HERBERT SMITH FREEHILLS

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

From: Avv. Lorenzo Parola – Herbert Smith Freehills Studio Legale

Date: Milan, 18 December 2020

Re: 2020 Italian Legal Opinion Regarding Master Netting and related Cross-Product Credit Support Documentation

Dear Sirs,

We make reference to your instruction letter dated 2 July 2020 (**Instruction Letter**) whereby you have requested our opinion (the **2020 Opinion Letter**) on certain Italian law issues, in relation to the Master Netting Agreement (the **MNA**) published by the European Federation of Energy Traders (**EFET**) in June 2010 and the Cross Product Master Agreement published in February 2000 by the Bond Market Association (the **CPMA Form**) as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/International Energy Credit Association (**IECA**) (the **Schedule**) (collectively, the CPMA Form as modified by the Schedule is referred to as the Cross Product Master Agreement - the **CPMA**), as set out in the outline of opinion as set out in italics below.

PART I. Limitations of Opinions/Scope of Review

A. Introduction

For the purpose of the 2020 Opinion Letter, we have reviewed:

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

2. EFET Cross-Product Master Agreement published by the Bond Market Association (Version 1.0, published 16 February 2000),

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

4. EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (the **CPMA CSA**),

5. EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011) (the **MNA CSA** and together to the CPMA CSA, the **CSAs**, each a **CSA**).

The 2020 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 2020 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 2020 Opinion Letter should be read in its entirety, and reading the Executive Summary or some Part of this 2020 Opinion Letter only is not a substitute for reading the information in the remainder of this 2020 Opinion Letter.

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

B. Definitions

Unless otherwise defined in this Opinion Letter any capitalised term has the meaning attributed to it in the MNA, CPMA or CSAs, as relevant.

Any capitalised term not otherwise defined in this 2020 Opinion Letter has the following meaning:

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

2020 Opinion Letter means this opinion letter;

Banking Act means Italian Legislative Decree No. 385 of 1 September 1993, 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*);

Core Provision means the following provisions of the MNA and CPMA respectively, which are so essential that a material alteration thereof could affect the conclusions reached in our 2020 Letter Opinion:

MNA

(a) § 2.1 and § 2.2;

(b) § 3.1;

(c) § 4, § 5, § 6, § 7, § 8, § 9, § 10;

(d) § 11.1, § 11.3, § 11.5, § 11.6; and

(e) any other provision referred to and all defined terms used in the above paragraphs;

CPMA:

(a) Sections 2 and 3;

(b) Sections 4.1, 4.2, 4.3 and 4.4;

(c) Section 7; and

(d) any other provision referred to and all defined terms used in the above paragraphs;

CSA means any of the Credit Support Annexes to the CPMA and the MNA;

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

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

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. 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. 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;

Derivative Financial Instruments means a *strumento finanziario derivato* according to the definition established under Article 1, paragraph 2-*ter* of the Financial Act;

EFET means European Federation of Energy Traders;

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

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[1], with the exception of contracts entered into with end customers regardless of their consumption capacity;

Executive Summary means the executive summary of this 2020 Opinion Letter;

Final Net Settlement Amount has the meaning given to it in the Master Agreements;

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

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[1] Please note that, after the date of issuance of this 2020 Opinion Letter, Article 1, Paragraph, of the 2017 Competition Act, has been amended by Law Decree No. 130 of 27 September 2021, Article 3-*bis* (converted into Law No. 171 of 25 November 2021), under which «*Regardless of the delivery date provided for therein, for supply contracts and derivative contracts already in place or entered into by 31 December 2022, the provisions of Article 1, paragraph 86, of Law 4 August 2017 No.124, shall also apply in cases where delivery with respect to supply contracts, or production, marketing and delivery with respect to derivative contracts, do not take place in the European Union, but in States directly interconnected with it by means of power lines or gas grids or in States which are party to the Athens Treaty of 25 October 2005, as referred to in the Council Decision 2006/500/EC dated 29 May 2006*».

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[2], an intermediary company (*società di intermediazione mobiliare*) or an investment fund management company (*società di gestione del risparmio*);

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 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 Part III.B.18; for ease of reference we include in the definition of "Insolvency Proceedings" also a number of pre-insolvency proceedings, as described in Part III.B.18;

Insolvency Regulation means Regulation No. 1346/2000/EC of 29 May 2000, as amended;

Italian Party has the meaning given to it in Part I.D;

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

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

Master Agreements means the MNA and the CPMA and **Master Agreement** means any of them;

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

Parties means the parties to a Master Agreement;

Party A has the meaning given to it in Part II.1;

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;

Rome I Regulation 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;

Scenario 1 and **Scenario 2** have the meanings given to them in Part I.C;

Underlying Agreement has the meaning given to it in Part II.2; and

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

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

In this 2020 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 Part is to a part of this 2020 Opinion Letter; and

4. headings do not affect the interpretation of this 2020 Opinion Letter.

C. Scenarios

In the Instruction Letter we have been requested to address a number of questions, including the validity and binding nature of the Master Agreements and CSA under the laws of Italy and the need to review any clause of the Master Agreements and the CSA under Italian law[3].

Therefore, in addressing the questions raised by EFET in the Instruction Letter, we will consider the following two scenarios:

1. as if Italian law governs the Master Agreements and the CSAs and the transfer of the collaterals (**Scenario 1**); where not expressly specified, we assume that the Master Agreements, the CSAs (and the transfer of the collateral thereof) and the Underlying Agreements are governed by Italian law;

2. if the governing law of the Master Agreements and the CSAs is a law other than the Italian one, opinion on the legal enforceability by the Italian courts of such agreements in accordance with their own terms (**Scenario 2**).

D. Potential Counterparties

This 2020 Opinion Letter is given in respect of potential counterparties to the Master Agreements 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[4];

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] See Part II, F and G of the Instruction Letter.
[4] Simple partnerships (*società semplici*) are not included in the scope of this 2020 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.

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

This 2020 Opinion Letter is also given in respect of potential counterparties to the Master Agreements that are:

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

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

In respect of the purposes of this 2020 Opinion Letter, publicly owned companies are not subject to different regulation as privately owned entities.

E. Addressees

This 2020 Letter Opinion is addressed exclusively to EFET and its members who have subscribed to the EFET Legal Module, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without the prior written approval of EFET and Herbert Smith Freehills – Studio Legale.

PART II. Assumptions Necessary for the Opinion

For the purposes of providing this 2020 Opinion Letter, and without prejudice to all Parts of this 2020 Opinion Letter, we have made the assumptions listed in points 1 to 15 below.

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

2. Party A is an entity listed under Part I.D.

3. Only those designated Principal Agreements/Netted Agreements (**Underlying Agreements**) and the commodities/financial instruments commonly traded thereunder will be covered by the model Master Agreement. On the basis of the terms and conditions of the relevant Master Agreement, the relevant Underlying Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant Underlying Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the Master Agreement either as transactions entered into under the relevant Underlying Agreement or as Uncovered Transactions/Additional Netted Agreements (where such Uncovered Transactions/Additional Netted Agreements

will only include long form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements identified below in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet). The transactions entered into will include any or all of the transactions described in Annex A attached to this 2020 Opinion Letter.

4. Each of those Underlying Agreements and each Uncovered Transaction/Additional Netted Agreement is valid, binding and enforceable in accordance with its own respective terms and conditions unless expressly stated otherwise.

5. Each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, the Election for Division 1, Part II, Section A of the model Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet is an effective and valid Event of Default under the applicable Underlying Agreement.

6. Each CSA only contemplates the use of cash or letters of credit as Eligible Credit Support. When addressing any questions relating to the rights of a transferor to retrieve collateral from an insolvent entity, we assume that the transferor is incorporated or organized under the laws of Italy. For questions relating to the rights of a transferee to hold collateral and apply and use that collateral in a close-out netting event, we assume that the transferee is incorporated or organized under the laws of a jurisdiction other than Italy. We assume that cash collateral is denominated in a freely convertible currency and is held under the control of the Transferee.

7. Each CSA and Master Agreement are entered into by two entities, one of which is a corporation (including a bank or other similar Financial Institutions) duly incorporated or organized under the laws of your jurisdiction.

8. For the purposes of addressing the multi-branch issues at Part III.D.1 below, we have assumed that a counterparty is incorporated or organized in Italy but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other jurisdictions.

9. For the purposes of addressing the multi-branch issues at Part III.D.2 and Part III.D.3 below, we have assumed that an overseas counterparty is incorporated or organized outside Italy but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in Italy.

10. We can rely (and have indeed relied) upon relevant industry opinions on the Underlying Agreements (e.g. those available from EFET and the International Swaps and Derivatives Association ISDA).

11. The Core Provisions of the Master Agreements and the CSA have not been amended in any material respect. The Underlying Agreements do not waive the provisions under Master Agreements and the CSA and the Master Agreements have the characteristics set out under Annex B attached to this 2020 Opinion Letter.

12. At the time at which the Master Agreement is entered into, neither Party is insolvent or has actual knowledge of the insolvency of the other Party. The Master Agreements and

the CSA and all Underlying Agreements are entered into prior to the formal commencement of Insolvency Proceedings against either Party.

13. 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.

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

15. The Master Agreements and the CSA 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.

Please note that in this 2020 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*).

Executive Summary (as if the Master Agreements and the Underlying Agreements are governed by Italian law)

Enforceability of Close-out Netting Provisions Absent an Insolvency

If the Master Agreements and the Underlying Agreements are governed by Italian law, Articles 1241 et. seq. of the Italian Civil Code would apply in terms of set-off. In particular, the Italian Civil Code envisages different kinds of set-off (*compensazione*): the automatic set-off which provides for the cancellation of due and payable monetary debts or related to fungible goods (*compensazione legale*); the set-off declared by a judge (*compensazione giudiziale*) and the voluntary set-off agreed by the parties (*compensazione volontaria*).

In addition, the Italian legal system expressly recognizes the close out netting concept in two different cases: one is related to EU Energy Contracts, the other one concerns Collaterals.

Enforceability of Close-out Netting Provisions in an Insolvency Scenario

1. Enforceability of close-out

If the Close-Out Events are insolvency-based we believe that:

(a) 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, save for the exceptions below:

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

  (ii) there is a risk that the provisions would also be considered void and not enforceable 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 particular features 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*) that also meets the requirements set out in Article 186-*bis* of the Insolvency Act.

If the early termination rights are triggered by restructuring plans pursuant to Article 67, paragraph 3, letter d) of the Insolvency Act, debt restructuring agreements (*accordi di ristrutturazione dei debiti*) pursuant to Article 182-*bis*, the composition with creditors (*concordato preventivo*) - with the sole exception of composition with creditors with a going concern pursuant to Article 186-*bis* of the Insolvency Act, the composition with creditors with reserve (*concordato con riserva*) – and any other arrangements and agreements with creditors outside a specific insolvency scheme, they could be valid and enforceable if they are construed either as discretionary or as a right of withdrawal or condition subsequent. However, in absence of case precedents, we are not in a position to exclude that a court may apply a different interpretation.

With respect to transactions which are Derivative Financial Instruments, termination of contracts is expressly provided by law in case of bankruptcy and compulsory administrative liquidation (unless the Insolvency Official elects to continue the activity of the company). With respect to other Insolvency Proceedings, in absence of a specific rule providing for the termination or the compulsory continuation of the agreements, contractual termination rights should be valid and enforceable. Therefore, early termination rights could be void only in case of (i) composition with creditors with a going concern and (ii) compulsory administrative liquidation if the Insolvency Official elects to continue the activity of the company, since Article 186-*bis* of the Insolvency Act and Article 90 of the Banking Act, expressly set out that pending contracts continue to be effective.

In addition, according to the 2017 Competition Act, close-out netting provisions set out in EU Energy Contracts[5] and in collateral agreements under the scope of application of Decree No. 170 are valid and enforceable also in insolvency scenarios

[5] See specification under footnote No. 1. The novelty introduced by Law Decree No. 130 of 27 September 2021 results in an extension of the applicability of close-out netting in case of wholesale energy products under REMIT providing for delivery in an extra-EU State which is either interconnected with the EU or participates in the Athens Treaty. However, the application of close-out netting is still limited to contracts already in place or entered into by 31 December 2022, regardless of the delivery date.

(with the exception of the peculiarities of resolution proceedings involving Financial Institutions).

The different regime applicable to the various Underlying Agreements and transactions might therefore cause a partial unenforceability of the Close-Out rights provided for in the Master Agreements in case of insolvency. More particularly, there could be the case that, while the Derivative Financial Instruments are automatically terminated because of the bankruptcy of a Party, and EU Energy Contracts are closed-out in accordance with their terms, other agreements may not be terminated despite the existence of the close-out netting provisions.

In this respect, one may argue that the limitations applicable to termination of Physical Transactions under Article 72, sixth paragraph, of the Insolvency Act would not apply if those transactions were not terminated because of the insolvency of a Party but (under a condition subsequent – *condizione risolutiva*) as a consequence of the termination of the Derivative Financial Instruments of a EU Energy Contracts, which all together constitute a "single agreement". However, in absence of case precedents and authoritative scholarship in this respect, we point out that there is a risk that this construction would be not upheld by a competent court.

2. *Enforceability of Final Net Settlement Account*

The Final Net Settlement Amount is the sum of all the Settlement Amounts provided under the Closed-Out Agreements; if such Settlement Amounts are calculated as a liquidated damages clause (*clausola penale*), 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*).

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[6] of the Insolvency Act. As a general rule, however, the set-off mechanism is only valid for debts and credits arisen out before the insolvency declaration and, therefore, it is not possible to offset credits originated prior to the insolvency declaration with debts incurred after the insolvency declaration and *vice versa*.

Special rules apply in case of close-out netting provisions included in collaterals and EU Energy Contracts[7]. For those agreements 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[8]. The reasonableness of the valuations can be challenged only within the limits of the Decree No. 170 and 2017 Competition Act respectively.

3. *Risk of claw-back for early termination, close-out netting provisions and Final Net Settlement Amount arising as a result of an insolvency*

[6] As examined in Part III. A.4., under this provision, 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.
[7] See specifications under footnotes No. 1 and No. 5.
[8] With respect to the peculiarities under the resolution proceedings for Financial Institutions, please refer to Part III.B.18.

Claw-back actions in insolvency proceedings do not apply provided that:

(a) the relevant acts occurred before the claw-back periods[9]; or

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

4. *Enforceability of early termination other than due to insolvency*

If Italian law is the governing law of the Master Agreements, early termination for non-insolvency Close-Out Events corresponds to circumstances specifically contemplated under the Civil Code and, therefore, would be enforceable, with the exception of certain minor cautions described in this 2020 Opinion Letter.

Collaterals

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

With respect to Letters of Credit, they are provided directly by the issuer to the beneficiary and are stand-by letters of credit pursuant to the definition provided in the CSA. As such, 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 required by the relevant counterparty. Accordingly, we believe that under Italian laws this kind of collateral cannot be qualified as a security interest. The insolvency of the Debtor does not affect the validity and enforceability of the stand-by Letters of Credit, given that those are issued by a third party, unless a security interest or some form of security (e.g. a cash deposit or a minimum balance in a bank account held with the Issuer) is required by the Issuer as a condition precedent to the issuance and maintenance of the Letter of Credit, in which case the payment by the Issuer following the enforcement of the Letter of Credit could be deemed to be made using the assets of the Transferor.

Where the Eligible Credit Support consists in Cash transferred from the Transferor to the Transferee, it cannot be excluded that such transfer could be re-characterized as intending to create or creating a pledge. However, the re-characterisation as a pledge may not imply *per se* the creation of a security interest as this will depend on the type of pledge the transfer may be deemed to create, if any. In particular, the pledge can be regular (*pegno regolare*), and in this case the ownership on the cash is not transferred, or irregular (*pegno irregolare*), in which case the ownership is transferred. A significant advantage of the irregular pledge is that, in the event of the pledgor’s bankruptcy, the pledgee is entitled to satisfy its claim directly, using the cash, while a regular pledge requires the pledgee to file a claim to the bankruptcy receiver.

More questionable is the qualification of an Eligible Credit Support consisting of the transfer of Cash into a credit account held by a third party (i.e. a bank) in the name of the Transferee. In this case, the Cash collateral could be construed as a security deposit (*deposito cauzionale presso terzi*) or a pledge over receivables (*pegno su crediti*) depending on the specific

[9] However, even if effected before the claw-back periods, the acts could be clawed back with an ordinary claw-back action if the conditions listed in Part III.B.4.(ii) are met.

agreement reached by the parties or, according to a different approach, an irregular pledge regardless of the fact that the pledged asset is transferred to a depositary rather than the pledgee if certain requirements are met. Given the features of the transfer of Cash under the CSAs, we are of the view that such transfer could be characterised as irregular pledge, subject to the qualifications in this 2020 Letter Opinion, also in the event that the Transferee is not a bank holding its own payment account and the Cash is paid by the Transferor to the Transferee's bank account held by it with a bank.

Decree No. 170 expressly includes among the financial security documents the agreements for the transfer of a financial asset for the purpose of security and provides that such documents shall have the effect as set forth under their terms and conditions, regardless of their characterisation (art. 6 of the Decree No. 170). It is noteworthy that the Decree No. 170 refers to the aforementioned agreements as a different type of financial security from the pledge. This may be deemed to demonstrate that the agreements for the transfer of an asset for the purpose of security are a type of agreements recognised under Italian law, so reducing the possibility that the transfer of Cash under the CSAs could be re-characterised as creating a pledge. In addition, if a CSA is entered into by a Financial Institution (or other relevant party identified in the Decree No. 170) and so falls under the Decree No. 170 regulation, a re-characterisation of the agreement should not affect its terms and conditions pursuant to the abovementioned art. 6 of the Decree No. 170.

PART III. Opinion

A. Netting / Set-off Absent an insolvency

Model CPMA / Model MNA

1. Whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement would be validly included in each Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law).

If the Master Agreement, the Underlying Agreement and the Uncovered Transactions / Additional Netted Agreements are governed by English or German law (Scenario 2), Italian law is not relevant to assess the validity of the inclusion of a transaction in the Master Agreement since this needs to be assessed under the governing law of the agreements.

For sake of completeness, although the question does not refer to Scenario 1, we highlight that if Italian law is the governing law of the agreements, unless the Parties have agreed in writing to adopt a specific procedure to both enter into the transactions and to include them in the Master Agreements, these may be validly included in the Master Agreements since, in general, Italian law does not require specific formalities to be complied with for the formation of transactions.

In particular, 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 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, transactions would be validly included in the Master Agreements even if the Parties did not make reference to the specific Master Agreement or Underlying Agreement, provided that the Parties do not include in the transaction anything inconsistent with the applicability of them.

2. Legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) to the netting and set-off of obligations due between the parties:

a. under one or more physically settling transactions involving the same commodity or product,

b. under one or more physically settling energy transactions involving two or more different classes or types of commodity or product, and

c. under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements)

Under the Master Agreement, the off-set obligations are monetary. In this respect, as described in more detail under Part III.A.4 below, under Italian law different kinds of set-off are admissible and none of them requires that the single transactions from which the monetary obligations have arisen have the same nature or that they refer to a same product.

3. The necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement

Leaving aside possible due diligence obligations on certain entities, related to the specific activities carried out, in general terms an Italian Party is not obliged to perform a due diligence before entering into an agreement.

Having this said, this may be opportune in order to be aware of any insolvency claim already filed against Party A.

4. General discussion of Italian laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in Italy to address such issues

The Italian Civil Code envisages different kinds of set-off (*compensazione*). The first kind of set-off is set out under Articles 1241 et. seq. and provides for the cancellation of due and payable monetary debts or related to fungible goods (*compensazione legale*). If a debt is not due but can be easily determined, the judge can declare the set-off (*compensazione giudiziale*).

Moreover, the parties can agree upon a voluntary set-off provision (*compensazione volontaria*), by which even if the conditions above are not met the set-off applies.

With particular regard to an insolvency scenario, Article 56 of the Insolvency Act is worth mentioning. Under this provision, 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.

In particular, Article 56 of the Insolvency Act provides that the set-off right is applicable only 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.

As an exception to the rule stated above, Article 83 of the Banking Act – as amended following the implementation of the Winding-up Directive – provides that if a bank is affected by a liquidation proceedings (*liquidazione coatta amministrativa*), the right to set-off under Article 56 of the Insolvency Act is available only where the set-off has actually been claimed by one of the parties prior to the commencement of the liquidation proceedings, unless it is claimed in the context of: (a) a financial collateral agreement pursuant to the Decree No. 170; (b) a netting agreement pursuant to the Decree No. 170; or (c) an agreement under Article 1252 of the Italian Civil Code where no such limitation applies.

In addition, the Italian legal system expressly recognizes the close out netting concept in two different cases.

First, 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 reorganization measures in respect of financial collateral arrangements and agreements including financial collateral arrangements[10]. 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

[10] With respect to the peculiarities under the resolution proceedings for Financial Institutions, please refer to Part III.B.18.

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

The settlement amounts must be reasonable under a commercial standpoint. The reasonableness is presumed in case of contractual schemes approved by the Bank of Italy and Consob in relation to collaterals clauses used in the international practice. The violation of the reasonableness requirement can be challenged within three months if the settlement conditions have not been agreed between the parties or within six months from the opening of a liquidation proceedings (regardless of the agreement between the parties) if the calculation of the settlement amount took place within the year before of the commencement of the liquidation proceedings.

Moreover, Article 9, third paragraph, of Decree No. 170 expressly 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. 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, in case of application of Decree No. 170, also those agreements continue to be valid and effective despite the bankruptcy of a party.

Secondly, 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[11].

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 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.

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 of the determination of the settlement amount 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.

CPMA CSA / MNA CSA

5. Opinion on whether the laws of Italy characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA. If so, please opine on whether there is any way to minimize such risk and the consequences of such a re-characterization to ensure the valid transfer of each type of Eligible Credit Support created by the providing party under each CSA.

In order to address the question how the laws of Italy characterize each transfer of Eligible Credit Support governed by Italian law, we should analyse separately the scenario where the Eligible Credit Support provided pursuant to the relevant CSA consists of a Letter of Credit and the scenario where it consists of Cash.

<u>Letters of Credit.</u> Letters of Credit as defined in the CSAs do not determine a transfer of an asset (i.e. cash) upon their execution but upon their enforcement. The issuance of a Letter of Credit by a third party bank (the **Issuer**) in favour of a Transferee does not - *per se* - constitute a security interest on an asset of the Transferor. However, if a security interest or some form of security (e.g. a cash deposit or a minimum balance in a bank account held with the Issuer) is required by the Issuer as a condition precedent to the issuance and maintenance of the Letter of Credit, in the event of enforcement of the Letter of Credit, the payment by the Issuer could be deemed to be made using the assets

[11] See specifications under footnotes No. 1 and No. 5.

of the Transferor, depending on the arrangement existing between the Issuer and the Transferor in relation to the Letter of Credit. If so, this payment may be declared ineffective or clawed back in the event of the Transferor's bankruptcy under Italian Law, but the Transferee should be entitled to claim a new payment from the issuer.

Cash. Where the Eligible Credit Support consists in Cash transferred from the Transferor to the Transferee, it cannot be excluded that such transfer could be re-characterized as intending to create or creating a pledge, regardless of the parties to the CSAs expressing stating that they do not intend to create a security interest, given that a number of elements of the CSAs may be seen as typical elements of a pledge. However, the re-characterisation as a pledge may not imply *per se* the creation of a security interest as this will depend on the type of pledge the transfer may be deemed to create, if any.

Under Italian law a pledge on cash can be regular, in which case the ownership on the cash is not transferred, or irregular (*pegno irregolare*) pursuant to Article 1851 of the Civil Code, in which case the ownership is transferred[12]. The first type does not allow the pledgee to dispose of the cash and normally implies the accrual of interest on the cash in favour of the pledgor (interest would also be pledged and paid upon release of the pledge). The irregular pledge allows the pledgee to use the cash as the pledgee wishes and does not provide for the accrual of interest in favour of the pledger as the cash no longer belongs to it. A significant advantage of the irregular pledge is that, in the event of the pledgor's bankruptcy, the pledgee is entitled to satisfy its claim directly, using the cash, while a regular pledge requires the pledgee to file a claim to the bankruptcy receiver.

As the CSAs provide in clause 7 the transfer of title on the Eligible Credit Support, free of any encumbrances and interest of the Transferor or third parties, should the transfer of the Eligible Credit Support be re-characterized as a pledge, we are of the view that it is more likely to be considered an irregular pledge when the Transferee transfers the Cash directly to the Transferor in a bank account held by the Transferor. A key condition for this qualification is however that the Transferor is recognised to have the power to dispose of the Cash discretionally, provided that it will return the Eligible Credit Support as due under the CSAs at the relevant time. On the other hand, a feature of the CSAs which would be typical for a regular pledge and appears inconsistent with the irregular pledge is the Transferor right to interest on Cash in accordance with clause 9 of the CSAs. This provision may be read in favour of the characterisation of the transfer as a regular rather than an irregular pledge.

Although the irregular pledge purpose is to provide the pledgee with a form of security in relation to certain pledgor's obligations, it may not be construed as a traditional security interest because it determines an unconditional transfer of the ownership of the pledged cash from the Transferor to the Transferee while a security interest would provide the beneficiary with certain preferential rights in the disposition of the secured assets. On the other hand, a regular pledge would typically create a security interest.

More questionable is the qualification of an Eligible Credit Support consisting of the transfer of Cash into a credit account held by a third party (i.e. a bank) in the name of the Transferee. It has been argued that an irregular pledge can be created only if the pledgee

[12] This interpretation is supported by the uniform interpretation by the Court of Cassation; Court of Cassation No. 202 of 14 May 2001; Court of Cassation No. 23164 of 11 October 2013 and Court of Cassation No. 25796 of 22 December 2015.

is also the Cash depository[13]. If this is not the case, the cash collateral could be construed as a security deposit (*deposito cauzionale presso terzi*) or a pledge over receivables (*pegno su crediti*) depending on the specific agreement reached by the parties. However, with particular reference to the pledge over receivables, it must be noted that the case precedents distinguishing between the case of a pledge in favour of the depository and the pledge in favour of an entity other than the depository was related to a case where the deposit agreement was entered into between the pledgor and the depository and the depository was expressly granted with the right to dispose of the relevant right[14]. In that case, the pledge was deemed to be created over the receivables (*pegno su crediti*) owed by the debtor vis-à-vis the depository. This does not seem to be the case of the Eligible Credit Support transfer under the CSAs assuming that there is no relationship between the Transferor and the bank of the Transferee.

According to a different approach, if the parties intended to transfer the ownership of the pledged asset, the agreement must be qualified as an irregular pledge regardless of the fact that the pledged asset is transferred to a depositary rather than the pledgee, provided that the arrangement in place has the typical features of an irregular pledge (transfer of full ownership and obligation to return to the pledgor the amount received net of the amount necessary to pay the pledgee's credit[15]. This approach appears more consistent with the features of the transfer of Cash under the CSAs. Accordingly we are of the view that such transfer could be characterised as irregular pledge, subject to the qualifications mentioned above, also in the event that the Transferee is not a bank holding its own payment account and the Cash is paid by the Transferor to the Transferee's bank account held by it with a bank.

Decree No. 170 expressly includes among the financial security documents the agreements for the transfer of a financial asset for the purpose of security and provides that such documents shall have the effect as set forth under their terms and conditions, regardless of their characterisation (art. 6 of the Decree No. 170). It is noteworthy that the Decree No. 170 refers to the aforementioned agreements as a different type of financial security from the pledge. This may be deemed to demonstrate that the agreements for the transfer of an asset for the purpose of security are a type of agreements recognised under Italian law, so reducing the possibility that the transfer of Cash under the CSAs could be re-characterised as creating a pledge. In addition, if a CSA is entered into by a Financial Institution (or other relevant party identified in the Decree No. 170) and so falls under the Decree No. 170 regulation, a re-characterisation of the agreement should not affect its terms and conditions pursuant to the abovementioned art. 6 of the Decree No. 170.

6. Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, opinion whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues and whether there are any requirements in Italy necessary or advisable, including any filing registration, notification, stamping,

[13] G. Grisi, Il deposito in funzione di garanzia, 1999, 538.

[14] Court of Cassation No. 9528 of 29 September 1997; Court of Cassation No. 5290 of 10 March 2006 and Court of Cassation No. 3794 of 15 February 2008.

[15] See Court of Cassation No. 892 of 28 March 1956. Gatti, *Pegno irregolare e fallimento del debitore*, *Rivista del Diritto Commerciale*, 2000, 117. In the energy sector, specifically with respect to natural gas, this qualification has been confirmed by the Energy Regulatory Authority (*Autorità per l'Energia Elettrica, il Gas e il Sistema Idrico*) – although of course it does not have any role in the interpretation of provisions of the Civil Code - when it provided that natural gas stored by a shipper at the facility of the storage operator may be pledged in favour of third parties under an irregular pledge (Resolution 423/2014/R/GAS of 7 August 2014).

notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval together with any 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

If the Cash ownership is transferred as Eligible Credit Support under an arrangement which is subject to Decree No. 170, the following requirements shall apply:

(a) the financial collateral arrangement (i.e. the CSA) shall be executed in writing (this includes also electronic form in accordance with the applicable laws);

(b) 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.

If the Cash ownership is transferred as Eligible Credit Support under an arrangement which is subject to Decree No. 170, in principle, no further action has to be taken to ensure the relevant title. However, considering that a risk of re-characterisation of the transfer as creating a pledge cannot be entirely excluded, in addition to the compliance with the two requirements above it is strongly advisable to ensures that evidence of a "*data certa*" as described in Part III.G of the transfer is provided. These requirements are also key in the event of bankruptcy of the Transferor as, if the case, they shall allow to demonstrate the transfer of Cash prior to the revenant "suspect period" (to the extent applicable).

The written form and "*data certa*" shall also be obtained for Letters of Credit, should they be the relevant Eligible Credit Support.

7. Opinion on the effect, if any, under the laws of Italy of the right to a providing party incorporated or otherwise organized under your jurisdiction to exchange Eligible Credit Support (for example, by swapping cash for a letter of credit) pursuant to Section 6 of each CSA. Does the presence of consent to substitution by the receiving party have any bearing on this question

Under Italian law, the Parties may establish a contractual substitution right of the collateral (*patto di rotatività*). According to some case precedents[16], 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

[16] 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.

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).

As under the CSAs the Eligible Credit Support consists of either Cash or a Letter of Credit, in practice we envisage two scenarios: a) exchange of Cash with a Letter of Credit or *vice versa*; and b) exchange of a Letter of Credit with another Letter of Credit. As Decree No. 170 applies to financial assets such as securities and cash, the above mentioned provision of the Decree No. 170 does not seem to be applicable where the exchange of the Eligible Credit Support regards Letter of Credits.

8. Opinion whether the parties' agreement on the governing law of each CSA and their submission to jurisdiction would be upheld in your jurisdiction, and what would be the consequences if they were not

We are of the view that the parties' agreement on the governing law of any contractual obligations arising under a CSA to which Italian companies are expressed to be a party will be recognised and enforced by the Italian courts in any proceedings brought in Italy in relation to the CSA, in each case subject to, and in accordance with, the provisions of: (i) the Rome I Regulation; (ii) the Convention on the Law applicable to Contractual Obligations dated 9 October 1980 (Rome Convention) (as amended) (the "**Rome Convention**"); or, as applicable, (iii) the provisions of Titolo IV (*Efficacia di sentenze ed atti stranieri*) of the Italian Law No. 218 of 31 May 1995 (*Riforma del sistema italiano di diritto internazionale privato*) (as amended) (the "**Law No. 218/1995**"). In particular:

(a) the choice of a law as governing law of a document, where all the other elements relevant to the document at the time of the choice are connected with another country only, may conflict with the rules of the law of such other country which cannot be derogated from by contract. In addition, in a dispute where Italian conflict of law rules are relevant, an Italian court may also require (as a matter of Italian law) that specific issues be determined by reference to a law other than that chosen as the governing law of the document;

(b) under the Rome I Regulation and the Law No. 218/1995, as the case may be, a limited number of circumstances exists where the law that applies to a contract in accordance with the provisions of the Rome I Regulation and/or the Law No. 218/1995 (whether by virtue of the parties' choice of law or otherwise) (the "**Relevant Law**") would not be recognized (partially or entirely). In particular, when applying the Relevant Law, the courts of Italy:

(i) will apply the overriding mandatory provisions of the laws of Italy;

(ii) may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of a document have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the document unlawful; and

(iii) may refuse to apply the Relevant Law if such application is manifestly incompatible with the public policy of Italy;

(c) the effectiveness of provisions relating to the choice of law to govern non-contractual obligations will be subject, where applicable, to Regulation EC 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (the "**Rome II Regulation**"). The effectiveness of such provisions in circumstances where the Rome II Regulation does not apply is uncertain.

The submission to the jurisdiction of foreign courts under a CSA to which Italian companies are expressed to be a party would be recognised and enforced by the Italian courts, subject to, and in accordance with, the provisions of: (i) the provisions of the Council Regulation (EU) No. 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as subsequently amended and supplemented; and/or (ii) the provisions of Titolo IV (*Efficacia di sentenze ed atti stranieri*) of the Law No. 218/1995, as applicable. In particular:

(a) if concurrent proceedings are pending elsewhere and may refuse recognition of a foreign decision in certain circumstances; and

(b) the agreement between parties conferring jurisdiction to courts of a different EU Member State does not meet the requirements set out by the applicable law.

9. Opinion whether under local law of Italy, each CSA complies with any mandatory margining requirements applicable under the laws of Italy

In the Italian legal system margining requirements are those set out by EU EMIR regulations (in particular, EU Regulation 2012/648). To date there no Italian laws which set forth additional mandatory marginal requirements in relation to CSAs.

10. Opinion whether there are any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under the Italian jurisdiction

Cash collateral may be subject to claw-back if it was constituted by the Debtor, acting as Transferor during the applicable suspect period before the bankruptcy declaration of the Debtor[17] and the conditions for the claw back or ineffectiveness occurred (in this respect please see Part III.B.4. Likewise, the payment by the Issuer following the enforcement of the Letter of Credit may be subject to claw-back if it was made using the Debtor assets during the applicable suspect period before the bankruptcy declaration of the Debtor.

With regard to claw-back actions, it is worth noting that under certain circumstances, they do not apply in relation to security interests, such as when the security is granted as a

[17] Since, according to the Italian provisions on the formation of pledges, the cash collateral is formed with the delivery of the pledged money, with reference to the claw-back period each daily/weekly transfer under the EFET Cross Product Credit Support Annex should be taken into consideration. Moreover, even if effected before the claw-back periods, the transfer could be clawed back with an ordinary claw-back action if the requirements under Part III.B.4.(ii) are met. Special rules apply in case of collaterals granted under Decree No. 170, since (i) the substitution of collateral is considered made on the date of the original collateral; (ii) the transfer of additional collateral pursuant to the mark-to-market provisions is considered as provided on the date of the guaranteed obligation or on the date of the original collateral, if the transfer of such additional collateral is due to reasons different from mark to market.

consequence of a plan for the restructuring of the Debtor or under a debt restructuring agreement or a compositions with creditors.

In addition, please refer to Part III.G on the relevance of the certainty of the date (*data certa*).

With regard to the determination of valuations, where a party to an agreement is vested with discretionary powers or may determine a matter in its opinion, Italian law may in certain circumstances invalidate such provisions to the extent they are unfettered or may require that such discretion is exercised in good faith or that such opinion is based on reasonable grounds and such law may, as a matter of public policy, be applied by the Italian courts notwithstanding that the law governing the relevant agreement is a law other than Italian law. In order to mitigate such risk, it is advisable that the valuation is performed by a Valuation Agent (as defined in the CSA) rather than one of the Parties[18].

With regard to the Interest Income on Cash, the relevant CSA provisions may be deemed subject to Italian usury laws and regulations (including Italian Law No. 108 of March 7, 1996, as amended and supplemented). Accordingly, should the Reference Interest Rate Italian be fixed at a rate above the relevant usury threshold periodically set by the Italian Government, Courts may hold that the provisions imposing usurious interest rates are null and void and that no interest payments are due under the CSA. In addition, as usury is a criminal offence, criminal liability may also arise.

Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA

11. The transferee's right in relation to the transferred Eligible Credit Support upon the occurrence of a Close-Out Event will be governed by: (i) in the case of the CPMA, Section 4 of the CPMA (see Section 11 of the CPMA CSA); and (ii) in the case of the MNA, Section 8 of the MNA (see Section 12 of the MNA CSA). Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in Italy insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, whether Section 11 of the CPMA CSA / Section 12 of the MNA CSA is also valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. In other words whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable

Under Section 11 of the CPMA CSA and Section 12 of the MNA CSA only the Eligible Credit Support in the form of Cash shall be included in the Calculation of the Final Net Settlement Amount. We are of the view that the right of a party to apply collateral to a Settlement Amount under a CSA governed by Italian law is enforceable subject to the following:

(a) in the event of bankruptcy of the Transferor,

[18] See also our remarks under Part III.A.4 with respect to valuations made under collateral agreements falling within the scope of application of Decree No. 170.

(i) as examined in Part III.A.10 above, the right may not be enforceable or the enforcement may be revoked if the transfer of the Cash collateral available to the Transferee for settlement was made during the applicable claw-back period unless the Transferee proves that, when it received the Cash, it was not aware of the Transferor's insolvency;

(ii) as examined above, if the Eligible Credit Support is qualified as a pledge, the right would be enforceable if the pledge would be qualified as an irregular pledge, provided anyway that the Cash transfer was not made during the relevant claw-back period[19].

(b) pursuant to article 1375 of the Italian Civil Code, agreements must be performed in good faith notwithstanding their express terms. Additionally, enforcement of certain contractually-created rights could be limited if the court determines that:

(i) such enforcement constitutes an abuse of right; and/or

(ii) such enforcement is fraudulent;

(c) contractual provisions which may alter the ranking or position of creditors provided by law in case of or in connection with bankruptcy might be interpreted by a court of competent jurisdiction as to be in violation of mandatory law provisions;

(d) such enforcement would be subject to the Italian laws in force at the time enforcement is sought, the jurisdiction of Italian courts, the power to stay proceedings, statute of limitations (*prescrizioni e decadenze*), breach of contract by the counterparty (*eccezione di inadempimento*).

12. Whether the opinions above on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA would change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than a party to each Master Agreement and relevant CSA.

Subject to our analysis in Part III.A. 5 above and, in particular, the fact that there are different theories in relation to the qualification of a pledge as irregular when the Cash collateral is transferred to a third party, we are of the view that our opinions, to the extent applicable, would not change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent, except that the risk of insolvency of such agent should also be taken into account.

B. Netting / Set-off in the context of an insolvency

In answering the following questions, we assume that after entering into a transaction and prior to its maturity, an entity incorporated in Italy becomes the subject of voluntary or involuntary Insolvency Proceedings in Italy and, subsequent to the commencement of the Insolvency Proceedings, either that entity or an Insolvency Official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party.

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[19] See Court of Cassation No. 202 of 14 May 2001; Court of Cassation No. 23164 of 11 October 2013.

Model CPMA / Model MNA

1. Assuming the parties have not selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in Italy, whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction

In order to address the question at issue, a distinction must be made between the different kinds of transactions. In particular, we will describe the regime applicable to the following agreements: (i) forward physically settled transactions, (ii) forward agreements having a financial nature; (iii) commodity options non having a financial nature[20].

(a) Forward Physically Settled Transactions

In general terms, under Italian law, the effects of bankruptcy (*fallimento*) and compulsory administrative liquidation (*liquidazione coatta amministrativa*)[21] on forward physically settled transactions not having a financial nature are established in:

- 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[22].

The automatic suspension of the outstanding agreements does not apply if he Insolvency Official decides to keep (and if the competent court authorises the

[20] In this 2020 Opinion Letter we do not cover other special rules applicable to different kinds of contracts such as lease agreements, work contracts etc.
[21] These effects also apply to Financial Institutions by means of reference made by under Article 83 of the Banking Act.
[22] 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.

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[23] 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 clauses triggering termination of the agreement due of the bankruptcy are void.

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[24], 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[25]. 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

[23] Although Article 74 of the Insolvency Act was amended with Legislative Decree No. 169 of 12 September 2007, its content was not dramatically changed.
[24] As amended by Law No. 132 of 6 August 2015.
[25] This has been affirmed by case precedents. 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.

– 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[26]. 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[27]. 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 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[28].

However, different regimes apply with respect to certain outstanding agreements. In particular, for the purpose of this 2020 Opinion Letter, the exception related to EU Energy Contracts, as described in Part III.A.4, is relevant. Indeed, under Article 1, paragraph 86, of the 2017 Competition Act, close-out netting provisions set out in EU Energy Contracts[29] 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 kinds of Insolvency Proceedings).

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[26] 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*.
[27] Guglielmucci, *Lezioni di diritto fallimentare,* Turin, 2004, 133-137.
[28] Court of Udine of 16 May 2011, Court of Rome No. 11324 of 5 June 2017.
[29] See specifications under footnotes No. 1 and No. 5.

The definition of "close out netting" clauses under the 2017 Competition Act applies to the Close-Out under the Master Agreements and the related obligation to pay the Final Net Settlement Amount.

As described in Part III.A.4, the reasonableness of the determination of the settlement amount 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 Master Agreements being standard contracts drafted by international representative associations, the reasonableness of the evaluation of the Final Net Settlement Amount is presumed. However, the Final Net Settlement Amounts is the sum of the various Settlement Amounts calculated under the Underlying Agreements. Therefore, if their reasonableness can be presumed or not depends on the recognition by international representative associations of the relevant calculations methods.

In conclusion, both Close-Out and the close-netting provisions under the Master Agreement are valid and enforceable with respect to the Underlying Contracts which fall within the definition of EU Energy Contracts. In addition, the reasonableness of the evaluation of the Final Net Settlement Amount is presumed.

(b) Forward agreements having a financial nature

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[30].

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

[30] For the purpose of this 2020 Letter Opinion, we assumed that the relevant derivative financial instrument is not exchanged in regulated markets. On the contrary, if this was the case, Article 80 of the Joint Regulation of Consob (the Italian Financial Services Authority) and Bank of Italy of 22 February 2008 would apply. Under this provision, the composition with creditor implies a presumption of market insolvency; therefore, in this case the derivative financial instruments are terminated.

and Article 203 of the Financial Act prevent cherry-picking by the Insolvency Official of 'in the money' transactions[31].

The same above applies in compulsory administrative liquidation (*liquidazione coatta amministrativa*) governed by Articles 80 to 97 of the Banking Act and by certain provisions of the Insolvency Act[32], to which specific reference is made in the Banking Act, unless the Insolvency Official requests to continue the activity of the Debtor under Article 90 of the Banking Act. In this latter case, in fact, Article 76 of the Insolvency Act (as referred into Articles 83 of the Banking Act) does not apply.

In case of extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) Article 50 of Decree No. 270 provides that all contracts remain effective, unless the Commissioner decides to terminate the contract. The same principle applies in restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*).

Automatic termination does also not apply in composition with creditors (*concordato preventivo*). Similarly, the filing of a petition (*ricorso*) for the composition with creditors with reserve (*concordato con riserva*), the admission to said procedure and its confirmation by the court (*omologa*) do not trigger the automatic termination of contracts *ex lege*. The same applies with respect to debt restructuring agreements (*accordi di ristrutturazione dei debiti*).

No termination *ex lege* occurs in case of composition with creditors with a going concern (*concordato preventivo con continuità aziendale*). In fact, this is expressly set out under Article 186-*bis* of the Insolvency Act, which also provides that clauses to the contrary are void.

Finally, under Article 65 of Decree No. 180, the resolution proceedings (*risoluzione*) applicable to Financial Institutions does not trigger *per se* the termination of agreements (please refer to Part III.B.18).

(c) Commodity options (not having a financial nature)

Different remarks have to be made in the case of commodity options not having a financial nature 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 or 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

[31] 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 emission allowances are financial instruments under MiFID II, they do 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 nor 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.

[32] 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.

been exercised, the second agreement does not come into existence, since only one party's proposal has been put forward[33].

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[34]. 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[35].

<u>Conclusions</u>

In conclusion, if Italian Insolvency law applies, there may be different "*netting pools*", given the application of different regimes described 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.

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[36].

In addition, special rules apply in case of close-out netting provisions included in collaterals and agreements including collaterals under the meaning of Decree No. 170. Decree No. 170, in fact, provides that 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[37].

Having this said, the discretionary termination rights under the Master Agreements may, from time to time, be deemed both an express termination clause (*clausola risolutiva espressa*) or a right of withdrawal (*diritto di recesso*), as better specified in Part III.B.2.

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[33] 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 and Court of Naples, 6 November 2014.
[34] 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.*
[35] This is confirmed by Bonsignori-Lardo-Lazzara, *I contratti nelle procedure concorsuali,* Milan, 1992, 46 and 47.
[36] The same rule applies to forward financial contracts traded on exchanges under Article 76 of the Insolvency Act.
[37] With respect to the peculiarities under the resolution proceedings for Financial Institutions, please refer to Part III.B.18.

If the Close-Out Events are insolvency based and neither the 2017 Competition Act nor Decree No. 170 apply, 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 III.B.2).

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 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 providing termination of the agreement tied to the presentation of a petition for a declaration of insolvency may also be void.

In addition, under Article 76 of the Insolvency Law and Article 203 of the Financial Act Derivative Financial Instruments are automatically terminated as of the date on which bankruptcy (or compulsory administrative liquidation) is declared irrespective of the fact that the Parties have specified that Automatic Close-Out does not apply.

2. Assuming the parties have selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in Italy, whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of Italy

Similarly to what has been described in Part III.B.1 above, while with respect to EU Energy Contracts and contracts falling within the scope of Decree No. 170 the Early Termination (either automatic or voluntary) cannot be challenged by the Insolvency

Official[38] and save also for the special rules set out under Articles 76 of the Insolvency Law and Article 203 of the Financial Act, certain distinctions must be made in respect of the legal qualification of discretionary and automatic termination rights.

(a) Early Termination – Discretionary Termination Rights

Italian law provides for several ways to terminate an agreement in the event of a party's default.

The first way 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[39].

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 express termination clause to be effective under Article 1456 of the Civil Code[40]. 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[41].

[38] Please refer to Part III.A.4 on the possibility to challenge the commercial reasonableness of the calculation.
[39] Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 346. This has been confirmed by case precedents, 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 and Court of Cassation No. 29301 of 12 November 2019.
[40] Court of Cassation No. 20854 of 2 October 2014; Court of Cassation No. 6386 of 15 March 2018 and Court of Cassation No. 29301 of 12 November 2019 and Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 342.
[41] 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.

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 transactions which refer to continuous or periodic deliveries, this principle is likely to apply.

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 prior notice. Article 1373 states that, when an agreement provides for instantaneous performance, a party may withdraw before the parties start performance of 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 Master Agreements, the discretionary termination under § 5 of the MNA and § 2.2(a) of the CPMA could be construed as either a right of withdrawal from the agreement or an express termination clause.

On the other hand, discretionary termination under § 5 of the MNA and § 2.2(a) of the CPMA 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 absence of a requirement to request remedy of the breach.

Instead, both a right of withdrawal and express termination clause are remedies the features of which are consistent with the discretionary termination mechanism set forth by the MNA/CPMA.

However, as previously mentioned, the construction as an express termination clause is not consistent with the Close-Out Events triggering discretionary termination right that are based not on either Party's default but on a mere risk of default or insolvency, or a default in respect of the Underlying Agreements and not to the Master Agreements themselves. In fact, these kind of events fall outside the scope of default set out in Article 1456 of the Civil Code.

Therefore, in those latter cases, the discretionary termination amounts 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 § 6.3 of the MNA and Part II.C of the EFET/IECA Commodities Schedule to the CPMA. 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 also recognise an express termination clause with specific waiver to the notice of enforcement under the name of "automatic termination clause" ("*clausola risolutiva automatica*")[42]. 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 the case precedents, a communication expressing the willingness to terminate the agreement seems to be a requisite to enforce the termination right under Article 1456 of the Civil Code[43].

We note, in any event, that the construction as an "automatic termination clause" does not seem to be in accordance with Close-Out Events that are not based on either Party's default but on a mere risk of default or insolvency, or a default in respect of the Underlying Agreements and not to the Master Agreements themselves, as they fall outside the concept of default referred to in Article 1456 of the Civil Code.

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[42] Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 347.
[43] Court of Cassation No. 26508 of 17 December 2009; Court of Cassation No.18920 of 31 August 2009 and Court of Cassation No. 20854 of 2 October 2014.

(c) Early Termination – Insolvency-Based Material Reasons

Article 72, sixth paragraph, of the Insolvency Act 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, doing "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 merit case-law, 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

(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[44], the scope of the 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)[45].

However, according to a merit decision[46], 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*):

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[44] 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.*

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

[46] Tribunale di Messina, 2 July 2009.

(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[47]; 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[48].

On these grounds, a detailed analysis of the insolvency-based Close-Out Events under § 3.1(C)(III) of the MNA is necessary, in order to define which would and which would not be enforceable under Italian law. To this aim, the following Close-Out Events under § 3.1(C)(III) may be held to be insolvency-based: §§ 3.1(C)(III)(b), 3.1(C)(III)(c), 3.1(C)(III)(d) and 3.1(C)(III)(f) (please note that § 3.1(C)(III)(h) and § 3.1(C)(III)(i) are also relevant, but they operates by way of reference to the other Close-Out Events). For ease of explanation, we analyse each of these Close-Out Events out of order.

It is worth noting that, as anticipated, the remarks above do not apply to Derivative Financial Instruments, since with respect to those agreements the automatic termination applies *ex lege* in case of bankruptcy and compulsory administrative liquidation and with respect to UE Energy Contracts and collaterals under Decree No. 170 (see Part III.B.1).

§ 3.1(C)(III)(d)

If interpreted under an Italian insolvency law perspective, the first part of this Close-Out Event ("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

[47] Vattermoli, *Commento all'art. 72*, in *La riforma della legge fallimentare*, Torino, 2006, p. 424.
[48] Under Article 1344 of the Civil Code an agreement (or, indeed, a clause) is void when it is intended to avoid a mandatory rule.

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 Close-Out Event ("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 the 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 the 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 the termination, either automatic or discretionary, may be considered as a fraudulent clause, which, as such, is prohibited by Article 1344 of the Civil Code.

In addition, with respect to resolution proceedings under Decree No. 180, any kind of termination rights are prevented unless the Financial Institution is not in breach of its payment or delivery obligations.

<u>3.1(C)(III)(f)</u>

To the extent that this Close-Out Event refers to the commencement of Insolvency Proceedings providing for an insolvency declaration, this Close-Out Event is subject to Article 72, sixth paragraph of the Insolvency Act. In this respect, the same considerations with regard to § 3.1(C)(III)(d)apply.

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

<u>§ 3.1(C)(III)(c)</u>

This Close-Out Event, 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[49]. Therefore, to the extent that the termination is acted upon with the aim of bringing a claim for damages or restitution, it would not be enforceable in a composition with creditors.

On the other hand, according to some case-law, while under Article 168 of the Insolvency Act the non-defaulting party is prohibited from commencing or continuing any enforcement proceedings against a Debtor under composition with creditors, it is nevertheless entitled to pursue actions for the termination of the relevant agreement under a specific contractual provision[50].

Therefore, with regard to this matter, a definite response cannot be given, and we cannot exclude that the 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 merit case-law[51], such effect would also apply to the composition with creditors with reserve (*concordato con riserva*).

§ 3.1(C)(III)(b)

As to this insolvency-based Close-Out Event, we note that the termination 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 the termination exercised as a result of this Close-Out Event would be protecting the Terminating Party from a counterparty that is no longer reliable.

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 in our view us a significant argument in favour of the validity and enforceability of the termination with respect to this Close-Out Event.

[49] 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*.

[50] 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.*.

[51] 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.

However, it is possible that a court may interpret the same clause differently. In particular, there is a risk that the termination exercised as a result of this Close-Out Event 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 the termination right: as explained, an express termination clause can only refer to a party's actual default, not to a party's risk of default.

In conclusion, leaving aside the special rules applicable to EU Energy Contracts, Derivative Financial Instruments and collaterals:

Scenario 1

Considering only the Close-Out Events of the MNA that are insolvency-based, we are of the opinion that:

(i) if the termination rights are triggered by a) the declaration of insolvency/bankruptcy of the Debtor, or b) 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 particular features 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.

   In addition, according to a merit case precedent[52], the Early Termination rights should be also considered void and not enforceable in case the Debtor

[52]Court of Appeal of Milan with decision No. 580 of 4 February 2015.

enters into a composition with creditors with reserve (*concordato con riserva*).

With respect to the other mentioned Insolvency Proceedings, in absence of a specific rule providing for the termination or the compulsory continuation of the agreements, contractual termination rights should be valid and enforceable. Therefore, early termination rights might be void only in case of (i) composition with creditors with a going concern and (ii) compulsory administrative liquidation if the Insolvency Official elects to continue the activity of the company, since Article 186-*bis* of the Insolvency Act and Article 90 of the Banking Act, expressly set out that pending contracts continue to be effective;

(ii) if the 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 definitive case precedents, we are not in a position to exclude that a court may apply a different interpretation;

(iii) if the termination rights are triggered by a resolution proceedings (*risoluzione*), Decree No. 180 prevents termination and withdrawal rights unless the Financial Institution is in breach of its payment or delivery obligations.

Scenario 2

If a law other than the Italian one is the governing law of the Master Agreements, in the event that a Party is declared insolvent in Italy, the same opinion under Scenario 1 above would apply, given that the Insolvency Regulation would apply. In particular, Article 4, second paragraph, letter (e), of the Insolvency Regulation provides that the effects of Insolvency Proceedings on "current agreements to which the Debtor is party" are subject to the law of the Member State where the proceedings are opened (i.e. Italy).

3. Whether the provisions of each model Master Agreement provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of Italy

(a) Italian law aspects

Offsetting of all positive and negative Settlement Amounts is provided for under § 8 of the MNA and 4 of the CPMA. According to this provision, if on the termination date both Parties owe one or more Settlement Amounts shall be aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts shall be owed on the termination date by the Party with the larger aggregate obligation.

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 compensation for damages) are converted into monetary debts.

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

In addition, with particular regard to an insolvency scenario, under Article 56 of the Insolvency Act, the creditor of 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.

In particular, Article 56 of the Insolvency Act provides that the set-off right is applicable only 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.

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

In addition, close out netting provisions of EU Energy Contracts and agreements falling in the scope of application of Decree No. 170 (i.e. collateral arrangements or agreements including collaterals entered into with Financial Institutions or other specific entities) remain effective and enforceable despite the insolvency of a Party (see Part III.A.4).

Having this said, it is worth considering the following two remarks.

First, the validity and enforceability of the clauses providing for the Final Net Settlement Amount are mainly related to the possibility to terminate all the Close-Out Agreements and claim for damages (in this respect, please refer to Part III.B.1 above). Therefore, in case of insolvency, it would be possible to set-off all positive and negative Settlement Amounts only if they were due (even if not payable), for instance because the relevant Close-Out Event occurred before the insolvency or because the Settlement Amounts refer to deliveries already occurred.

Second, given that the Final Net Settlement Amount is the difference, if positive, between the Settlement Amounts owed by the Parties, it would be relevant to assess how the Settlement Amounts are calculated under the Underlying Agreements. In fact, if the Settlement Amounts were determined on the basis of a liquidated damages clause (*clausola penale*) providing for compensation of costs and losses, under Article 1384 of the Civil Code, a judge could reduce the amount *ex officio* when, having regard to the affected party's interest in the fulfilment of the obligations, the amount was manifestly excessive (*manifestamente eccessiva*). In addition, liquidated damages clauses are not valid to the extent that they limit the liability of a party for gross negligence or wilful misconduct under Article 1229 of the Civil Code. Finally, also with respect to close out netting provisions of EU Energy Contracts and agreements falling in the scope of application of Decree No. 170, the reasonableness of the calculation method may be challenged but only within the limits described in Part III.A.4.

(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 Insolvency Regulation thus ensures the enforceability of close-out netting in all proceedings to which it applies. Therefore, to the extent that the applicable law of the proceedings is the Italian one, arguments under par. (a) above shall apply.

(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, 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 par. (a) would apply.

In this regard, please note that a main principle of the Italian insolvency laws is that the Insolvency Official is a third party in connection with agreements entered into between two parties, one of them later declared insolvent. Based on such principle, case precedents stated that Article 2704 of the Italian Civil Code applies in order to determine the effect of an agreement vis-à-vis an Insolvency Official. This Article provides that the date of a private document without a certified signature is neither certain nor enforceable vis-à-vis third parties (i.e. an Insolvency Official), if not starting from the day when the document is registered, or from the decease or physical impediment of its signatory/signatories, or from the day when the contents thereof are reproduced in a notarial instrument, or from the day when another equally certain fact is established that determines equivalent certainty as to the prior formation of the document (the so called "*data certa*" principle). Therefore, in the case of insolvency proceedings, the Insolvency Official shall be entitled to challenge the choice of law contained in the Master Agreements to the extent that they are without a *data certa* (Part III.G). This could lead to avoid the application of the law chosen by the parties.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the Master Agreements, leaving aside the enforceability of early termination based on insolvency based Close-Out Event (see Part III.B.1), offsetting provisions would be enforceable. However, in insolvency scenarios, the validity and enforceability of close-out netting provisions are mainly related to the limitations provided under the Insolvency Act on the possibility (i) to terminate the Underlying Agreements and (ii) to claim for damages (including liquidated damages) in case of insolvency.

The limitations above do not apply to (i) Derivative Financial Instruments, which, in case of bankruptcy and compulsory administrative liquidation, are automatically terminated and (ii) close-out netting provisions of agreements falling in the scope of application of Decree No. 170 and the 2017 Competition Act, which remain effective and enforceable despite the insolvency of a Party.

In addition, because the Final Net Settlement Amount is the difference, if positive, between the Settlement Amounts owed by the Parties, it would be necessary to assess how those Settlement Amounts are calculated under the Underlying Agreements. In fact, if the Settlement Amount was considered a liquidated damages clause (*clausola penale*), a Court could reduce liquidated damages *ex officio* when, having regard to the affected party's interest in the fulfilment of the obligations, the amount was manifestly excessive (*manifestamente eccessiva*). Moreover, the reasonableness of the calculation may be challenged within the limits described under Part III.A.4.

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

If a law other than the Italian one is the governing law of the Master Agreements, in the event that an Italian Party is an Italian Commercial Company subject to Insolvency Proceedings, the same opinion expressed under Scenario 1 above will apply.

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 the Master Agreements would be assessed under the governing law of the Master Agreements.

4. Whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if insolvency procedures are later opened against a party that is organized under the laws of Italy

With respect to the possible challenge of the reasonableness of the calculation of the Settlements Amount in the context of EU Energy Contracts and agreements falling within the scope of Decree No. 170, please refer to Part III.A.4 and Part III.B.3. In addition, we set out below the following general remarks.

(a) Italian Law Aspects

(i) Claw-back action under Insolvency Proceedings (*revocatoria fallimentare*)

After the insolvency declaration (*dichiarazione di insolvenza*), the following transactions may be subject to bankruptcy claw back actions (*revocatoria fallimentare*) to be commenced by the Insolvency Official:

(i) acts for 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);

(ii) 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, paragraph 1, number 2, of the Insolvency Act);

(iii) 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, paragraph 1, number 3, of the Insolvency Act);

(iv) 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, paragraph 1, number 3, of the Insolvency Act);

(v) 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 , 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, paragraph 1, number 4, of the Insolvency Act); and

(vi) 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, paragraph 2, of the Insolvency Act).

Claw-back actions (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 precedents, 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 .

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[53]. In fact, when the counterparty is a Financial Institution, a stricter test applies since, according to court precedents, 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:

- 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;

[53] See, for instance, Court of Cassation No. 1545 of 11 February 1995; Court of Cassation No. 10953 of 28 November 2020 and Court of Reggio Calabria No. 759 of 24 August 2020.

• 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; 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, paragraph 3, 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. However, according to certain court precedents 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 a single transaction, when the subject matter of that transaction 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 if the relevant agreement is a market standard contractual instrument (such as EFET General Agreement) and the Parties do not modify provisions regarding payments set forth under the standard agreement.

According to the second interpretation, the performance of the single transaction which constitute a core activity of a party in its ordinary course of business would be eligible for the claw-back exemption regardless of terms of payment.

In addition, Article 67, paragraph 2, of the Insolvency Act, which applies to all Insolvency Proceedings providing for an insolvency declaration (*dichiarazione di insolvenza*)[54], sets out that payments and acts for consideration (*atti a titolo oneroso*) and those creating pre-emption rights (*diritto di prelazione*) occurred in the six months before the insolvency declaration may be clawed back by the Insolvency Official, within three years from the declaration provided that the Insolvency Official proves that the other party was aware of the Debtor's insolvency at the time the relevant payment or act for consideration was effected (constructive knowledge) [55].

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[54] 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*),

[55] Save for the exceptions under Article 67, paragraph 3, of the Insolvency Act.

With particular regard to the insolvency of a Financial Institution declared in the context of a resolution proceedings (*risoluzione*), the terms of the claw-back action under Article 67, paragraph 1, of the Insolvency Act start from the declaration of insolvency by the Bank of Italy. On the contrary, the claw-back action under Article 67, paragraph 2, of the Insolvency Act does not apply. In the context of a compulsory liquidation (*liquidazione coatta amministrativa*) of a Financial Institution Article 67 of the Insolvency Act does not apply with the exception of agreements entered into by the insolvent Financial Institution and other companies of its group.

(A) Risk of claw-back for early termination

With regard 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 Close-Out Event affecting the Debtor enforced before the insolvency declaration.

In relation to the first case, it is worth noting that certain case precedents 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[56].

This applies to discretionary early termination rights classified as either an express termination clause (*clausola risolutiva espressa*) under Article 1456 of the Civil Code[57] or as a right of withdrawal (*diritto di recesso*) under Article 1373 of the Civil Code[58].

In relation to the enforceability of early termination due to insolvency reasons, please refer to Part III.B.1.

Finally, in relation to early termination due to Close-Out Event affecting the Debtor 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[59]. However, if with the termination the counterparty aims at obtaining the restitution of goods or payments or damages compensation, the claim must be brought within the Insolvency Proceedings.

(B) Risk of claw-back of close-out netting arrangements

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[56] 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.

[57] 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.

[58] Court of Catania, 28 January 1988, in *Il diritto fallimentare*, 1989, II, 586.

[59] Provided that if the judicial demand for termination, where necessary, is registered with the public registry.

Provided that the Master Agreement has been entered into and that the relevant contractual right has been defined in its content and its limits at least six months prior to the insolvency declaration (*dichiarazione di insolvenza*), there would be no risk of claw-back of close-out netting. This is because the case precedents hold that if an agreement providing for contractual rights of set-off has been entered into prior to the six-month claw-back period, provided that the relevant contractual right is "certain" (ie clear in its content and limits), then it is of no legal significance that a set-off occurred during that period[60].

(C) Risk of claw-back for payment of the Final Net Settlement 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 the Master Agreements if paid in the six months prior to the insolvency declaration (*dichiarazione di insolvenza*).

With regard to the enforceability of the Settlement Amount to be paid as a consequence of an insolvency-related event, please refer to Part III.B.3.

(ii) 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

[60] Court of Appeal of Salerno, No. 147 of 31 January 2018 and Court of Court of Cassation, No. 10869 of 8 June 2020..

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 Master Agreements were governed by a law other than Italian law.

However, a rule favourable to foreign governing laws 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 party proves that the governing law of the Master Agreements 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 Master Agreements, the detrimental act cannot be clawed back and also that there are no other means by which the act can be avoided[61]. This applies if the Debtor is an Italian branch of an EU company, provided that the Master Agreements are governed by non-Italian law.

In this regard, please refer to our remarks on the *data certa* and choice of law under Part III.B.3.

(c) Winding-Up Directive

Article 95-*bis* of the Banking Act, 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*".

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 Master Agreements 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 Master Agreements, 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 Master Agreements are governed by non-Italian law.

The issue concerning the claw-back of the netting agreements (such as under the Master Agreements) 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 to 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 Final Net Settlement Amount, as set out under the Master Agreements, may be clawed back only under the governing

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

law of the Master Agreements. Article 95-*ter*, second paragraph, of the Banking Act, however, would not apply to the issue concerning the claw-back of the early termination itself, which cannot be considered part of a netting agreement and, therefore, would remain subject to Article 95-*ter*, fourth paragraph, of the Banking Act.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the Master Agreements, we are of the opinion that early termination, close-out netting and payment of the Final Net Settlement Amount may not be clawed back by an Insolvency Official provided that:

(i) the above acts occurred before the above-mentioned claw-back periods[62]; or

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

Scenario 2

If a law other than the Italian one is the governing law of the Master Agreements, and the Debtor is an Italian Commercial Company, by virtue of Article 4, second paragraph, letter (m), of the Insolvency Regulation, the same opinion under Scenario 1 above would apply, provided that under Article 13 of the Insolvency Regulation the Terminating Party may avoid application of Italian law by proving that the governing law of the Master Agreements neither allow a claw-back action nor any other means by which the act can be avoided (in the latter case, the governing law of the Master Agreements will apply)[63].

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 Final Net Settlement Amount, Article 95-*ter*, second paragraph, of the Banking Act would apply. Under this rule, the close-out netting and the payment of the Final Net Settlement Amount may be clawed back only under the governing law of the Master Agreements.

5. "Cross Category Netting" – since the model Master Agreements contemplates the inclusion of various types of master agreements and other trading documentation covering both physical and financial trading, whether there are any applicable issues that need to be considered as to the enforceability of netting between physical and financial transactions or various categories of physical products

[62] 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 III.B.4(ii) are met.

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

As examined above, with respect to early termination in case of Insolvency Proceedings, the Insolvency Act and other applicable laws establish heterogeneous rules to different kinds of contracts.

In fact, while, as a general rule, early termination rights may be limited or become unenforceable if triggered by insolvency based reasons because they may conflict with Italian mandatory provisions in(please refer to Part III.B.1) and the principle under which it is not possible to claim against the bankruptcy estate the costs – by way of damages or otherwise –incurred as a result of the insolvency, special rules apply in case of Derivative Financial Instruments and EU Energy Contracts (and Collaterals).

This different treatment may therefore cause a partial unenforceability of the early termination rights and global close-out netting rights provided for in the Master Agreements in case of insolvency. In this respect, one may argue that the limitations applicable under the Insolvency Act would not apply if those transactions were not terminated because of the insolvency of a Party but (under a condition subsequent – *condizione risolutiva*) as a consequence of the termination of the Derivative Financial Instruments or the EU Energy Contracts, which all together constitute a "single agreement" (please refer to Part III.B.2(b) for the meaning of *condizione risolutiva*).

With respect to the concept of "single agreement" (*collegamento negoziale*), 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, 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[64].

In this respect a partial Close-Out, in the context of the Master Agreements, the termination of some but not all Underlying Agreements and some and not all transactions could be considered in contrast with the concept of the "single agreement". In fact, the election by the Terminating Party/Close-Out Party, on case by case, of the Underlying Agreements and the transactions subject to Close-Out could lead to believe that, despite the relevant clause in the Master Agreements, a relationship between all Underlying Agreements and all transactions do not exist and such election is made only on the basis of the interest of the Terminating Party/Close-Out Party.

On the contrary, the global Close-Out could be used as an argument to hold that, despite the prohibition under Article 72, paragraph 6, of the Insolvency Act, if that transaction forms a "single agreement" with a Derivative Financial Instrument terminated by operation of law as a consequence of the bankruptcy of a Party or with a EU Energy Contract, in relation to which the exception of the 2017 Competition Act applies.

However, in absence of authoritative case precedents and scholarship in this respect, we point out that there is a risk that this interpretation would not be upheld by a competent court. In particular, in this circumstances the aim of Article 72, paragraph 6, of the Insolvency Act would be jeopardised as the prohibition set out therein could be easily

[64] 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.

circumvented by including in a same Master Agreement also a EU Energy Contract or a Derivative Financial Instrument.

<u>In conclusion:</u>

Scenario 1

If Italian law is the governing law of the Master Agreements, one may argue that the limitations applicable under the Insolvency Act would not apply if those transactions were not terminated because of the insolvency of a Party but (under a condition subsequent – *condizione risolutiva*) as a consequence of the termination of the Derivative Financial Instruments or the EU Energy Contracts, which all together constitute a "single agreement". However, we point out that this construction could be not upheld by a competent court, given that in this case the aim of Article 72, paragraph 6, of the Insolvency Act would be jeopardised and the prohibition set out therein would be circumvented.

Scenario 2

If a law other than the Italian one is the governing law of the Master Agreements and an Italian Party is a Debtor, the construction of the termination as a condition subsequent and the existence of a single agreement relationship is a matter of interpretation of the agreement, which would be assessed according to the governing law of the agreement[65].

6. Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of Italy in which the insolvent party is organized, whether payment of the Final Net Settlement Amount in that currency would be enforceable under the laws of your jurisdiction.

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 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[66].

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

[65] Please note that, in Italy, the Rome Convention is applicable to all contractual obligations (including obligations of parties resident in countries that are not party to the Rome Convention), by virtue of Article 57 of Law No. 218 of 31 May 1995.
[66] In the absence of specific case precedents, 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.

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 Master Agreements.

Therefore, the Final Net Settlement Amount owed under the Master Agreements, by a Debtor subject to Insolvency Proceedings in Italy must be 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[67].

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.

7. Whether the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in your jurisdiction

With respect to the enforceability of the provisions of the Master Agreements, please refer to our remarks under Part III.A.3 and Part III.B.1 above.

8. Whether the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be upheld in your jurisdiction, and the consequences if it were not

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

Since Rome I Regulation is applicable in Italy pursuant to Article 57 of Law No. 218, as set out under Article 3 of the Rome Convention, the Parties are free to choose the law applicable to their relevant relationships. Accordingly, with the limited exceptions listed under Part III.A.8, Italian Courts must uphold the governing laws chosen by the Parties.

9. Whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "EU Insolvency Regulation") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in Italy would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of your jurisdiction (please see paragraph III.B.18.c below where this topic is to be discussed at greater length). In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, whether the close-out netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation

With respect to the Insolvency Regulation, please refer to Part III.B.2, III.B.3(b) and Part III.B.4.

10. General discussion of whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of the model Master Agreement

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 III.B.1). 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 III.B.18), in general, 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 express 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 preventive 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. Also, the Debtor cannot pay any creditor for sums due before the filing of the relevant petition, unless so authorized 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 termination rights or on the calculation and payment of a 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 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.

Please also refer to Part III.B.18 for the peculiarities and various scenarios of extraordinary administration (*amministrazione straordinaria*) and resolution (*risoluzione*) proceedings involving Financial Institutions.

11. Advisability in Italy of using each model Master Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master agreements or deal documentation) as opposed to allowing such underlying default provisions to operate for their respective categories of trades even if to do so might permit close-out and set-off of some trades governed by the relevant Master Agreement, but not others

We do not have specific recommendations on the application of uniform default events since the advisability of ensuring uniformity to the Underlying Agreements in that respect, through the use of the Master Agreements, depends on the nature and kind of obligations under each Underlying Agreement.

Moreover, a uniformity of events default would not be useful in case of an Insolvency Proceedings. Indeed, as described above, default events related to insolvency may not be enforceable depending on the kind of transaction entered into. Therefore, regardless of the uniform contractual regime agreed between the parties to the different types and categories of trades, the mandatory provisions of the insolvency laws would apply in case of an Italian Debtor.

CPMA CSA / MNA CSA

12. Whether an entity duly organized or incorporated under the laws of Italy (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. If such a "suspect period" *exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time period(s) surrounding the insolvency.*

We assume that this question applies only to the Eligible Credit Support in the form of Cash collateral given that the Letter of Credit involves the payment obligation of a third party guarantor. A Cash payment may be clawed back if the Cash was transferred by the Debtor (i.e. the Transferor) during the applicable claw-back period before the bankruptcy declaration of the Debtor[68] and the other relevant claw back conditions apply[69] (in this respect please see Part III.B.4).

With regard to the question whether the substitution of Eligible Credit Support by a counterparty during the suspect period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing, as mentioned in Part III.A.7 above, if the Cash 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).

If Decree No. 170 would not apply, the substitution of the Cash collateral during the suspect period risks to jeopardise the Eligible Credit Support as the relevant payment may be clawed back if the Transferee is unable to prove that, when it received the relevant transfer, it was not aware of the Debtor's insolvency.

With regard to claw-back actions, they do not apply in relation to security interests. The exemption from claw-back actions applies when the security is granted as a consequence of a plan for the restructuring of the Debtor[70].

13. Whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.

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[68] Since, according to the Italian provisions on the formation of pledges, the cash collateral is formed with the delivery of the pledged money, with reference to the claw-back period each daily/weekly transfer under the EFET Cross Product Credit Support Annex should be taken into consideration. Moreover, even if effected before the claw-back periods, the transfer could be clawed back with an ordinary claw-back action if the requirements under Part III.B.4 are met. Special rules apply in case of collaterals granted under Decree No. 170, since (i) the substitution of collateral is considered made on the date of the original collateral; (ii) the transfer of additional collateral pursuant to the mark-to-market provisions is considered as provided on the date of the guaranteed obligation or on the date of the original collateral, if the transfer of such additional collateral is due to reasons different from mark to market.

[69] Pursuant to Article 67, paragraph 1, of the Insolvency Act, the Transferee bears the burden of proof that it did not have knowledge about the Debtor's insolvency. In this respect, for instance, it could be useful that, before receiving the cash collateral, the Transferee is provided with a good-standing certificate of the Transferor. On the contrary, in case of transfer due to a Material Adverse Change it is likely that such transfer would be subject to claw-back action (i.e. because it may be argued that it has been in contemplation of an insolvency related event).

[70] The same exemption applies to securities granted under a debt restructuring agreement or a composition with creditors. No other exemptions apply with specific reference to securities.

Assuming that this question only regards the Eligible Credit Support in the form of Cash, if the Cash collateral is granted under an arrangement with a Financial Institution or another entity under Decree No. 170, such Decree expressly sets out that transfer of additional collateral pursuant to the mark-to-market provisions is considered as if it was made on the date of the guaranteed obligation or on the date of the original collateral, if the transfer of such additional collateral is due to reasons different from mark to market. Accordingly, the transfer would not be subject to claw back.

If Decree No. 170 would not apply, the transfer of additional Cash collateral during the suspect period may be clawed back if the Transferee is unable to prove that, when it received the relevant transfer, it was not aware of the Debtor's insolvency.

14. A general discussion of whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA.

In this respect, please refer to Part III.A.5 and Part III.B.10.

15. An analysis of Italian law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in Italy, with the provider of the Eligible Credit Support being an entity based outside Italy. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or re-characterize the nature of the providing party's rights to that Eligible Credit Support.

A. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party?

B. Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?

We assume that this question refers only to the Cash collaterals. As explained under Part III.A.5, Cash collaterals may have different characterisations. Assuming that title vests in the recipient because of an outright transfer of Eligible Credit Support, in case of the recipient's insolvency, the provider will need to claim its rights in the context of the Insolvency Proceedings under the *pari passu* principle.

On the contrary, if the ownership of the cash Collateral is not transferred to the recipient, the providing party may bring an *in rem* action (*azione di rivendicazione*) claiming the title over the Cash collateral. In this respect, it would be particularly important to ensure a segregation of the Cash collateral so that there is no confusion with the assets of the recipient party and the providing party can prove its ownership.

16. An analysis of the rights and obligations of an insolvent party organized in your jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?

We assume that this question refers only to the Cash collaterals. Please refer to Part III.A.5, with respect to the different possible characterisations of Cash collaterals.

Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA

17. Whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under Italy

Please refer to Part III.B.10 and, with particular regard to Eligible Credit Support which fall within the scope of collateral agreements under Decree No. 170, please refer to Part III.A.4.

18. General discussion of Italian insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties

We provide below some general considerations and relevant terminology of Insolvency Proceedings. The general principles on insolvency claw back are outlined in Part III.B.4 above. With respect to the concepts of close-out and set-off, please refer to Part III.A.4 and Part III.B.1 and Part III.B.3.

As a general principle, public administrations (*pubblica amministrazione*) are not subject to bankruptcy[71]. 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.

For Commercial Companies, the purpose of bankruptcy proceedings (*fallimento*) is the liquidation of the insolvent Commercial Company, while the composition with creditors (*concordato preventivo*), debt restructuring agreements (*accordi di ristrutturazione dei debiti*), restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione industriale delle grandi imprese in stato di insolvenza*), composition with creditors with reserve (*concordato con riserva*) and composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) 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*) may be used to achieve either purpose.

Certain Insolvency Proceedings are conducted solely by the competent court, whilst others also require intervention of the administrative authority.

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[71] 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 2012); More 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).

Financial Institutions are subject to specific Insolvency Proceedings. In particular, they can be subject to extraordinary administration (*amministrazione straordinaria*), which 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 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 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.

Financial Institutions may also be subject to compulsory administrative liquidation (*liquidazione coatta amministrativa*) governed by Articles 80 to 95 of the Banking Act[72] 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 Ministry of Economy and Finance, on proposal of 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.

From the time that the liquidation takes effect:

(i) no actions against the Financial Institution or its assets may be commenced or continued;

(ii) no action may be taken to perfect any security over the Debtor's assets;

(iii) all payments due by the Financial Institution are suspended; and

(iv) the same effects as under bankruptcy proceedings (*fallimento*) apply to outstanding agreements (*rapporti giuridici preesistenti*) (please refer to Part III.B.1).

Finally, Financial Institution may be subject to resolution proceedings (*risoluzione*), introduced by Decree No. 180.

Pursuant to Article 17 of Decree No. 180, the resolution proceedings can be initiated by the Bank of Italy, with the approval of the Ministry of Economy and Finance, if the following conditions are met:

[72] 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.

(i) the Financial Institution is insolvent or risks to be insolvent;

(ii) alternative private measures (e.g. increase in capital) would not be sufficient to avoid the insolvency of the Financial Institution in due time;

(iii) the resolution proceedings 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 proceedings is the *Unità di Risoluzionee Gestione delle Crisi* of the Bank of Italy.

Under Article 66 of Decree No. 180, the Bank of Italy may order a suspension of payment and delivery obligations of the Financial Institution subject to resolution from the day on which the suspension order is published until midnight of the following business day. The suspension also applies to the counterparty's obligations. Moreover, according to Article 65 of Decree No. 180, the resolution proceedings, even in the context of a declaration of insolvency, does not trigger *per se* the enforcement of collaterals under Decree No. 170 as long as the Financial Institution is not in breach of its payment or delivery obligations under the relevant agreement. Similarly, unless the Financial Institution breaches its payment or delivery obligations under the relevant agreement, can neither terminate, suspend or amend the agreement, exercise its set-off or close-out rights nor take possession of the Financial Institution's assets and it must continue to perform its counter-obligations.

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. Article 95-*bis* of the Banking Act sets out 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 provision is that any applicable proceedings must be automatically recognised in Italy.

and:

a. how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;

b. applicable law which might have an impact on the respective priorities assigned to such rights by a court in Italy; and

c. specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the *insolvent party. In particular, whether or not a bankruptcy court in your jurisdiction would apply the EU Insolvency Regulation to close-out netting and/or set-off such that it would apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;*

d. whether, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement when combined with the relevant CSA would nevertheless become valid by operation of the EU Insolvency Regulation

In respect of questions (a), (b), (c) and (d), please refer to Part III.B.2, III.B.3(b) and Part III.B.4.

e. whether the laws of your jurisdiction consider set-off and close-out netting as separate or similar rights

In this respect, please refer to Part III.A.4.

C. Cross Affiliate Netting and Set-off

NOT APPLICABLE

D. Multibranch Parties

1. Italian Multibranch Party

1. Whether there would be any change in our conclusions expressed in paragraph III.B above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption in part II.9 above);

Our conclusions in Part III.B would not be changed given the assumption under Part II.9 above if it is opened a secondary proceeding in Italy under the EU Insolvency Regulation.

Foreign Multibranch Party

2. Whether separate proceedings could be brought in Italy with respect to assets and liabilities of the overseas branch located in Italy of a counterparty organized or incorporated outside Italy upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. How the relevant authorities in Italy would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include whether or not local creditors of the branch would be able to initiate separate proceedings in Italy even if the relevant authorities did not do so

and

3. In the event that proceedings are brought in your jurisdiction with respect to the assets and liabilities of the branch located in Italy, whether or not the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in your jurisdiction would include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms (you may assume that the close-out netting provisions under the relevant Underlying Agreements or underlying transactions would be enforceable in the proceedings against the counterparty brought outside Italy).

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

Under the Insolvency Regulation, Article 3, 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.

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 EU 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 (Article 35 of the Insolvency Regulation).

In light of the remarks 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 Master Agreements, 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 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 transactions 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 transaction or Netted Agreement or Principal Agreement and seek the payment of the positive mark-to-market, if any, from the relevant counterparty.

Pursuant to Article 3, second paragraph, of the Insolvency Regulation, if Party F has no branches located in Italy, Italian Courts will have no jurisdiction to open secondary proceedings. However, under Article 11 of the Insolvency Regulation, the Court of the main proceedings will apply Italian Law to contracts conferring the right to acquire or make use of immoveable property located in Italy.

E. CSA Specific Permutations

1. *In relation to each of the questions in paragraph III.B above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in your jurisdiction. Please consider your answer to each question and indicate how your answer would be different, if at all, assuming instead that*:

(a) The providing party is a branch located in your jurisdiction of a bank organised outside your jurisdiction;

In this respect, please refer to Part III.A.4 and Part III.B.18.

(b) *The providing party is neither incorporated nor otherwise organised in nor a branch located in your jurisdiction, but has assets in your jurisdiction;*

Under Article 11 of the Insolvency Regulation, the Court of the main proceedings will apply Italian Law to contracts conferring the right to acquire or make use of immoveable property located in Italy.

(c) *None of the above applies to the providing party (that is, it has no connection with your jurisdiction), but the margin was issued by the government of your jurisdiction or comprises cash in the lawful currency of your jurisdiction.*

An *ad hoc* analysis would be needed in order to understand the nature of the specific entity providing the margin and the particular context since special rules and statutes apply to the Italian State and governmental authorities.

The currency of the margin is not relevant, under Italian law, to determine the governing law of the insolvency proceedings, therefore our opinions under Part III.B are given irrespective of the currency (please also refer to Part III.B.6, which refers to debts in foreign currency).

F. General Enforceability

1. Are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA legal, valid and binding under the laws of Italy

Without prejudice to all Parts of this 2020 Opinion Letter, including, but not limited to, the assumptions listed in Part II and all our remarks in a insolvency scenario, we are of the opinion that the MNA/CPMA and the CSAs are legal, valid and binding under Italian law.

2. Are there any applicable limitations on the courts in your country with regard to upholding a choice of local law and submission to the jurisdiction of local courts?

Without prejudice to all Parts of this 2020 Opinion Letter, including, but not limited to all our assumptions, we are of the opinion that the Master Agreements and the EFET Cross Product Credit Support Annex are legal, valid and binding under Italian law, even if a law other than the Italian one is the governing law of the Master Agreements, in accordance with both the Rome Convention and Law No. 218.

In addition, in accordance with Article 4 of Law No. 218 and, with respect to EU Member States, Council Regulation (EC) No. 44/2001 of 22 December 2000, 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:

(a) 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

(b) the dispute relates to rights which a party is entitled to dispose of (*diritti disponibili*)[73].

G. Other Provisions

1. *Are there any other provisions of either Master Agreement or either CSA that, given a choice of your local law, either*:

(a) need to be revised in order to be enforceable in your jurisdiction; or

(b) the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)?

(a) Necessary Amendments to the Master Agreements Given a Choice of Italian Law

If the Parties wish to choose Italian law as the as the governing law of the Master Agreements, 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 MNA:

"Pursuant to Articles 1341 and 1342 of the Italian Civil Code each Party acknowledges that it has examined the content of the Master Netting Agreement and specifically approves in writing the following clauses: § 4.1 **(*Termination and Close-Out of the Netted Agreement*)**; § 6.1 **(*Automatic Termination and Global Close-Out*)**; § 6.2 **(*Optional Uniform Election of Automatic Termination and Close-Out*)**; § 6.3 **(*Automatic Termination Mechanics*)**; § 10.1(B) **(*Suspension*)**; 11.9 **(*Disputed Amounts*)**; § 11.4 **(*Selection of Arbitration and or Jurisdiction*)**; § 11.5 (***Limitations on Assignment and Transfer***).";

and the following special clause for approval of standard contractual conditions should be added after the signatures for the execution of the CPMA:

"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: Section 2.1 **(*Right to Close-Out*)**; Section 6 **(*Governing Law and Jurisdiction; Waivers*)**; Section 7 (***Transfer / Assignment***); Section 10.4 of the CMPA and EFET/IECA Commodities Schedule (***Suspension***) ";

[73] 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, would be upheld by Italian courts, 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.

(b) Recommendations for the Improvement in Efficacy of Certain Provisions of the Master Agreements and the CSA when the Parties Have Chosen Italian Law as Governing Law

(i) Interest

In light of the applicable regulations on usury interest, it should be clarified that the interest rate shall 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.

In relation to the CSA please refer to Part III.A.5 and Part III.A.10.

(ii) 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 Master Agreements to an arbitration chamber based in Italy[74].

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.

On the contrary, with specific reference to agreements entered into between companies 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) Certain Date (*Data certa*)

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.).

[74] Possible models of arbitration clause are available on the website www.camera-arbitrale.com.

Therefore, a verbal agreement is sufficient for the formation of a legally binding confirmation[75].

Special rules apply with respect to financial instruments (*strumento finanziario*). Under Article 23 of the Financial Act all contracts related to investment services must be in writing and, therefore, duly signed; otherwise they are void[76].

However, according to case precedents[77], 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 single transactions, which are executed on the basis of a master agreement[78].

In any event, with respect to all kind of contracts, only with a certain date of law (*data certa*) the agreements 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.

In this respect, a distinction must be made depending on specific formalities provided by the law for the valid execution of the agreement.

(A) If written form is required by the law, the relevant document must have a certain date of law (*data certa*) prior to the declaration of insolvency[79].

Under Italian law, the certain date of law is granted when the agreement is executed by a public deed (*atto pubblico*[80]) (see Article 2699 of the Civil Code). Furthermore, under Article 2704 of the Civil Code, in the event that the agreement is executed by private deed, the certain date of law is granted:

(i) if the signature has been notarised by a notary public or another authorised public officer (*scrittura privata autenticata*[81]); or

(ii) the deed is registered with the tax register; or

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[75] In this 2018 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).
[76] Exceptions may be granted by Consob with respect to certain contracts.
[77] Court of Cassation, no. 3950 of 29 February 2016 and Court of Cassation, no. 19759 of 9 August 2017.
[78] 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.
[79] The fundamental decision on this point is Court of Cassation No 8879 of 28 August 2000.
[80] Under Articles 2699 and 2700 of the Civil Code, a public deed (*atto pubblico*) is a document drafted by a notary public or by another authorised public officer, who certifies, *inter alia*, the declarations made by the parties, their identity, the date and the place in which the document has been made.
[81] Under Article 2703 of the Civil Code, the signature to a private deed is notarised when a notary public or other authorised public officer certifies that the signature has been affixed before him.

(iii) the content of the private deed is reproduced in a public deed; or

(iv) other circumstances occur with equal certainty that the deed has been previously drawn up.

The registration of the deed referred to under (ii) above is required in connection with the payment of the registration tax, which is not due for transactions subject to VAT, whilst events referred to under (iii) and (iv) above may occur only incidentally and *ex post*.

In practice, only the execution of an agreement by public deed or by private deed with notarised signature will always grant *ex ante* a certain date of law.

(B) If written form is not required by the law, the execution of the agreement on a date prior to the declaration of insolvency may also be demonstrated by witness evidence[82].

However:

(i) this opinion is not shared by several Courts' precedents, which state that, when a private deed has been executed by the parties, the certain date of law cannot be proved by witness evidence[83;]

(ii) Italian law provides for strict limitations on the admission of witness evidence with regard to agreements[84];

(iii) in the context of Insolvency Proceedings, the hearing of the examination and admission of the claims to the creditors' list is conducted on a summary basis, with very limited opportunity for witness evidences to be admitted.

Therefore, even when the written form is not required by the law for the validity of an agreement, proof that the agreement has been executed before the declaration of insolvency is certain when the agreement has been executed by public deed or by private deed with notarised signature. However, other circumstances could grant the agreement a certain date of law (*data certa*), such as providing the document with a postmark or in case of electronic document with a timestamp.

IV. Recent & Pending Developments

With Legislative Decree No. 14 of 12 January 2019 the so-called "Code of Insolvency" was adopted with the aim of reorganising the various Insolvency Proceedings laws in a single piece of legislation. Law-Decree No. 23 of 8 April 2020 postponed the entry into force of the Code of Insolvency to 1 September 2021.

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[82] See Guglielmucci, *Lezioni di diritto fallimentare*, Turin, 2000, 224-225, and Iorio, *Le crisi di impresa. Il fallimento*, Milan, 1999, p. 618.

[83] See, for example, Court of Parma 27 December 2006 (ordinance rendered in the Parmalat case), Court of Cassation No 3742 of 4 June 1986; Court of Cassation No 4235 of 12 December 1974 and Court of Cassation No 931 of 9 May 1962.

[84] Under Article 2721 of the Civil Code, witnesses concerning agreements for a value greater than Euro 2.58 may be admitted only on Courts' discretion, having regard to the quality of the parties, of the nature of the agreement and other circumstances.

*   *   *

Yours faithfully,

TABLE OF CONTENT

	Agreement, but not others	
12.	*Whether an entity duly organized or incorporated under the laws of Italy (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. If such a "suspect period" exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time period(s) surrounding the insolvency*	54
13.	*Whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason*	55
14.	*A general discussion of whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA*	56
15.	*An analysis of Italian law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in Italy, with the provider of the Eligible Credit Support being an entity based outside Italy. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or re-characterize the nature of the providing party's rights to that Eligible Credit Support* *A. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party?* *B. Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?*	56
16.	*An analysis of the rights and obligations of an insolvent party organized in your jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?*	56
17.	*Whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under Italy*	57
18.	*General discussion of Italian insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties*	57
	and: *a. how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;* *b. applicable law which might have an impact on the respective priorities*	59