Terna, the Single Buyer (*Acquirente unico*) and the Gestore dei servizi energetici – GSE S.p.A., only (a) "dispatching users" (*utenti del dispacciamento*[113]) and (b) wholesale customers acting as their agents, may qualify as OM by registering with the PCE. To this end, each applicant OM must: (i) meet certain professionalism and IT skill requirements; (ii) file an application with the GME; (iii) enter into a standard deed of adherence[114]; and (iv) deliver certain bank guarantees (*fidejussioni*)[115].

Finally, please note that, in Part B of this 2017 Opinion Letter we assumed thatstarting from 3 January 2018, the entering into Commodity Transactions, Commodity Options and Commodity Swap does not qualify as activities reserved to financial intermediaries (*riserva di attività*) under Article 18 of the Financial Act as the exemptions under Article 2, paragraph 1, of MiFID II as implemented by Article 4-*terdecies*, paragraph 1, of the Financial Act apply.

X. Other Provisions

1. *If you have other recommendations that you would like EFET member companies to consider (for example to fully optimise the General Agreement for a specific purpose such as to support limited trading between two entities both organised and doing business solely in Italy), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter*

Please refer to Part C.V.5.

* * *

Yours faithfully,

Avv. Lorenzo Parola
PAUL HASTINGS (Europe) LLP

[112] In particular, each OM may register: (a) with its own energy account both sales purchases as well as offtake and delivery profiles related to dispatching points included in that energy accounts; and (b) with other OMs' energy accounts, in relation to which it has been granted a proxy (*delega*), only sales and purchases of electricity (but not the relevant profiles) (see Article 28 *et seq.* of the PCE Regulation (*Regolamento della piattaforma dei conti energia a termine*) issued by GME (and positively assessed by the AEEGSI).

[113] In addition to the Single Buyer (*Acquirente unico*) and the Gestore dei servizi energetici – GSE S.p.A., the following entities must enter into a dispatching services agreement (*contratto per servizio di dispacciamento*) with Terna thus qualifying as dispatching user (*utente del dispacciamento*): (a) holders of a generating unit; (b) holders of a consumption unit; (c) holders of an import point; and (d) holders of an export point. The execution of the dispatching services agreement (*contratto per servizio di dispacciamento*) is a prerequisite for the access to transmission and distribution grids.

[114] See Articles 16 *et seq.* of the PCE Regulation (*Regolamento della piattaforma dei conti energia a termine*) issued by GME (and positively assessed by the AEEGSI).

[115] See Articles 55 *et seq.* of the PCE Regulation (*Regolamento della piattaforma dei conti energia a termine*) issued by GME (and positively assessed by the AEEGSI).

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