APPENDIX 1

2018 OPINION LETTER

(a) Insolvency of public administrations and Commercial Companies

(i) Bankruptcy (*fallimento*) and claw-back action (*azione revocatoria*)

Bankruptcy proceedings are the general insolvency proceedings for Commercial Companies in Italy. It is initiated by a petition filed with the competent Court by either a creditor, a public prosecutor (*pubblico ministero*) or the Debtor itself.

If the Court finds that the Debtor is insolvent, it will make an insolvency declaration (*dichiarazione di insolvenza*) and appoint a supervising judge (*giudice delegato*) and a liquidator (*curatore*). A creditors' committee (*comitato dei creditori*) is also appointed by the supervising judge within 30 days of the insolvency declaration. A Debtor will be deemed insolvent if it cannot regularly fulfil its obligations (Article 5 of the Insolvency Act). Therefore, insolvency is a liquidity test, rather than an assets-versus-liabilities test.

An insolvency declaration has several material effects on the Debtor's assets, outstanding agreements (*rapporti giuridici preesistenti*), creditors and other third parties which entered into relationships with the Debtor in a specific period before declaration, referred to as the claw-back period.

From the time of the insolvency declaration, the Debtor's assets are managed exclusively by the liquidator (under the control of both the supervising judge' and the creditors' committee), and the Debtor is no longer entitled to dispose of them. Any payment made or transaction carried out by the Debtor will have no effect *vis-à-vis* the creditors. The liquidator also takes the place of the Debtor in all outstanding judicial proceedings (Articles 42 and 43 of the Insolvency Act).

After the insolvency declaration, creditors cannot commence or continue enforcement proceedings (*procedimenti esecutivi*) or precautionary measures (*azioni cautelari*) against the Debtor's assets (Article 51 of the Insolvency Act). Furthermore, as a general rule, the performance of outstanding agreements is suspended until the Insolvency Official elects whether to terminate the agreement or not (in substance, doing “cherry-picking” among the agreements of the Debtor); on the contrary, certain outstanding agreements are subject to automatic termination by operation of law (Articles 76[1], 77[2], 78[3] and 81[4] of the Insolvency Act) or mandatory performance under the Insolvency Act (Articles 80[5], 82[6] and 83[7] of the Insolvency Act). An agreement is considered outstanding when, albeit regularly entered into, both parties' (and not one party's only) obligations have not been fully fulfilled. For instance, an Individual Contract setting out

[1] Forward agreements having a financial nature (*contratti di borsa a termine*).
[2] Association in partecipation (*associazione in partecipazione*).
[3] Contract for current account (*conto corrente*).
[4] Works contract (*appalto*).
[5] Real estate lease (*locazione di immobili*).
[6] Insurance contract (*contratto di assicurazione*), however parties may waive to this provision.
[7] Edition contract (*contratto di edizione*).

deliveries for a certain period would be an outstanding agreement if the Debtor was declared insolvent before the end of such period.

As an exception to the general rule outlined above, however, should the Insolvency Official decide to keep (and should the competent Court authorise the Insolvency Official to keep) the insolvent company provisionally operating pursuant to Article 104 of the Insolvency Act, all pending contracts continue (and therefore are not suspended) unless the Insolvency Official declares to suspend the relevant performance or terminate the same. All credits stemming from the continued pending contracts rank as super priority claims (*crediti prededucibili*).

In addition to the ordinary claw-back action[8], after the insolvency declaration, the following transactions may be subject to bankruptcy claw-back actions (*revocatoria fallimentare*) to be commenced by the Insolvency Official:

- acts for a consideration (*atti a titolo oneroso*) concluded in the year preceding the insolvency declaration where the value of the Debtor's obligations is greater than 125% of the consideration, unless the other party can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the act was entered into (Article 67, paragraph 1, number 1, of the Insolvency Act);

- acts for a consideration concluded in the year preceding the insolvency declaration where payment was made through "unusual means" (e.g. payment in kind), unless the other party can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the act was entered into (Article 67, first paragraph 1, number 2, of the Insolvency Act);

- the granting in the year preceding the insolvency declaration of a pledge (*pegno*), antichresis (*anticresi*) or a voluntary mortgage (*ipoteca volontaria*) in respect of a debt that has been incurred, but is not yet due for payment, unless the grantee can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the transaction was entered into (Article 67, first paragraph, number 3, of the Insolvency Act);

- the granting in the six months preceding the insolvency declaration of a pledge (*pegno*), antichresis (*anticresi*) or a judicial or voluntary mortgage (*ipoteca giudiziale o volontaria*) in respect of a debt that is due and payable[9], but has not yet been paid, unless the grantee can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the transaction was entered into (Article 67, first paragraph, number 4, of the Insolvency Act); and

[8] Please refer to Part C.I.3 (a)(ii) of the 2018 Opinion Letter.
[9] A debt is due and payable when is determined in its amount and is not subject to terms or conditions to occur.

- payments of debts that are due and payable, acts for a consideration entered into and pre-emption rights concurrently granted in respect of debts, also created by third parties, arisen during the six months preceding the insolvency declaration, provided that the liquidator proves that the other party had actual or constructive knowledge of the Debtor's insolvency at the time the payment was effected, the act was entered into, or the security interest was granted (Article 67, second paragraph, of the Insolvency Act).

Claw-back actions (*azioni revocatorie*) (whether bankruptcy claw-back or ordinary claw-back actions) shall be commenced by the Insolvency Official within (and no later than) 3 years following the opening of the bankruptcy proceedings and, in any case, within 5 years of the date of execution of the challenged transaction.

According to case law, actual knowledge of the Debtor's insolvency may result from particular actions of the counterparty of any of the above listed transactions, such as an actual or threatened petition for bankruptcy, or the participation to negotiations with the Debtor in order to obtain extensions for credit payments.

More often, the counterparty's knowledge of the Debtor's insolvency is based on presumptions (constructive knowledge). In this respect, Courts are used to verifying the counterparty's knowledge of specific symptoms of the Debtor's insolvency. The protest of bills issued by the Debtor is considered a clear symptom of insolvency, as well as the opening of execution proceedings on the Debtor's properties. The insolvency may also be induced from the publication of press releases relating to the Debtor's financial distress and from the figures resulting from its financial statements[10].

In order to ascertain a counterparty's constructive knowledge of the Debtor's insolvency, the knowledge of these symptoms is verified in light of practical circumstances, including, for instance, the nature and the duration of the relationship between the Debtor and the counterparty and the professional activity of the counterparty. In fact, when the counterparty is a Financial Institution, a stricter test applies since, according to case law, they usually have more extensive means to assess the creditworthiness of a Debtor.

The main consequence of a claw-back action is that a party that benefits from one of the above transactions must return any payment or consideration received under the transaction to the Insolvency Official. The consideration must be returned in the same form as it was given; however, if payment in kind is not possible, a payment of an equivalent value must be made to the liquidator.

Several types of transaction are exempt from a claw-back action (even if included in the list above), including:

[10] In absence of relevant case law, it cannot be ruled out that the request for additional security may be construed as a symptom of knowledge of the Debtor's insolvency.

- payments for goods or services made during the exercise of the Debtor's core activity, when made on usual terms (*termini d'uso*);

- deposits in bank accounts, provided that the deposits did not substantially reduce the Debtor's exposure *vis-à-vis* the bank;

- acts, payments and guarantees granted on goods or properties of the Debtor but only if effected while performing a restructuring plan which is considerate appropriate by an accounting auditor[11] (in this regard please also see Part C.III of the 2018 Opinion Letter); and

- acts, payments and guarantees granted on goods or properties of the Debtor made in execution of a composition with creditors (*concordato preventivo*) or a debt restructuring agreement (*accordo di ristrutturazione dei debiti*) pursuant to Article 182-*bis* of the Insolvency Act.

In particular, with regard to the exemption for payments made during the exercise of the Debtor's core activity, the expression "usual terms" under Article 67, third paragraph, of the Insolvency Act could be interpreted as referring to terms of payment or to the activities of the Debtor. Scholars seem to prefer the second interpretation[12]. However, according to certain case law[13] the expression "usual terms" must be construed as referring to the timing and way of payments usually applied between the parties in their ordinary course of business.

In any event, regardless of either interpretation, this exemption would probably have the effect of preventing the risk of claw-back actions in respect of payments effected by a Debtor performing an Individual Contract, when trading of energy constitutes the Debtor's core business or a usual activity of its core business.

According to the first interpretation, payment terms could be considered usual since they are governed by the General Agreement, which is a market standard contractual instrument for energy trading. This conclusion would be valid provided that the Parties do not significantly modify provisions set forth under § 13 of the General Agreement in the Election Sheet.

According to the second interpretation, the performance of the Individual Contracts, in relation to which the payments are effected, would constitute a core activity of a party who usually buys electricity or other products covered by this 2018 Opinion Letter in its ordinary course of business (including energy traders), so that payments would probably be eligible for the claw-back exemption.

[11] The accounting auditor must comply with certain professional requirements.
[12] On this debate, see Cavalli, *Commento all'art. 67, 3° co., lett. a)*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Bologna, 2006, p. 951 *et seq,*; Guglielmucci, *La riforma in via d'urgenza della legge fallimentare*, Torino, 2005, 27; Martorano, *L'esenzione dalla revocatoria dei pagamenti "nei termini d'uso",* on 'www.ipsoa.it' and Ianniello, *Come cambia la* revocatoria *fallimentare*, in Corriere Tributario, 2005, 1960 *et seq.*, Clemente, *Le esenzioni da azione revocatoria di cui all'art. 67*, in *Il Fallimentarista*, 16 July 2013, Bosticco, Esenzione da revocatoria, in *Il Fallimentarista*, 24 August 2016.
[13] On this debate. Court of First Instance of Torino of 23 April 2009; Court of First Instance of Torino of 4 May 2010, Court of Appeal of Milano of 17 November 2015, Court of Cassation No. 25162 of 7 December 2016.

The insolvency declaration also sets the date for examination of claims submitted by creditors. After examination of the claims, the Insolvency Official issues a list of creditors whose claims will benefit from the liquidation of the Debtor's assets; the list is discussed between the creditors during a hearing before the supervising judge, who confirms or amends the list and declares it enforceable (*dichiarazione di esecutività dello stato passivo*). Creditors not included in the above-mentioned list or creditors wishing to object to the admission of other claims may file a petition with the supervising judge, who will decide on such petitions in accordance with a summary judicial proceedings.

The ranking of distribution of the liquidation's proceeds depends on the existence of security *in rem* (*diritti reali di garanzia*, e.g. a pledge or a mortgage) and, more in general, on the order of priority established in the Civil Code and other legislation.

(ii) Composition with Creditors (*concordato preventivo*)

These proceedings are regulated by Article 160 *et seq.* of the Insolvency Act. A Debtor in financial crisis can initiate the procedure by filing a petition with the Court of the place where the company has its registered office.

In broad terms, the Debtor makes a proposal to the creditors, that may be divided in different classes and, if the proposal is approved by the creditors representing the majority of the company's debts, the proposal is binding for all creditors.

The Debtor is entitled to differentiate creditors in classes on the basis of the legal and economic nature of their claims and, should creditors have been divided into different classes, the proposal needs to be approved by the majority of the classes and (ii) in any case, creditors representing more than 50% of the total outstanding debt of the Debtor.

During the proceedings all the debts of the Debtor accrued before the proposal is filed are frozen and individual collection of debts by creditors is stayed.

The petition has to be based on a plan, which may provide for, amongst other things:

- the restructuring and payment of the Debtor's debt;
- the transfer of the Debtor's activities to a general acquirer (*assuntore*);
- the subdivision of creditors into classes; and
- different treatment applicable for creditors belonging to different classes.

If the Court allows the petition to be registered, it will order the holding of a creditors' meeting in order to consider the Debtor's proposal.

If a secured creditor is paid in full, he does not vote unless the creditor waives in whole or in part the payment, in which case they can vote for the waived amount. However, a secured creditor could not be paid in full in a different hypothesis, such as (i) the value of the security is lower that the secured creditor's claim; and (ii) the overall Debtor's estate is not sufficient to repay in full all secured creditors.

If a secured creditor is not paid in full, then such secured creditor would get to vote for the part of his claim not being paid in full.

In any event, in order to approve the proposal, the creditors admitted to vote have to pass a resolution with simple majority (50% plus one) approving the Debtor's proposal. As mentioned, if creditors are divided into different classes, in addition to the above quorum, the proposal shall be approved by the majority of the classes.

Creditors that do not cast votes are counted for as voting in favour of the proposal.

If the creditors accept the proposal, the Court will authorise the composition with creditors.

Preferred creditors (i.e. secured creditors and certain categories of creditors preferred by law such as employees and social security bodies) are not entitled to vote on the composition with creditors between the Debtor and the creditors, since the amount of their claims is not subject to reduction. A judicial commissioner (*commissario giudiziale*) appointed by the Court supervises the performance of the composition with creditors.

If the Court does not authorise commencement of the proceedings or the creditors do not vote in favour of the Debtor's proposal, the Court will likely make a bankruptcy declaration (*fallimento*) against the Debtor, provided that a creditor or the public prosecutor have requested it (please refer to (a)(i)).

Please note that pursuant to Article 67, third paragraph 3, letter (e), the transactions entered into in performance of a composition with creditors are not subject to claw back actions.

(iii) Debt Restructuring Agreements (*accordi di ristrutturazione dei debiti*)

Under Article 182-*bis* of the Insolvency Act, a Debtor may propose, negotiate and enter into an out-of-court restructuring agreement with its creditors holding no less than 60% of the overall claims, which shall be subsequently submitted to the Court for approval (*omologazione*). All creditors that do not take part to the debt restructuring agreement shall be paid in full by the Debtor within 120 days of the final approval of same by the Court.

The restructuring agreement encloses an industrial and financial restructuring plan prepared by the Debtor, and it shall be accompanied by a sworn assessment made by an independent expert certifying the feasibility of the restructuring plan with specific reference to the ability of the Debtor to regularly pay all creditors who are not a party to the debt restructuring agreement.

The debt restructuring agreement must be published in the Companies' Register (*Registro delle Imprese*) and it takes effects from the date of its publication. Creditors and any other interested party are entitled to challenge the restructuring agreement by no later than 30 days from its publication. In addition, from the publication date a 60-day period of a stay commences (the Debtor may also ask the competent court to extend the stay period to the 60 days preceding the publication of the agreement).

Please note that pursuant to Article 67, third paragraph 3, letter (e), the transactions entered into under the debt restructuring agreement are not subject to eventual claw back actions.

(iv) Extraordinary Administration for Large Companies (*Amministrazione straordinaria delle grandi imprese in stato di insolvenza*)

Extraordinary administration for large companies is regulated by Decree No. 270 and applies to insolvent Debtors that meet the following criteria (Article 2 of Decree No. 270):

- 200 or more employees, including those temporarily laid off (*ammessi al trattamento di integrazione dei guadagni*); and
- debts amounting to at least (A) two-thirds of the value of the assets shown on the balance sheet and (B) two-thirds of the revenue derived from sales and services provided in the previous financial year.

Extraordinary administration for large companies is commenced upon petition by either a creditor, a public prosecutor or the Debtor itself.

During a first phase, the Court makes an insolvency declaration (*dichiarazione di insolvenza*) against the Debtor and appoints a supervising judge (*giudice delegato*) and one or three judicial commissioners (*commissari giudiziali*). The Court must also decide whether the Debtor's managers or the judicial commissioners should be entrusted with the management of the business[14]. In addition, the judge shall decide whether the Debtor shall continue managing the company (under the supervision of the judicial commissioners). The insolvency declaration (*dichiarazione di insolvenza*) also sets out the date for examination of claims submitted by creditors (Article 8 of Decree No. 270). From the date of the insolvency declaration, no enforcement proceedings or precautionary measures may be commenced or continued against the Debtor.

Within 30 days after the insolvency declaration (*dichiarazione di insolvenza*), the judicial commissioners must submit to the Court a report setting out, *inter alia*, an assessment of whether the restructuring or transfer of the business will result in "a recovery of economic balance of the business" (Article 27 of Decree No. 270). Within ten days after the report is filed, the MSE submits its comments on the report to the Court. Within 30 days after this date, the Court decides, by decree, on the opening of extraordinary administration for large companies and will order either:

[14] In both events, extraordinary transactions must be authorised by the supervising judge.

- the transfer of the business, to be implemented within one year in accordance with a business plan; or
- the economic and financial restructuring of the business, to be realised within two years in accordance with a business plan.

If on the basis of the commissioners' and the MSE's recommendations the Court finds that the "economic balance of the business" will not be achieved under the business plan, the Court will make a bankruptcy declaration (*fallimento*) against the Debtor (please refer to (a)(i)).

The decree admitting the Debtor to extraordinary administration for large companies opens the second phase of extraordinary administration. From this moment, if the judge with the insolvency declaration has not allowed the Debtor to continue managing the business, one or three extraordinary commissioners (*commissari straordinari*) are appointed by the MSE, act under its supervision and are entrusted with the management of the business. A detailed plan setting out the transfer or the restructuring of the business is drafted by the extraordinary commissioners, to be filed with the MSE within 60 days after the Court's decree and approved by the MSE within 90 days after its filing.

In extraordinary administration for large companies, transactions may only be clawed back if the Court has authorised the liquidation plan. Claw-back actions are governed by the Insolvency Act (please refer to C.I.1.1.(a)(i) above). Under extraordinary administration, the claw-back period is calculated with respect to the date of the insolvency declaration.

Notably, Article 91 of Decree No. 270 provides for the “aggravated” claw-back action for certain acts and intra-group transactions executed by the Debtor in the five-year period before the insolvency declaration (three years for security granted on overdue debts).

A special regime is set forth for outstanding agreements (*rapporti giuridici preesistenti*) under the extraordinary administration for large companies proceedings. Except for some labour and lease contracts, all outstanding agreements continue to be performed unless the extraordinary commissioners elect to terminate them. However, at any time after the MSE's approval of the plan, counterparties may request the extraordinary commissioners to elect whether to terminate or continue the agreements within 30 days. If the extraordinary commissioner fails to respond within said term, the relevant agreements are automatically terminated.

If the transfer of the business is not carried out in accordance with the plan or the restructuring plan is discontinued, the Court will make a bankruptcy declaration against the Debtor.

(v) Restructuring Extraordinary Administration (*Amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*)

Restructuring extraordinary administration is governed by Decree No. 347 and Decree No. 270. These proceedings apply to Debtors that meet all the following requirements:

- 500 or more employees employed during the previous calendar year, including those temporarily laid-off (*ammessi al trattamento di integrazione dei guadagni*);
- debts, including those arising from guarantees, of EUR 300 million or more; and
- the Debtor proposes to undertake a financial restructuring, or a transfer of one or more businesses based on a plan not exceeding one-year period.

Restructuring extraordinary administration may only be commenced by the Debtor filing a petition supported by adequate documentation with the MSE. At the same time, the Debtor must file an application for the declaration of its insolvency with the competent Court (i.e. the Court in the jurisdiction where the company has its principal office (*sede principale*)[15]). On the basis of the petition, the MSE may admit the company to the restructuring extraordinary administration by issuing a decree in which it will also appoint an extraordinary commissioner (*commissario straordinario*), who will manage the company.

By no later than 60 days after the issue of the MSE decree, the extraordinary commissioner must file with the Court a report containing the Debtor's financial data and a list of the Debtor's creditors. Upon the request of the extraordinary commissioner, the Court may extend this term by 60 days. The extraordinary commissioner may also request other companies of the same group to be admitted to restructuring extraordinary administration (even if these companies do not meet the relevant requirements).

By no later than 180 days[16] after the date of the MSE decree, the Extraordinary Commissioner must file a restructuring plan with the MSE. If the MSE does not approve the restructuring plan, the Court must convert the proceedings into an extraordinary administration for large companies (please refer to C.I.1.1.(a)(iv) above) or bankruptcy proceedings (*fallimento*) (please refer to (a)(i)).

The restructuring plan may include a proposal for a composition with creditors (*concordato*) to be filed by the extraordinary commissioner. In particular, Decree No. 347 states that the composition may provide for:

- subdivision of creditors into classes;
- different treatment applicable for creditors belonging to different classes; and
- transfer of assets to a general acquirer (*assuntore*), with potential allocation to creditors of the acquirer's shares, bonds or other financial instruments. Claw-back actions (*revocatoria fallimentare*) commenced by the extraordinary commissioner may also be transferred to the acquirer.

[15] Please note that the principal office (*sede principale*), being the office in which the core Debtor’s activity is carried out, does not necessarily correspond to the registered office.
[16] Subject to a possible extension to be granted by the MSE for an additional 90 days.

The composition is subject to the approval of the creditors according to specific majority rules set out in Decree No. 347. Only creditors admitted by the Court to the proceedings may vote for the composition's approval. After approval by the creditors, the composition is confirmed by the Court.

As with extraordinary administration for large companies (please refer to C.I.1.1.(a)(iv) above), under restructuring extraordinary administration, as of the date of the MSE decree, creditors are prohibited from commencing or continuing enforcement proceedings against the Debtor or its assets and, until such time as the extraordinary commissioner elects to reject performance of outstanding agreements (*rapporti giuridici preesistenti*), the agreements will continue to be performed.

The extraordinary commissioner may bring claw-back actions after the MSE's approval of the restructuring plan, provided that those actions may actually benefit creditors.

Finally, please observe that Decree 134 amended Decree 347 by introducing specific provisions adding new flexibility to the restructuring proceedings under Decree 347 and principally dealing with businesses performing essential public services. We note that Decree 134 established that the restructuring proceedings can be commenced directly by decree of the Prime Minister or the MSE.

Secondly, Decree 134 extended the applicability of the provisions under Decree 347 including not only proceedings for restructuring, but also the transfer of business lines pursuant to a programme for the continuation of the business of the company for a maximum period of one year, amplifying in such a way the possibility of undertaking a sale of the business. In this case, the MSE may authorise both transfer of business units and transfer of single contracts or assets of the company if such transactions are aimed at restructuring or safeguarding the economic and productive value, either total or partial, of the company or the group. Such an authorisation can occur both after and before (in urgent cases only) the declaration of insolvency.

Greater powers are granted by Decree 134 to the extraordinary commissioner, who may identify the buyer by private contract if this guarantees the continuity in the medium term of the service of the company and the rapidity of the intervention, in any case in compliance with laws. However, the transfer price must not be less than the market price, in accordance with specific expert advice.

(vi) Composition with Creditors with Reserve (*concordato con riserva*)

The composition with creditors with reserve is an interim proceeding introduced by Decree No. 83 and, governed by Article 161, paragraph 6, of the of the Insolvency Act.

It is a debtor in possession procedure, very similar to the procedures under Chapter 11 of the U.S. bankruptcy code. The Debtor is entitled to file a petition with the competent Court, declaring that it wishes to evaluate the possible restructuring options available under the Insolvency Act and requesting the Court to grant a time-window to properly asses the alternatives and draft the relevant restructuring plan.

The time-window to be assigned by the Court may range from a minimum of 60 days to a maximum of 120 days, during which the Debtor may continue to operate.

Within the above-mentioned term assigned by the Court, the Debtor shall adopt one of the following restructuring proceedings:

- a final proposal for a composition with creditors (*concordato preventivo*); or
- a debt restructuring agreement pursuant to Article 182-*bis* of the Insolvency Act.

Immediately after the filing of the petition for composition with creditors with reserve, the Debtor benefits from an automatic stay protection until the completion of the procedure and the mandatory rules on share capital losses contained in the Italian civil code are non-applied even in case of business continuation.

(vii) Composition with creditors with a going concern (*concordato preventivo con continuità aziendale*).

Also proceedings for a composition with creditors with a going concern has been introduced by Decree No. 83, and they are governed by Article 186-*bis* of the Insolvency Act. The main feauture of this proceeding is that the proposal of composition is based on a business plan envisaging the continuity of the business, provided that certain specific requirements[17] are met.

The most relevant effects are: (a) pending contracts cannot be terminated by the other party, even if it is a public entity, due to the opening of a *concordato preventivo con continuità aziendale* and any contractual provision that states otherwise is ineffective; (b) companies under *concordato preventivo con continuità aziendale* proceedings cannot be banned from participating in public tenders for the sole reason of being in *concordato preventivo con continuità aziendale*; (c) the underlying restructuring plan may envisage that payments of secured creditors are stayed for one year (and such secured creditors are nevertheless not allowed to vote); and (d) if the *concordato preventivo con continuità aziendale* proposal provides for the sale of the business as a going concern, this may be sold free from encumbrances.

(b) Proceedings Specific to Financial Institutions

(i) Extraordinary Administration (*amministrazione straordinaria*)

Extraordinary administration may be initiated where there have been exceptionally serious administrative irregularities, violations of laws or a serious reduction in the Debtor's net worth, or by a shareholders' resolution

[17] For these specific proceedings, which grant higher protections to the Debtor, certain additional conditions have to be met by the Debtor, including the following: (i) there is a plan, which provides the continuation of the business in three possible forms (i.e. by the Debtor, through the sale of the company or through the transfer of the business of the company); (ii) the plan also contains an analytical indication of the costs and revenues expected from the continuation of the business and from the relevant financial resources; and (iii) the independent expert's report sets out that the continuation of the business is to better satisfy creditors.

upon proposal of the Bank of Italy (*Banca di Italia*). These proceedings are governed by Articles 70 to 77 of the Banking Act. In particular, Article 71 of the Banking Act provides for the appointment of one or more extraordinary commissioners (*commissari straordinari*).

Moreover, the Banking Act provides that, in exceptional circumstances (which are not defined) and subject to the Bank of Italy's authorisation, the extraordinary commissioner(s) (*commissario straordinario*) may suspend payment of all debts for up to a maximum period of three months to protect creditors' interests. Creditors are prohibited from pursuing individual actions against the Debtor or the Debtor's assets based on an allegation of default resulting from the implementation of any such suspension of payments.

Extraordinary administration proceedings may last for up to a maximum of one year (and the relevant term could be extended).

(ii) Compulsory Administrative Liquidation (*liquidazione coatta amministrativa*)

Compulsory administrative liquidation is governed by Articles 80 to 95 of the Banking Act[18] and by certain provisions of the Insolvency Act, to which specific reference is made in the Banking Act.

Compulsory administrative liquidation may be initiated where there have been exceptionally serious administrative irregularities, violations of laws or a serious reduction in the Debtor's net worth. The proceedings are commenced by the MEF, on proposal by the Bank of Italy. The Bank of Italy appoints (A) one or more liquidators (*commissari liquidatori*) and (B) a supervision committee (*comitato di sorveglianza*).

If the Financial Institution becomes insolvent, a liquidator, a creditor or the public prosecutor (*pubblico ministero*) may also file an application with the competent Court for an insolvency declaration (*dichiarazione di insolvenza*), which will enable the commissioners to bring ordinary claw-back actions[19].

From the time that the liquidation takes effect:

- no actions against the Financial Institution or its assets may be commenced or continued;
- no action may be taken to perfect any security over the Debtor's assets;
- all payments due by the Financial Institution are suspended; and
- the same effects as under bankruptcy proceedings (*fallimento*) apply to outstanding agreements (*rapporti giuridici preesistenti*) (please refer to (a)(i))[20].

[18] Please note that compulsory administrative liquidation (*liquidazione coatta amministrativa*) also applies, *inter alia*, to insurance companies, investment companies (including open-end investment companies), consortia (*consorzi*), and cooperatives (*cooperative*) and is governed by Articles 194-215 of the Insolvency Act.
[19] Those under Article 66 of the Insolvency Act (please refer to Part C.I.3(a)(ii) of the 2018 Opinion Letter.
[20] Article 67 of the Insolvency Act referred to insolvency claw-back actions (*revocatoria fallimentare*) does not apply with the exception of agreements entered into by the insolvent Financial Institution and other companies of its group.

The Banking Act provides that, under certain circumstances, the Bank of Italy may authorise the continuation of the business of a Financial Institution which has been made subject to compulsory administrative liquidation. The Banking Act further provides that, at any stage of the compulsory liquidation, the liquidators may propose a composition with creditors (*concordato*). In order for a composition to be implemented, it must be authorised by the Bank of Italy and approved by the competent Court.

The proceedings also apply to Italian branches of EU Financial Institutions established in an EU Member State (with the exception of EU banks) whose authorisation has been revoked by the competent authority.

(iii) Resolution (*risoluzione*)

The resolution procedure was introduced by Decree No. 180 implementing the so-called Bank Recovery and Resolution Directive (Directive 2014/59/EU).

Pursuant to Article 17 of Decree No. 180, the resolution procedure can be initiated if the following conditions are met:

- the Financial Institution is insolvent or risks to be insolvent;
- alternative private measures (e.g. increase in capital) would not be sufficient to avoid the insolvency of the Financial Institution in due time;
- the resolution procedure is necessary in the public interest, since the compulsory administrative liquidation (*liquidazione coatta amministrativa*) would not allow to preserve the systemic financial stability, ensuring the continuation of the activities of the Financial Institution and protecting customers.

The authority governing the resolution procedure is the *Unità di Risoluzione e Gestione delle Crisi* of the Bank of Italy.

The resolution plan shall contain a description of the tools and powers to be used with the aim of preserving the critical functions of the Financial Institution during the procedure.

Under Articles 39 and following of Decree No. 180 those tools may consist of:

- sale of asset to a private party;
- temporary transfer of a business concern to a bridge bank in view of a following sale;
- transfer assets, rights or liabilities to one or more asset management vehicles (so-called bad bank);
- the bail-in, i.e. consisting of a write down of shares and other liabilities and convert them into shares to absorb the losses and recapitalise the Financial Institution under resolution or a new entity.

Under Article 38 of Decree No. 180, the resolution procedure ceases once the pursued goals have been fulfilled, or when it is clear that they can no longer be usefully pursued.

If the insolvency of the Financial Institution is declared in the context of a resolution procedure, the terms of the claw-back action under Article 67, first paragraph, of the Insolvency Act (see (a)(i)) start from the declaration of insolvency by the Bank of Italy. On the contrary, the claw-back action under Article 67, second paragraph, of the Insolvency Act (see (a)(i)) does not apply.