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

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

Date: Milan, ~~22 September 2015~~18 December 2020

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

~~**EFET CPMA/MNA – 2015 Italian Opinion Letter**~~

Dear Sirs,

~~**A. Limitations of Opinions/Scope of Review**~~

~~**I. Introduction**~~

~~In June 2010, the European Federation of Energy Traders (**EFET**) published a Master Netting Agreement (version 1.0/June 2010) (the **MNA**) and on 16 February 2000 The Bond Market Association published a CPMA Cross-Product Master Agreement (the **CPMA**).~~

~~You~~ We make reference to your instruction letter dated 2 July 2020 (**Instruction Letter**) whereby you have requested our opinion (the ~~**2015**~~ **2020 Opinion Letter**) on certain Italian law issues, in relation to the ~~MNA/CPMA~~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 ~~2015~~ 2020 Opinion Letter, we have reviewed:

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

~~2. EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010),~~

2. ~~3.EFET CPMA~~ EFET Cross-Product Master Agreement published by ~~The~~ the Bond Market

Association ~~(TBMA)~~ (Version 1.0, published 16 February 2000),

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

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

5. ~~6.~~EFET ~~Cross-Product~~ 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**).

~~7. EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005).~~

~~The 2015~~ 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 ~~2015~~ 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.

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This ~~2015~~ 2020 Opinion Letter should be read in its entirety, and reading the Executive Summary or some Part of this ~~2015~~ 2020 Opinion Letter only is not a substitute for reading the information in the remainder of this ~~2015~~ 2020 Opinion Letter.

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

B. ~~II.~~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 ~~2015~~ 2020 Opinion Letter has the following meaning:

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

~~2015~~ 2020 Opinion Letter means this opinion letter;

~~**Automatic Termination** has the meaning given to it in the MNA/CPMA;~~

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;

~~**Close-Out** has the meaning given to it in the MNA/CPMA;~~

~~**Close-Out Events** has the meaning given to it in the MNA/CPMA;~~

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

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

~~**Core Provision** has the meaning given to it in Part C.VI;~~

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

~~Without prejudice to all Parts of this 2015 Opinion Letter, including, but not limited to, the assumptions listed in Part B, we believe that the choice of law and jurisdiction would generally be upheld by an Italian Court in accordance with Italian rules on jurisdictional competence and conflict of laws. The same conclusions would apply if the MNA/CPMA were expressed to be governed by a law other than the Italian law.~~

~~**C. Opinion**~~

~~**I. Enforceability of Close-Out Netting Provisions**~~

~~**1. Winding up, Insolvency or Attachment**~~

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

~~(a) Insolvency of public administrations and Commercial Companies~~

~~As a general principle, public administrations ((*pubblica amministrazione*) are not subject to bankruptcy[5]. In particular, for local authorities (*enti locali*) it is required by law (Decree No. 267) a special procedure when there is a situation of inability of the relevant local authority to pay its debts regularly. The Minister of Interior must appoint a liquidator who proceeds with a complex procedure for payment of debts and financial restructuring. Different procedures apply for the composition with creditors with the payment of a sum ranging between 40% and 60% of the claims.~~

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

~~For Commercial Companies, the purpose of bankruptcy proceedings (*fallimento*) (under (i)) is liquidation of the insolvent Commercial Company, while the composition with creditors (*concordato preventivo*) (under (ii)), debt restructuring agreements (*accordi di ristrutturazione dei debiti*) (under (iii)), restructuring extraordinary administration (*amministrazione straordinaria per la ristrutturazione*~~

~~[5] 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); on the contrary, other case-law pointed out that if a company is controlled by a public administration (e.g. the company's share capital is totally owned by a public administration, which keeps full control on the management, the company benefits from public funds, etc.) or performs activities not directly aimed to consumers (for example, when its activity consists in providing public services for a Municipality, a Province or a Region), it is *de facto* a public authority and, therefore, should be exempted from bankruptcy (see, *inter alia*, Court of First Instance of Santa Maria Capua Vetere of 9 January 2009; Court of First Instance of Naples of 31 October 2012; Court of First Instance of Palermo of 8 January 2013). Finally, the Court of Cassation, with decision No. 11417 of 13 May 2013, 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.~~

~~*industriale delle grandi imprese in stato di insolvenza*) (under (v)), composition with creditors with reserve (*concordato con riserva*) (under (vi)) and composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) (under (vii)) are intended for the reorganisation and restructuring of businesses in financial crises. Extraordinary administration for large companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*) (under (iv)) may be used to achieve either purpose.~~

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

~~(i) Bankruptcy (*fallimento*)~~

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

~~itself.~~

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

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

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

~~After the insolvency declaration, creditors cannot commence or continue enforcement proceedings (*procedimenti esecutivi*) or precautionary measures (*azioni cautelari*) against the Debtor's assets (Article 51 of the Insolvency Act). Furthermore, as a general rule, the performance of outstanding agreements is suspended until the Insolvency Official elects whether to terminate the agreement or not (in substance, doing "cherry-picking" among the agreements of the Debtor); on the contrary, certain outstanding agreements are subject to automatic termination by operation of law (Articles 76[6], 77[7], 78[8] and 81[9] of the Insolvency Act) or mandatory~~

~~[6] Forward agreements having a financial nature (*contratti di borsa a termine*).~~
~~[7] Association in partecipation (*associazione in partecipazione*).~~
~~[8] Contract for current account (*conto corrente*).~~
~~[9] Works contract (*appalto*).~~

~~performance under the Insolvency Act (Articles 80[10], 82[11] and 83[12] of the Insolvency Act). An agreement is considered outstanding when, albeit regularly entered into, both parties' (and not one party's only) obligations have not been fully fulfilled. For instance, an Individual Contract setting out deliveries for a certain period would be an outstanding agreement if the Debtor was declared insolvent before the end of such period.~~

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

~~In addition to the ordinary claw-back action[13], after the insolvency declaration, the following transactions may be subject to bankruptcy claw- back actions (*revocatoria fallimentare*) to be commenced by the Insolvency Official:~~

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

~~Debtor's insolvency at the time the act was entered into (Article 67, first paragraph 1, number 2, of the Insolvency Act);~~

- ~~the granting in the year preceding the insolvency declaration of a pledge (*pegno*), antichresis (*anticresi*) or a voluntary mortgage (*ipoteca volontaria*) in respect of a debt that has been incurred, but is not yet due for payment, unless the grantee can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the transaction was entered into (Article 67, first paragraph, number 3, of the Insolvency Act);~~
- ~~the granting in the six months preceding the insolvency declaration of a pledge (*pegno*), antichresis (*anticresi*) or a judicial or voluntary mortgage (*ipoteca giudiziale o volontaria*) in respect of a debt that is due and payable[14], but has not yet been paid, unless the grantee can prove that it had no actual or constructive knowledge of the Debtor's insolvency at the time the transaction was entered into (Article 67, first paragraph, number 4, of the Insolvency Act); and~~
- ~~payments of debts that are due and payable, acts for a consideration entered into and pre-emption rights concurrently granted in respect of debts, also created by third parties, arisen during the six months preceding the insolvency declaration, provided that the liquidator proves that the other party had actual or constructive knowledge of the Debtor's insolvency at the time the payment was effected, the act was entered into, or the security interest was granted (Article 67, second paragraph, of the Insolvency Act).~~

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

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

~~More often, the counterparty's knowledge of the Debtor's insolvency is based on presumptions (constructive knowledge). In this respect, Courts are used to verifying the counterparty's knowledge of specific symptoms of the Debtor's insolvency. The protest of bills issued by the Debtor is considered a clear symptom of insolvency, as well as the opening of execution proceedings on the Debtor's properties. The insolvency may also be induced from the publication of press releases relating to the Debtor's financial distress and from the figures resulting from its financial statements[15].~~

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

~~The main consequence of a claw-back action is that a party that benefits from one of the above transactions must return any payment or consideration received under the transaction to the Insolvency Official. The consideration~~

~~[10] Real estate lease (*locazione di immobili*).~~
~~[11] Insurance contract (*contratto di assicurazione*), however parties may waive to this provision.~~
~~[12] Edition contract (*contratto di edizione*).~~
~~[13] Please refer to Part C.I.3(a)(ii).~~

~~[14] A debt is due and payable when is determined in its amount and is not subject to terms or conditions to occur.~~

~~[15] In absence of relevant case law, it cannot be ruled out that the request for additional security may be construed as a symptom of knowledge of the Debtor's insolvency.~~

~~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;~~
- ~~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[16] (in this regard please also see Part C.III); and~~
- ~~acts, payments and guarantees granted on goods or properties of the Debtor made in execution of a composition with creditors (*concordato preventivo*) or a debt restructuring agreement (*accordo di ristrutturazione dei debiti*) pursuant to Article 182-*bis* of the Insolvency Act.~~

~~In particular, with regard to the exemption for payments made during the exercise of the Debtor's core activity, the expression "usual terms" under Article 67, third paragraph, of the Insolvency Act could be interpreted as referring to terms of payment or to the activities of the Debtor. Scholars seem to prefer the second interpretation[17]. However, according to certain case law[18] the expression "usual terms" must be construed as referring to the timing and way of payments usually applied between the parties in their ordinary course of business.~~

~~In any event, regardless of either interpretation, this exemption would probably have the effect of preventing the risk of claw-back actions in respect of payments effected by a Debtor performing an Individual Contract, when trading of energy constitutes the Debtor's core business or a usual activity of its core business. According to the first interpretation, payment terms could be considered usual since they are governed by the MNA/CPMA, which is a market standard contractual instrument for energy trading. This conclusion would be valid provided that the Parties do not significantly modify provisions regarding payments set forth under the MNA/CPMA.~~

~~[16] The accounting auditor must comply with certain professional requirements.~~

~~[17] On this debate, see Cavalli, *Commento all'art. 67, 3° co., lett. a)*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Bologna, 2006, p. 951 *et seq.*; Guglielmucci, *La riforma in via d'urgenza della legge fallimentare*, Torino, 2005, 27; Martorano, *L'esenzione dalla revocatoria dei pagamenti "nei termini d'uso"*, on 'www.ipsoa.it' and Ianniello, *Come cambia la* revocatoria *fallimentare*, in Corriere Tributario, 2005, 1960 *et seq.*~~

~~[18] Court of First Instance of Torino of 23 April 2009; Court of First Instance of Torino of 4 May 2010.~~

~~q.~~

~~According to the second interpretation, the performance of the Individual Contracts, in relation to which the payments are effected, would constitute a core activity of a party who usually buys electricity or other products covered by this 2015 Letter Opinion in its ordinary course of business (including energy traders), so that payments would probably be eligible for the claw-back exemption. The insolvency declaration also sets the date for examination of claims submitted by creditors. After examination of the claims, the Insolvency Official issues a list of creditors whose claims will benefit from the liquidation of the Debtor's assets; the list is discussed between the creditors during a hearing before the supervising judge, who confirms or amends the list and declares it enforceable (*dichiarazione di*~~

~~*esecutività dello stato passivo*). Creditors not included in the above-mentioned list or creditors wishing to object to the admission of other claims may file a petition with the supervising judge, who will decide on such petitions in accordance with a summary judicial proceedings.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~If the Court does not authorise commencement of the proceedings or the creditors do not vote in favour of the Debtor's proposal, the Court will likely make a bankruptcy declaration (*fallimento*) against the Debtor, provided that a creditor or the public prosecutor have requested it (please refer to Part C.I.1.1.(a)(i)).~~

~~Please note that pursuant to Article 67, third paragraph 3, letter (e), the transactions executed in execution of a composition with creditors are not subject~~

~~to claw back actions.~~

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

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

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

~~The debt restructuring agreement must be published in the Companies' Register (*Registro delle Imprese*) and has effects from the date of its publication. Creditors and any other interested party are entitled to challenge the restructuring agreement within 30 days from its publication. In addition, from the publication date a 60-day period of automatic stay starts (the Debtor may also ask the competent court to extend the automatic stay period to the 60 days preceding the publication of the agreement).~~

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

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

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

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

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

~~During a first phase, the Court makes an insolvency declaration (*dichiarazione di insolvenza*) against the Debtor and appoints a supervising judge (*giudice delegato*) and one or three judicial commissioners (*commissari giudiziali*). The Court must also decide whether the Debtor's managers or the judicial commissioners should be entrusted with the management of the business*[19]*. In addition, the judge shall decide whether the Debtor shall continue managing the company (under the supervision of the judicial commissioners). The insolvency declaration (*dichiarazione di insolvenza*) also sets the date for examination of claims submitted by creditors (Article 8 of Decree No. 270). From the date of the insolvency declaration, no enforcement proceedings or precautionary measures may be commenced or continued against the Debtor.~~

~~[19] In both events, extraordinary transactions must be authorised by the supervising judge.~~

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

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

~~within two years in accordance with a business plan.~~

~~If on the basis of the commissioners' and the MSE's recommendations the Court finds that the "economic balance of the business" will not be achieved under the business plan, the Court will make a bankruptcy declaration (*fallimento*) against the Debtor (please refer to Part C.I.1.1.(a)(i)).~~

~~The decree admitting the Debtor to extraordinary administration for large companies opens the second phase of extraordinary administration. From this moment, if the judge with the insolvency declaration allowed the Debtor to continue managing the company, the management of the business may no more be carried out by the Debtor. One or three extraordinary commissioners (*commissari straordinari* are appointed by the MSE, act under its supervision and are entrusted with the management of the business. A detailed plan setting out the transfer or the restructuring of the business is drafted by the extraordinary commissioner(s), to be filed with the MSE within 60 days after the Court's decree and approved by the MSE within 90 days after its filing.~~

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

~~Notably, Article 91 of Decree No. 270 sets for the "aggravated" claw-back action for certain acts and intra-group transactions executed by the Debtor in the 5-year period before the insolvency declaration (3 years for security granted on overdue debts).~~

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

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

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

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

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

~~Restructuring extraordinary administration may only be commenced by the Debtor filing a petition supported by adequate documentation with the MSE. At the same time, the Debtor must file an application for the declaration of its insolvency with the competent Court (i.e. the Court in the jurisdiction where the company has its principal office (*sede principale*)[20]). On the basis of the petition, the MSE may admit the company to the restructuring~~

~~extraordinary administration by issuing a decree in which it will also appoint an extraordinary commissioner (*commissario straordinario*), who will manage the company.~~

~~By no later than 60 days after the issue of the MSE decree, the extraordinary commissioner must file with the Court a report containing the Debtor's financial~~

~~data and a list of the Debtor's creditors. Upon the request of the extraordinary commissioner, the Court may extend this term by 60 days. The extraordinary commissioner may also request other companies of the same group to be admitted to restructuring extraordinary administration (even if these companies do not meet the relevant requirements).~~

~~By no later than 180 days[21] after the date of the MSE decree, the Extraordinary Commissioner must file a restructuring plan with the MSE. If the MSE does not approve the restructuring plan, the Court must convert the proceedings into an extraordinary administration for large companies (please refer to C.I.1.1.(a)(iv) above) or bankruptcy proceedings (*fallimento*) (please refer to Part C.I.1.1.(a)(i)).~~

~~[20] Please note that the principal office (*sede principale*), being the office in which the core Debtor's activity is carried out, does not necessarily correspond to the registered office.~~

~~[21] Subject to a possible extension to be granted by the MSE for an additional 90 days.~~

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

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

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

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

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

~~Finally, please observe that Decree 134 amended Decree 347 by introducing specific provisions adding new flexibility to the restructuring proceedings under Decree 347 and principally dealing with businesses performing essential public services. We note that Decree 134 established that the restructuring proceedings can be commenced directly by decree of the Prime Minister or the MSE. Secondly, Decree 134 extended the applicability of the provisions under Decree 347 including not only proceedings for restructuring, but also the transfer of business lines pursuant to a programme for the continuation of the business of the company for a maximum period of one year, amplifying in such a way the possibility of undertaking a sale of the business. In this case, the MSE may authorise both transfer of business units and transfer of single contracts or assets of the company if such transactions are aimed at restructuring or safeguarding the economic and productive value, either total or partial, of the company or the group. Such an authorisation can occur both after and before (in urgent cases only) the declaration of insolvency.~~

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

~~(vi) Composition with creditors with reserve (*concordato con riserva*)~~

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

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

~~The time-window to be assigned by the Court may range from a minimum of 60 days to a maximum of 120 days, during which the Debtor may continue to operate. Within the above-mentioned term assigned by the Court, the Debtor shall adopt one of the following restructuring proceedings:~~

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

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

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

~~Also proceedings for a composition with creditors with a going concern has been introduced by Decree No. 83, and they are governed by Article 186-*bis* of the Insolvency Act. The characteristic of this proceeding is that the proposal of composition is based on a business plan envisaging the continuity of the business, provided that certain specific requirements[22] are met.~~

~~The most relevant effects are: (a) pending contracts cannot be terminated by the other party, even if it is a public entity, due to the opening of a *concordato preventivo con continuità aziendale* and any contractual provision that states otherwise is ineffective; (b) companies under *concordato preventivo con continuità aziendale* proceedings cannot be banned from participating in public tenders for the sole reason of being in *concordato preventivo con continuità aziendale*; (c) the underlying~~

~~[22] For these specific proceedings, which grant higher protections to the Debtor, certain additional conditions have to be met by the Debtor, including the following: (i) there is a plan, which provides the continuation of the business in three possible forms (i.e. by the Debtor, through the sale of the company or through the transfer of the business of the company); (ii) the plan also contains an analytical indication of the costs and revenues expected from the continuation of the business and from the relevant financial resources; and (iii) the independent expert's report sets out that the continuation of the business is to better satisfy creditors.~~

~~restructuring plan may envisage that payments of secured creditors are stayed for one year (and such secured creditors are nevertheless not allowed to vote); and (d) should the *concordato preventivo con continuità aziendale* proposal provide for the sale of the business as a going concern, this may be sold free from encumbrances.~~

~~(b) Proceedings Specific to Financial Institutions~~

~~Under Italian law, Financial Institutions are subject to specific Insolvency Proceedings, which we summarise below.~~

~~(i) Extraordinary Administration (*amministrazione straordinaria*)~~

~~Extraordinary administration may be initiated where there have been exceptionally serious administrative irregularities, violations of laws or a serious reduction in the Debtor's net worth, or by a shareholders' resolution upon proposal of the Bank of Italy (*Banca di Italia*). These proceedings are governed by Articles 70 to 77 of the Banking Act. In particular, Article 71 of the Banking Act provides for the appointment of one or more extraordinary commissioners (*commissari straordinari*).~~

~~Moreover, the Banking Act provides that, in exceptional circumstances (which are not defined) and subject to the Bank of Italy's authorisation, the extraordinary~~

~~commissioner(s) (*commissario straordinario*) may suspend payment of all debts for up to a maximum period of three months to protect creditors' interests. Creditors are prohibited from pursuing individual actions against the Debtor or the Debtor's assets based on an allegation of default resulting from the implementation of any such suspension of payments.~~

~~Extraordinary administration proceedings may last for up to a maximum of 20 months.~~

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

~~Compulsory administrative liquidation is governed by Articles 80 to 95 of the Banking Act[23] and by certain provisions of the Insolvency Act, to which specific reference is made in the Banking Act.~~

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

~~If the Financial Institution becomes insolvent, a liquidator, a creditor or the public prosecutor (*pubblico ministero*) may also file an application with the~~

~~[23] 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.~~

~~competent Court for an insolvency declaration (*dichiarazione di insolvenza*), which will enable the commissioners to bring ordinary claw-back actions[24].~~

~~From the time that the liquidation takes effect:~~

- ~~no actions against the Financial Institution or its assets may be commenced or continued;~~
- ~~no action may be taken to perfect any security over the Debtor's assets;~~
- ~~all payments due by the Financial Institution are suspended; and~~
- ~~the same effects as under bankruptcy proceedings (*fallimento*) apply to outstanding agreements (*rapporti giuridici preesistenti*) (please refer to Part C.I.1.1.(a)(i))[25].~~

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

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

~~(c) Italian branches of EU foreign banks~~

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

~~As a consequence, insolvency of an EU bank's Italian branch will be exclusively~~

~~assessed and governed by the law of the country in which the bank is established. The effect of this law is that any applicable proceedings must be automatically recognised in Italy. Exceptions to this principle, concerning the enforceability of the MNA/CPMA are examined below.~~

~~2. *Brief discussion of your jurisdiction's insolvency laws as they apply Physical Transactions and Derivative Financial Instruments*~~

~~(a) Physical Transactions~~

~~[24] Those under Article 66 of the Insolvency Act (please refer to Part C.I.3(a)(ii).~~

~~[25] Article 67 of the Insolvency Act referred to insolvency claw-back actions (*revocatoria fallimentare*) does not apply with the exception of agreements entered into by the insolvent Financial Institution and other companies of its group.~~

~~[26] Article 3 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001, implemented in Italy by Decree No. 197.~~

~~Under Italian law, the effects of bankruptcy (*fallimento*) and compulsory administrative liquidation (*liquidazione coatta amministrativa*)[27] on Physical Transactions 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 suspension of all outstanding agreements, until the Insolvency Official chooses whether to terminate or perform each of them (in substance, doing "cherry-picking" among the agreements of the Debtor). Under Articles 72 and 74, an agreement is considered outstanding if the obligations of both parties provided for in the agreement have not been fulfilled yet[28].~~

~~However, should the Insolvency Official decide to keep (and should the competent Court authorise the Insolvency Official to keep) the insolvent company provisionally operating pursuant to Article 104 of the Insolvency Act, all pending contracts continue (and, therefore, are not suspended) unless the Insolvency Official declares to suspend the relevant performance or terminate the same. All credits stemming from the continued pending contracts rank as super priority claims (*crediti prededucibili*) and must be regularly paid by the Insolvency Official.~~

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

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

~~In addition to Article 72, which may be considered a general provision regarding outstanding agreements, with specific reference to outstanding continuous or periodical performance agreements (such as supply agreements), under Article 74[29] EC~~ EU company in a distressed situation;~~**Decree No. 5** means Italian Legislative Decree No. 5 of 9 January 2006, as amended;~~

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

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

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

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

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

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

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

Decree No. ~~197~~ 180 means Italian Legislative Decree~~. No. 197 of 9 July 2004~~ 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~~, letters d) – j)~~ -*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;

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

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 ~~in Part C~~ of this ~~2015~~ 2020 Opinion Letter;

Final Net Settlement Amount has the meaning given to it in the ~~MNA/CPMA~~Master Agreements;

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

[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~~[~~1~~]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 ~~C.I.1.1~~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 ~~C.I.1.1~~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 ~~A.IV~~I.D;

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

~~[1] A financial intermediary is a financial services provider.~~

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

~~**MEF** means the Italian Ministry of Economy and Finance (*Ministero dell'economia e delle finanze*);~~
~~**MNA/CPMA** has the meaning given to it in Part A.I;~~

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 ~~MNA/CPMA~~Master Agreement;

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

~~**Physical Transaction** means a transaction which is not a Derivative Financial Instrument and which may provide for the purchase of an amount of a commodity, such as coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates;~~

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;

~~**Regulation Rome I**~~ **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 ~~Rome Convention;**Rome Convention** means the~~ Convention on the law applicable to contractual obligations, opened for signature in Rome, on 19 June 1980;

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

~~**Settlement Amount**~~ **Underlying Agreement** has the meaning given to it in

~~the MNA/CPMA;**Terminating Party** or **Closing-Out Party** have the meaning given to them respectively in the MNA and CPMA;~~

~~**Transferor** has the meaning given to it in the EFET Cross Product Credit~~

~~Support Annex; **Transferee** has the meaning given to it in the EFET Cross~~

~~Product Credit Support Annex~~Part II.2; and **Winding-up Directive**

means Directive 2001/24/EC.

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

In this ~~2015~~ 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 ~~2015~~ 2020 Opinion Letter; and

4. headings do not affect the interpretation of this ~~2015~~ 2020 Opinion Letter.

C. ~~III.~~Scenarios

~~In this 2015 Opinion Letter we assume that the MNA/CPMA is governed by the laws of Italy, save for Part C.I.1, Part C.II and Part C.VII where different scenarios apply. However, where expressly~~

~~referred to, in certain circumstances, we deemed it opportune providing advice in respect of the following three 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 ~~MNA/CPMA~~ 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. with respect only to those insolvency and default-related issues identified in Part C.I, below, assuming a choice of either Italian law or another governing law, opinions regarding optimising the MNA/CPMA for use with an insolvent party legally organised or incorporated in Italy (**Scenario 2**); and~~

2. ~~3.~~if the governing law of the ~~MNA/CPMA~~ Master Agreements and the CSAs is a law other than the Italian one, ~~opinions~~ opinion on the legal enforceability by the Italian ~~Courts~~ courts of such agreements in accordance with ~~its~~ their own terms (**Scenario ~~3~~2**).

D. ~~IV.~~Potential Counterparties

This ~~2015~~ 2020 Opinion Letter is given in respect of potential counterparties to the ~~MNA/CPMA~~ 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[2]~~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. Italian publicly owned companies (i.e. corporations in which a public entity exercises a dominant influence);~~

~~9. Italian municipalities or other local authorities;~~

~~10. Italian associations of local government;~~

~~11. Italian public entities; or~~

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

~~[2] Simple partnerships (*società semplici*) are not included in the scope of this 2015 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.~~

~~This 2015 Opinion Letter is also given in respect of potential counterparties to the MNA/CPMA that are:~~
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.

~~Certain publicly owned companies, namely those established with the specific purpose of accomplish public administration's needs and in which a public administration exercises a dominant influence, are subject to Decree No. 163, implementing EU Directives No. 17 and No. 18 of 2004, on public procurements. Indeed, according to this Decree, publicly owned entities cannot enter into supply agreements without carrying out a public procurement proceeding. This is also the general rule for all public entities. Please note that according to Article 1 of Decree No. 95, in relation to certain matters (including electricity and gas), the public administrations must delegate Consip S.p.A. (a publicly owned company which provides advice, assistance and IT solutions for innovation in the public administration) or the relevant regional purchasing entity (*centrale di committenza*) for the awarding of contracts for the supply of goods and services and for managing special agreements with suppliers for the purposes of rationalising spending. The rule above does not affect the possibility for the public administration to carry out a public procurement procedure on its own or through another purchasing entity, provided that this causes a lower expenditure in respect of the one achievable entering into the agreements provided by Consip S.p.A. or by the regional purchasing entity. In such cases, the former contracts are to be subject to the condition subsequent for the contractor to adjust its considerations according to the conditions set out under a following agreement possibly entered into by Consip/regional purchasing entity (*centrale di committenza*) if providing a higher economic benefit. Failure to comply with the rule above may entail disciplinary liability of the public administration.~~
~~However, Article 24 of the same Decree No. 163 sets forth that the mandatory public procurement proceedings do not apply, *inter alia*, in the event that the supplied goods are intended to be resold to third parties and the companies subject to Decree No. 163 do not have exclusive or special rights to sell those goods or when other entities can sell the same goods to third parties at the same terms and conditions provided for in the supply agreement entered into by a publicly owned entity.~~
~~In the event of electricity and natural gas trading, we believe that both requirements for exemption are met: supplied electricity and natural gas are intended to be resold to third parties and there are no special or exclusive rights granted for the sale of Commodities. Moreover, other entities can operate on the same~~

~~trading market and enter into supply agreements at the same terms and conditions as publicly owned entities or public entities (Italian trading market is a liberalised market according to Article 1, first paragraph, of the Bersani Decree and Article 2, second paragraph, letter (a), of the Marzano Law). As a result, Decree No. 163 does not apply to publicly owned companies and public entities which enter into both the MNA/CPMA and the Netted Agreements or Principal Agreements for pure trading purposes. Please note that, in respect of the purposes of this 2015~~ In respect of the purposes of this 2020 Opinion Letter, publicly owned companies are not subject to different regulation as privately owned entities.~~In relation to the peculiarities of public administrations (*amministrazioni pubbliche*), please refer to Part C.I.1.1.~~

E. ~~V.~~Addressees

This ~~2015~~ 2020 Letter Opinion ~~Letter~~ is addressed exclusively to EFET~~, the~~ and its members ~~of~~ who have subscribed to the EFET Legal ~~Committee and any other entity who has subscribed to EFET for one or more of the country opinions~~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 ~~by both~~ of EFET and ~~Paul Hastings (Europe) LLP –~~ Herbert Smith Freehills – Studio Legale.

~~B.~~PART II. Assumptions Necessary for the Opinion

For the purposes of providing this ~~2015~~ 2020 Opinion Letter, and without prejudice to all Parts of this ~~2015~~ 2020 Opinion Letter, we have made the assumptions listed in points 1 to ~~12~~ 15 below.

1. Two counterparties enter into the ~~MNA/CPMA~~ 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 ~~A.IV.~~I.D.

~~3. The relevant MNA/CPMA is governed by the laws of Italy, unless expressly stated otherwise.~~
~~The MNA/CPMA and any of the documents listed in Part A.I are enforceable under the laws of any jurisdiction (other than the laws of Italy) and each counterparty has duly authorized, executed and delivered, and has 4. the capacity to enter into, each document.~~
~~5. The relevant MNA/CPMA provides for the inclusion of some master agreements, each such master agreement being a Netted Agreement or Principal Agreement.~~

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 ~~MNA or CPMA~~ 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 ~~MNA or CPMA, the counterparties over time enter into a number of transactions which include some or all of the transactions described under the Netted Agreements or Principal Agreements.~~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).

~~7. Some of the transactions provide for an exchange of cash by both counterparties and others provide for the physical delivery of shares, bonds or commodities (including emission rights) in exchange for cash; the natural of those transactions may be financial or physical.~~

11. ~~8.~~The Core Provisions of the ~~MNA/CPMA and any of the documents listed in Part A.I, if applicable,~~ Master Agreements and the CSA have not been amended in any material respect~~ and the Principal Agreements / Master~~. The Underlying Agreements do not waive the provisions under ~~MNA/CPMA~~Master Agreements and the CSA and the Master Agreements have the characteristics set out under Annex B attached to this 2020 Opinion Letter.

12. ~~9.~~At the time at which the ~~MNA/CPMA~~ Master Agreement is entered into~~ under~~, neither Party is insolvent or has actual knowledge of the insolvency of the other Party. The ~~MNA/CPMA, any of the documents listed in Part A.I, if applicable, and all Netted~~

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

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

14. ~~12.~~ The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 does not apply to the ~~MNA/CPMA~~ Master Agreements and to any of the documents listed in Part A.I or to any ~~Netted Agreement or Principal~~ 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 ~~2015~~ 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*).

~~C.Opinion -~~ Executive Summary (as if the Master Agreements and the Underlying Agreements are governed by Italian law)

~~I.~~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.

*~~1.~~*Enforceability of *~~early termination provisions under the MNA/CPMA arising as a result of an insolvency~~*Close-out Netting Provisions in an Insolvency Scenario

1. Enforceability of close-out

~~Under Scenarios 1, 2 and 3, considering only~~ If the Close-Out Events ~~that~~ are insolvency-based we believe that:

(a) ~~if~~ the early termination rights are triggered by the declaration of insolvency/bankruptcy or by the petition for a composition with creditors with a going concern (*concordato preventivo con continuità aziendale*) pursuant to Article 186-*bis* of the Insolvency Act, ~~with respect to Physical Transactions~~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 ~~peculiarities~~ 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~~ 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 ~~tool~~scheme, they could be valid and enforceable if they are construed either as discretionary or ~~in terms of~~ as a right of withdrawal or condition subsequent. However, in absence of case ~~law~~precedents, we are not in a position to exclude that a ~~Court~~ 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~~ 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 ~~Physical Transactions and Derivative Financial Instruments~~ the various Underlying Agreements and transactions might therefore cause a partial unenforceability of the Close-Out rights provided for in the ~~MNA/CPMA~~ 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, ~~Physical Transactions under the same MNA/CPMA cannot~~ and EU Energy Contracts are closed-out in accordance with their terms, other agreements may not be terminated ~~for the same reason~~ 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 ~~law~~ 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~~court. ~~In any case, in order to stand better chances to use this argument, we suggest not electing discretionary non-global Close-Out, as this could lead to believe that a single agreement between all the Netted Agreements / Principal Agreements and all transactions (being both Derivative Financial Instruments and Physical Transactions) does not exist.~~

2. *Enforceability of ~~close-out netting provisions in case of Winding-up, Insolvency or Attachment and for non-insolvency related Material Reasons~~ Final Net Settlement Account*

~~If Italian law is the governing law of the MNA/CPMA, close-out netting provisions would be generally enforceable. However, in insolvency scenarios, the validity and enforceability of close-out netting provisions are mainly related to the possibility to terminate the agreement in case of insolvency. Therefore, the remarks under point 1 above apply.~~

~~In addition, given that the~~ 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~~ 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~~ 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*.

~~If the governing law of the MNA/CPMA is a law other than the Italian law, the same regime applies, save for the peculiarities related to the reduction of the Settlement Amount and unless the Debtor is an Italian bank, in which case the enforceability of the close-out netting provisions would be assessed under the governing law of the MNA/CPMA.~~

Special rules apply in case of close-out netting provisions included in collaterals and EU Energy Contracts[7]. For those agreements ~~including collaterals under the meaning of Decree No. 170. Decree No. 170, infact, 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~~ 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.

~~If Italian law is the governing law of the MNA/CPMA, claw-back~~ Claw-back actions in insolvency proceedings do not apply provided that:

(a) the ~~above~~ relevant acts occurred before the claw-back ~~periods[3] (please see Part C.I.1.1(a)(i))~~periods[9]; or

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

~~Where the Italian Party is a Commercial Company and the MNA/CPMA is governed by a law other than the Italian law, the application of the Insolvency Regulation would disallow the claw-back in any event so long as this would not be allowed under the governing law. The same result applies under Article 95-*ter*, fourth paragraph, of the Banking Act implementing the Winding-up Directive in Italy in respect of an Italian Party which is a bank. However, 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, despite the fact that the Debtor is Italian the close-out netting and the payment of the Final Net Settlement Amount may be clawed back only to the extent applicable under the governing law of the MNA/CPMA. Therefore, if the governing law of the CPMA/MNA is other than the Italian law, the Italian claw-back rules do not apply even if the Debtor is Italian.~~

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

If Italian law is the governing law of the ~~MNA/CPMA~~Master Agreements, early termination for ~~non-~~non- insolvency Close-Out Events corresponds to ~~concepts~~ circumstances specifically ~~provided for~~ contemplated under the Civil Code and, therefore, would be enforceable, with the exception of certain minor cautions described in this ~~2015~~ 2020 Opinion Letter.

~~If the governing law of the MNA/CPMA is a law other than the Italian law, since those provisions do not conflict with mandatory provisions of Italian law, the same conclusions would apply.~~

~~**II. Multibranch Parties**~~

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

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

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

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

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

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

~~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 Member State shall have jurisdiction to open insolvency proceedings against that Debtor only if it~~

~~possesses an establishment within the territory of that other Member State.~~

~~**III. Collateral**~~

Collaterals

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

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

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[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 oftransactions.

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.

Letters of Credit. 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.

[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.

~~Cash collateral consisting of the transfer of an amount of money to the Transferee might be construed as an irregular pledge (*pegno irregolare*) pursuant to Article 1831 of the Civil Code. This interpretation is supported by the uniform interpretation by the Court of Cassation. If construed as an irregular pledge, the cash collateral directly transfers (the property of) the money to the beneficiary and, therefore, we are of the opinion that it cannot be qualified as a security interest. The same conclusion applies, according to a certain interpretation, if the cash is transferred into a credit account held by a third party (i.e. a bank) in the name of the Transferee. However, we note that there is no relevant case law in this respect.~~

~~The insolvency of the Debtor does not affect the validity and enforceability of the stand-by letters of credit, given that this is issued by a third party. In case of a cash collateral, it this is construed as an irregular pledge, according to now uniform case law, the *pari passu* principle does not apply and the Transferee does not need to take any action to enforce its right, given that it has full ownership of the money.~~

~~A cash collateral may be not clawed back by an Insolvency Official, provided that:~~

~~(a) the transfer occurred before the claw-back periods (please see Part C.I.1.1(a)(i)); or~~

~~(b)~~

~~(c) the Transferee proves that it was not aware of the Debtor's insolvency.~~

~~**IV. General Enforceability of the Agreement**~~

~~Without prejudice to all Parts of this 2015 Opinion Letter, we are of the opinion that the MNA/CPMA is legal, valid and binding under Italian law, even if a law other than the Italian one is the governing law of the MNA/CPMA, in accordance with Law No. 218.~~

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

~~**V. Confirmation Practices**~~

~~If Italian law is the governing law of the Netted Agreements / Principal Agreements, those agreements and their transactions may be concluded in any form, including verbally and electronically with no specific signature requirements, while in case of Derivative Financial Instruments (but not necessarily confirmations of each transaction) the written form is prescribed. Furthermore, provided that the Parties do not include in a transaction any provision to the contrary, such transaction would be validly included in the Netted Agreement / Principal Agreement even if the Parties entered into it verbally or electronically without making any reference to the MNA/CPMA[4].~~

~~If a law other than the Italian law is the governing law of the Netted Agreements / Principal Agreements, the transactions are enforceable by Italian Courts if concluded in any form, provided that, alternatively:~~

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

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

~~(c) they may be executed in any form under the laws of one of the countries in which the~~

~~Parties are at the time of execution, in the event that the Parties are in two different countries.~~

~~VI. Core Provisions~~

~~The following provisions of the MNA and CPMA respectively are so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.IV:~~

~~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~~

~~[4] However, although it could be burdensome from a practical standpoint, consideration should be given to execute each of the Netted Agreements / Principal Agreements and the transactions in the form (i) of a public deed (*atto pubblico*) under Article 2699 of the Civil Code or (ii) of a private deed with notarised signature (*scrittura privata autenticata*) under Article 2703 of the Civil Code or (iii) in written form with a certain date of law (*data certa*), which will allow these agreements to be asserted against third parties (especially in the context of Insolvency Proceedings).~~

~~(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.~~

~~VII. Governing Law, Arbitration and Jurisdiction~~

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).

[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.

[27] These effects also apply to Financial Institutions by means of reference made by under Article 83 of the Banking Act.
[28] On the contrary, if the obligations of a party (e.g. deliveries) have been fulfilled but not those of the other party (e.g. the payment) the agreement is not outstanding.
[29] Although Article 74 of the Insolvency Act was amended with Legislative Decree No. 169 of 12 September 2007, its content was not dramatically changed.

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, clauses triggering termination of the agreement because of the bankruptcy are void (please refer to Part C.I.1.7).
The same above applies in compulsory administrative liquidation (*liquidazione coatta amministrativa*).

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

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

As Article 50 of Decree No. 270 only concerns the second phase of the proceedings, the treatment of outstanding agreements (*rapporti giuridici preesistenti*) between the Court's insolvency declaration (*dichiarazione di insolvenza*) and the admission to the proceedings is uncertain. In this respect, some scholars argue that the performance of an agreement during this period of time should be authorised by the supervising judge[32]. This could lead to significant delays in the performance of an agreement requiring particular rapidity from the parties. However, it is a consolidated principle that, in the event of the non-performance of an agreement by the Debtor (or by the

[30] As recently amended by Law No. 132 of 6 August 2015.
[31] This has been affirmed by case law. See, for example, Court of Cassation No. 3683 of 8 June 1981 and Court of Cassation No. 8076 of 27 August 1997.
[32] Proto, *Gli organi, gli effetti e l'accertamento del passivo,* in *Il fallimento e le altre procedure concorsuali,* edited by Luciano Panzani, VI, Turin,

Insolvency Official) during this period, the counterparty may suspend performance of its obligations and, in the opinion of some authors, may also elect to terminate the agreement[33]. On this subject, please also refer to Part C.I.1.3. For the sake of completeness, Decree 134 has 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.~~

~~(b) Commodity Options~~

~~With specific reference to options, provided that they are not Derivative Financial Instruments, different remarks have to be made in the case of sale options as opposed to forward transactions. A sale option is an agreement by which one party grants another party the right, but not the obligation, to enter into a sales agreement (either as seller or purchaser) during an agreed period. Italian Courts maintain that the option agreement is separate from the agreement entered by the exercise of the option. In particular, before the option has actually been exercised, the second agreement does not come into existence, since only one party's proposal has been put~~

~~forward~~[34]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 a sale option must be evaluated by applying (by analogy) the rules that apply to forward transactions~~[35]However, scholars argue that the effect of the commencement of Insolvency Proceedings (and, particularly, bankruptcy proceedings – *fallimento*) on an option must be evaluated by applying (by analogy) the rules that apply to forward transactions[34]. Accordingly, under bankruptcy proceedings the ~~sale options will be suspended and:~~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 holder of the sale option, the Debtor's Insolvency Official may exercise the option and perform the resultant transaction; or~~
- ~~if the Debtor is the writer of the sale~~ if the Debtor is the writer of the option, the holder cannot exercise the option without the Insolvency Official's ~~approval~~[36]~~.~~approval[35].

Conclusions

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].

~~(c) Derivative Financial Instruments~~

Under Article 76 of Insolvency Act, forward contracts on regulated exchanges (*contratti di borsa a termine*) are automatically terminated as of the date on which bankruptcy is declared. Article 203 of the Financial Act broadens the scope of Article 76 of the Insolvency Act, stating that the same rule applies to all Derivative Financial Instruments[37].

Accordingly, if the relevant Derivative Financial Instrument has a maturity date which falls after the bankruptcy declaration, the 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 Insolvency Act prevents cherry-picking by the Insolvency Official in money transactions.

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[38], to which specific reference is made in the Banking Act, unless the Insolvency Official does not request 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*).

Also in composition with creditors (*concordato preventivo*), no automatic termination applies. 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*).

Finally, 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.

2. cont' *Whether the different rules applicable to the different contracts above result in a splitting-up or segregation of the portfolio of transactions under the relevant Netted Agreements or Principal Agreements into multiple "netting pools" of disparate treatment or limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the MNA/CPMA*

As examined above, with respect to early termination in case of Insolvency Proceedings, 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 Article 72, sixth paragraph, of the Insolvency Act (please refer to Part C.I.1.7) and the principle under which it is not possible to claim against the bankruptcy estate the costs by way of damages or otherwise

[33] Guglielmucci, *Lezioni di diritto fallimentare,* Turin, 2004, 133-137. .

[34] 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.

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.*

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

[37] For the purpose of this 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 Derivative

[38] ~~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, Article 57 of the Financial Act and Article 249 of the Private Insurance Code.~~

~~incurred as a result of the insolvency, Derivative Financial Instruments are automatically terminated in case of bankruptcy.~~

~~This different treatment may therefore cause a partial unenforceability of the early termination rights and global Close-Out rights provided for in the MNA/CPMA in case of insolvency. More particularly, there could be the case that, while the Derivative Financial Instruments are automatically terminated by virtue of the bankruptcy of a Party, Physical Transactions under the same MNA/CPMA cannot be terminated for the same reason 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, which all together constitute a "single agreement" (please refer to Part C.I.1.7(b) for the meaning of *condizione risolutiva* and Part C.I.1.10 for the "single agreement" concept).~~

~~However, in absence of case law 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. In fact, a Court could consider that in this case the aim of Article 72, sixth paragraph, of the Insolvency Act would be frustrated and the prohibition set out therein easily circumvented by entering into a Physical Transaction and a Derivative Financial Instrument under a same MNA/CPMA.~~

~~3. *Opinion on whether close-out netting, termination of the Netted Agreements or Principal Agreements or the transactions entered into thereunder, the calculation of the Settlement Amounts, the aggregation and offsetting of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way deletable by a liquidator or any third party if insolvency procedures are opened*~~

~~(a) Italian Law Aspects~~

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

~~For an overview of the principles applying to claw-back actions under Insolvency Proceedings (*revocatoria fallimentare*), please refer to Part C.I.1.1.(a)(i). In particular, Article 67, second paragraph, of the Insolvency Act, which applies to all Insolvency Proceedings providing for an insolvency declaration (*dichiarazione di insolvenza*)[39], sets out that payments and acts for consideration (*atti a titolo oneroso*) and those creating pre-emption rights (*diritto di prelazione*) effected in the six months preceding the insolvency declaration may be clawed back by the Insolvency Official, within five years of the declaration, provided that the Insolvency Official proves that the other party was aware of the Debtor's insolvency at the time the relevant payment or act for consideration was effected (constructive knowledge)[40].~~

[39] ~~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 (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*), compulsory administrative liquidation (*liquidazione coatta amministrativa*),~~

[40] ~~Save for the exceptions under Article 67, third paragraph, of the Insolvency Act.~~

~~As mentioned in Part C.I.1.1.(a)(i), Courts establish constructive knowledge of the Debtor's insolvency by the counterparty on the basis of symptoms of insolvency. These are practical circumstances which include, *inter alia*, the duration of the relationship between the Debtor and the counterparty[41].~~

~~(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 scholars and case law hold that acts (including notices to the counterparty) that give rise to termination of an agreement, fall within the concept of acts for a consideration (*atti a titolo oneroso*) and may accordingly be clawed back by the Insolvency Official[42].~~

~~This applies to discretionary early termination rights classified as either an express termination clause (*clausola risolutiva espressa*) under Article 1456 of the Civil Code (please refer to Part C.I.1.7)[43] or as a right of withdrawal (*diritto di recesso*) under Article 1373 of the Civil Code (please refer to Part C.I.1.7)[44].~~

~~In relation to the enforceability of early termination due to insolvency reasons, please refer to Part C.I.1.7.~~

~~Finally, in relation to early termination due to 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[45].~~

~~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 for close-out netting~~

~~Provided that the MNA/CPMA[46] has been entered into 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 law holds that if an agreement providing for contractual rights of set-off has been entered into prior to the six-month claw-back period, then it is of no legal significance that a set-off occurred during that period[47].~~

~~41 See, for instance, Court of Cassation No. 1545 of 11 February 1995.~~

~~42 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.~~

~~43 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.~~

~~44 Court of Catania, 28 January 1988, in *Il diritto fallimentare*, 1989, II, 586.~~

~~45 Provided that if the judicial demand for termination, where necessary, is registered with the public registry.~~

~~46 Or the Individual Contract is the concept of a "single agreement" (please refer to Part C.I.1.10) is not accepted.~~

~~47 Court of Cassation, No. 5612 of 16 September 1986, Court of Florence, 5 December 2007, in *Il Foro Italiano*, 2008, 633.~~

~~(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 MNA/CPMA 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 C.I.1.9.~~

~~(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 4, second paragraph, letter (m), of the Insolvency Regulation states that the law of the Member State in which the Insolvency Proceedings were opened also determines the rules relating to "the voidness, voidability or unenforceability of legal acts detrimental to all the creditors" (including claw-back rules). Therefore, Italian law would apply in Italian Insolvency Proceedings, even if the MNA/CPMA were governed by other than Italian law.

However, a rule favourable to foreign governing laws with a soft claw-back regime is set out in Article 13 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 MNA/CPMA 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 MNA/CPMA, the detrimental act cannot be clawed back and also that there are no other means by which the act can be avoided[48]. This applies if the Debtor is an Italian branch of an EU company, provided that the MNA/CPMA is governed by non-Italian law.

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

(c) Winding-Up Directive

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

However, Article 95-*ter*, fourth paragraph, of the Banking Act states that the person beneficiary of an act that is detrimental to creditors may avoid the application of Italian law regarding detrimental acts, provided that party proves that the governing law of the MNA/CPMA 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 MNA/CPMA, 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 MNA/CPMA is governed by non- Italian law.

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

As a result, close-out netting and payment of the Final Net Settlement Amount, as set out under the MNA/CPMA, may be clawed back only under the governing law of the MNA/CPMA. Article 95-*ter*, second paragraph, of the Banking Act, however, would not cover 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.

In conclusion:

~~Scenario 1~~

~~If Italian law is the governing law of the MNA/CPMA, 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:~~

~~the above acts occurred before (i) the above-mentioned claw-back periods~~[49]~~; or~~

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

~~(iii)~~

~~Scenario 2~~

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

~~(ii) If the Debtor is an Italian Commercial Company and the MNA/CPMA is not governed by Italian law, 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 MNA/CPMA does not allow either a claw-back action or any other means by which the act can be avoided (in the latter case, the governing law of the MNA/CPMA will apply)~~[50]~~. 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 MNA/CPMA.~~

~~Scenario 3~~

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

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

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

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

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

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

~~The filing of a petition for bankruptcy (*istanza fallimento*) does not have any effect on the position of the Debtor's creditors and counterparties (except as regards issues related to Article 72, sixth paragraph, of the Insolvency Act – see Part C.I.1.7). Likewise, during the period after the filing of the petition, during which time the Court investigates whether the Debtor is insolvent, creditors are not directly affected by the pending proceedings. As already mentioned in the brief description of the Insolvency Proceedings (please refer to Part C.I.1), the moment relevant to the position of creditors and counterparties is the date of the insolvency declaration (*dichiarazione di insolvenza*). From that moment, under Article 52 of the Insolvency Act, the *pari passu* principle applies and no activity may be carried out by a creditor or counterparty that could affect the Debtor's assets (including commencement of~~

~~[50] De Cesari, *Commento all'articolo 13*, in De Cesari-Montella, *Le procedure di insolvenza nella nuova disciplina comunitaria*, Milan, 2004, 174 *et seq.*~~

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 preventivo con riserva*) and composition with creditors with a going concern (*concordato preventivo con continuità aziendale*), from the date the Debtor files a petition for admission to these proceedings, even prior to the Court's decree of admission, creditors and counterparties are prevented from commencing enforcement actions and precautionary measures against the Debtor (please refer to Parts C.I.1.1. and C.I.1.2). Also, the Debtor cannot pay any creditor for sums due before the filing of the relevant petition, unless so 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 early termination rights or on the calculation and payment of the Termination Amount, similar to bankruptcy proceedings. The first act which could potentially affect outstanding agreements (*rapporti giuridici preesistenti*) is an insolvency declaration under Article 3 of Decree No. 270. However, also in this case the filing of the relevant petition, if known by the other party, may be considered as evidence of the fact that such party was aware of the insolvency status of the Debtor in case of claw back actions against transactions or payments executed after such filing but before the insolvency declaration.

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

(a) Derivative Financial Instruments

As anticipated under Part C.I.1.2.(c), a specific regulation applies to Derivative Financial Instruments. In fact, under Article 76 of Insolvency Act and Article 203 of the Financial Act, those contracts are automatically terminated as of the date on which bankruptcy is declared.

The same above applies in compulsory administrative liquidation (*liquidazione coatta amministrativa*)[51], unless the Insolvency Official requests to continue the activity of the company.

[51] Both Article 83 of the Banking Act and Article 201 of the Insolvency Act refers to a number of provisions of the Insolvency Act applicable to bankurptcy, including Article 76.

(b) Collaterals

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

(i) public authorities;

~~(ii) a central bank;~~

~~(iii) a Financial Institution;~~

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

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

~~Moreover, Article 9, third paragraph, of Decree No. 170 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. This means that they continue to be valid and effective despite the bankruptcy of a party.~~
~~Certain authors argue that the scope of application of Article 7 of Decree No. 170 is indeed broader than the one referred above, since it applies to all kind of contracts including close-out netting provisions, at least if they have a financial nature, when entered into with a Financial Institution or another entity listed above[52]. However, we note that this opinion is not supported by any case law and it seems to be in contrast with Article 1, first paragraph, lett. f), which, in defying "close-out netting" provisions clearly refers exclusively to financial collateral arrangements and agreements including financial collateral arrangements.~~
~~Another matter subject to possible different interpretations with respect to Article 7 of Decree No. 170 is whether, provided that the subjective and objection requirements for the application of the cited Decree No. 170 are met, this provision entitles a Party to enforce the close-out netting mechanism although the closed-out agreement is subject to the prohibition of Article 72, sixth paragraph, of the Insolvency Act. In particular, it has been argued that if an agreement is, at the same time, subject to Article 72, paragraph 6, of the Insolvency Act and Decree No. 170 (e.g. a MNA/CPMA with an EFET Cross Product Credit Annex entered into with a Financial Institution), the latter shall prevail, given that Decree No. 170 must be considered as a special rule protecting, in all circumstances, collaterals and related agreements[53].~~

~~[52] See Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 165.~~
~~[53] See Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 169.~~

~~Although this approach seems to be perfectly in line with the rationale of Decree No. 179, we must note that in this respect there is neither sufficient case law nor uniform authoritative scholarship. Therefore, we cannot exclude that a Court differently could interpret such inconsistency of Decree No. 170 and Article 72, paragraph 6, of the Insolvency Act.~~

~~*5. cont' We would also like to know whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.).*~~

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

~~*6. Assuming the Parties have not specified that Automatic Termination (as defined in § 6.3 of the MNA or Part II.C of the EFET/IECA Commodities Schedule to the CPMA) applies, are the provisions of the MNA/CPMA permitting the Terminating Party to terminate the Netted Agreements or Principal Agreements (including all transactions) upon the occurrence of a Close-Out Event enforceable under the laws of Italy or is there a risk that (i) the entering into the MNA/CPMA, (ii) the entering into the Netted Agreements or Principal Agreements or transactions thereunder or*~~

~~*(iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?*~~

~~The discretionary termination rights under the MNA/CPMA 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 C.I.1.7~~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.

~~If the Close-Out Events are insolvency based, in case of an express termination clause, the termination right will certainly not be enforceable with respect to Physical Transactions after the insolvency declaration, in light of Article 72, sixth paragraph, of the Insolvency Act, which considers void any clause providing for the termination of the agreement due to insolvency. However, even if construed as a right of withdrawal, there is a risk that a Court interprets Article 72, sixth paragraph of the Insolvency Act widely, considering the right of withdrawal comparable to the termination for the purpose of the provision at issue; also in this case, therefore, the right of withdrawal will not be enforceable after the insolvency declaration (please also refer to Part C.I.1.7.(c)).~~

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

~~prohibited by Article 1344 of the Civil Code, and, consequently, it might be challenged by the competent Insolvency Official.~~

~~For the same reason, we cannot exclude that clauses providing termination of the agreement tied to the presentation of a petition for a declaration of insolvency may also be void.~~

~~On the contrary, Derivative Financial Instruments are automatically terminated as of the date on which bankruptcy (or compulsory administrative liquidation) is declared regardless of the fact that the Parties have specified that Automatic Termination applies.~~

~~*7. Assuming the Parties have elected Automatic Termination to apply, are the provisions of the MNA/CPMA terminating the Netted Agreements or Principal Agreements (including all transactions) upon the occurrence of a Close-Out Event described in § 6.3 of the MNA or Part II.C of the EFET/IECA Commodities Schedule to the CPMA enforceable under the laws of Italy or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?*~~

~~Before dealing with the subject of enforceability of insolvency based termination rights under Italian law, it might be useful to consider the Italian legal qualifications of discretionary and automatic termination rights. This is necessary to understand the effects on the MNA/CPMA and the Netted Agreements or Principal Agreements which stem from the exercise of the termination rights resulting from insolvency- based Close-Out Events (see Part C.I.1.7.(c)).~~

[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~~[54]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~~[55]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~~[56]occurred[41].

~~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.~~

[38] Please refer to Part III.A.4 on the possibility to challenge the commercial reasonableness of the calculation.

[~~54~~][39] Bianca, *Diritto civile*, V, *La responsabilità,* Milan, 2012, 346. This has been confirmed by case ~~law~~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.~~
2 October 2014 and Court of Cassation No. 29301 of 12 November 2019.

[~~55~~][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.

[~~56~~][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 ~~MNA/CPMA~~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 ~~Netted Agreements or Principal~~ Underlying Agreements and not to the ~~MNA/CPMA~~ 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.

~~[57] Bianca, *Diritto civile*, V, *La responsabilità*, Milan, 2012, 347.~~.

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*")~~[57]*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 ~~law~~ 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 [58][43].

We note, in any event, ~~(in line with our considerations under Part C.I.1.7.(a))~~ 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 ~~Netted Agreements or Principal~~ Underlying Agreements and not to the ~~MNA/CPMA~~ Master Agreements themselves, as they fall outside the concept of default referred to in Article 1456 of the Civil Code.

[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~~, as introduced by Decree No. 5,~~ sets forth that "contractual clauses providing for the termination (*risoluzione*) of the contract as a consequence of the insolvency declaration are void (*inefficaci*)*"*.

This rule introduces to the Italian legal system the principle that the Insolvency Official's power to elect which outstanding agreements to perform and which to terminate cannot be contracted out by the parties (in substance, doing ~~"cherry-~~"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~~scholars[44], ~~[59]~~ 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)~~[60]subsequent)[45].

~~[58] Court of Cassation No. 26508 of 17 December 2009; Court of Cassation No.18920 of 31 August 2009; Court of First Instance of Milan of 17 February 2011.~~

~~[59] 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.*~~

~~[60] Guglielmucci, *Commento all'art. 72*, in *Il nuovo diritto fallimentare*, edited by A. Iorio and M. Fabiani, Turin, 2006, p. 1132.~~

However, according to a merit ~~decision~~[61]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*):

[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~~[62]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~~[63]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 § ~~10.5(c~~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 ~~C.I.1.2.(c)~~III.B.1).

§ 3.1(C)(III)(d)

~~[61] Tribunale di Messina, 2 July 2009.~~
~~[62] Vattermoli, *Commento all'art. 72*, in *La riforma della legge fallimentare*, Torino, 2006, p. 424.~~
~~[63] Under Article 1344 of the Civil Code an agreement (or, indeed, a clause) is void when it is intended to avoid a mandatory rule.~~

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.

3.1(C)(III)(f)

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.

§ 3.1(C)(III)(c)

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~~[64]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~~[65]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 ~~recent~~ merit ~~case law~~[66]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 ~~for~~ in our view us a significant ~~point~~ argument in favour of the validity and enforceability of the termination with respect to this Close-Out Event.

~~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~~

~~64~~ 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*.

~~65~~ 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.*.

~~66~~ 51 The Court of Appeal of Milan with decision ~~No.~~ No.580 of 4 February 2015 stated that the principle set out under Article 186-*bis* of the Insolvency Act also applies to the composition with creditors with reserve ~~(*concordato con riserva*)~~.

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 ~~(*i.e.* §§ §§ 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))~~, 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 ~~peculiarities~~ 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 ~~recent~~ merit case~~-law, the early termination~~ precedent[52], the Early Termination rights ~~may~~ 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*).

~~On the contrary, with respect to 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 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~~[67]enforceable. Therefore, early termination rights might be void only in case of~~(i)~~
(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~~[68]~~.~~effective;

(ii) ~~If~~ 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 ~~law~~precedents, we are not in a position to exclude that a ~~Court~~ court may apply a different interpretation;

(iii) ~~(ii)~~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.

~~The same above applies to Derivative Financial Instruments.~~

Scenario 2

~~Irrespective of~~ If a law other than the Italian one is the governing law of the ~~MNA/CPMA, if an Italian Party to the MNA/CPMA is subject to Insolvency Proceedings~~Master Agreements, in the event that a Party is declared insolvent in Italy, the same opinion under Scenario
1 above would apply~~. In fact~~, given that the Insolvency Regulation would apply. In particular, Article 4, second paragraph, letter (e), of the Insolvency Regulation ~~subjects~~ 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).

~~Scenario 3~~
~~If a law other than the Italian one is the governing law of the MNA/CPMA, in the event that a Party is declared insolvent in Italy, the same opinion under Scenario 2 above would apply. Indeed, also in this case, Article 4, second paragraph, letter (e), of the Insolvency Regulation would apply.~~

~~*Would you recommend to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(III) of the MNA) or similar event? If yes, please specify such event or events and indicate whether it 8. would be necessary or advisable to specify, or to refrain from specifying, a certain grace period to provide for optimal timing of such termination under local law? If you are recommending that a grace*~~

~~*period be made applicable, what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency Courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended*~~

~~[67] With respect to Derivative Financial Instruments in case of composition with creditors, see De Sensi, *Credit default swap tra dinamiche di mercato e disciplina concorsuale*, *Rivista di diritto societario*, 2014, No. 2, 286.~~

~~[68] Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 159 *et seq.*~~

~~*language for purposes of customizing the Automatic Termination provisions to implement such optimal termination timing*~~

~~From an Italian law point of view, we have no specific recommendations on making Automatic Termination operative *vis-à-vis* a Party incorporated or organised in Italy especially with respect to the events under § 3.1(C)(iii) of the MNA given our observations under Part C.I.1.7. Nevertheless, as a general remark, we note that by electing Automatic Termination, the Party could not evaluate from time to time to enforce or not the termination of the relevant agreement.~~

~~However, in this respect, it must be noted that an Automatic Termination triggering global Close-Out would render more robust the "single agreement" concept (see Part C.I.1.10). This would be particularly important in case of MNA/CPMA covering both Physical Transactions and Derivative Financial Instruments. In fact, the automatic Close-Out could be used as an argument to hold that a Physical Transaction must be terminated, despite the prohibition under Article 72, sixth paragraph, 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 (see Part I.1.2.cont').~~

~~*Are the provisions in § 8 of the MNA and Section 4 of the CPMA providing for offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of Italy or is there a risk that such determination could be challenged by 9.a liquidator, administrator, receiver or third party?*~~

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~~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.

~~In this respect, it is worth noting that, some legal scholars and a line of case law[69] argue that insolvency set-off is quite different from the legal set-off under Article 1243, *et. seq*, of the Civil Code since the insolvency set-off is applicable not only to homogeneous credits but also between non-pecuniary and pecuniary credits and that also debts which becomes payable after the insolvency declaration[70] may be included within the debts/credits subject to the right of set-off. By virtue of the interpretations above, the scope of insolvency set-off would be broadened granting, therefore, a higher level of protection to the creditor's claims.~~

If the set-off produces a positive differential in favour of the creditors, this would amount to an unsecured credit (*credito chirografario*) ~~in~~ towards the bankruptcy ~~procedure~~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 ~~C.I.1.5~~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 ~~C.I.1.7~~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 ~~is~~ are calculated under the ~~Principal Agreement / Netted Agreement~~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 ~~6~~ 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 ~~6~~ 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.

~~While we believe that the Insolvency Regulation has generally had a number of positive effects in terms of the administration of cross-border insolvencies, we do not believe that its entry into force will be interpreted by the Italian Courts as having a substantial impact on the enforceability of the close-out netting provisions of the~~

~~[69] See Court of Cassation No. 8322 of 16 August 1990; Court of Cassation No. 775 of 16 November 1999.~~
~~[70] The debt must be due (*liquido*) and payable (*esigibile*).~~

~~MNA/CPMA, except with regard to issues related to claw-back risk, as discussed in Part C.I.1.3.~~

~~This is because Article 4, second paragraph, letter (e), of the Insolvency Regulation provides that the law of the State where the proceedings were opened governs the effects of the proceedings on current agreements to which the Debtor is party. We do not believe that the exercise of early termination rights in relation to a Principal Agreement or Netted Agreement can be considered as merely a question of whether or not the relevant claim has matured for the purposes of claiming a set-off right. This view appears to be consistent with the drafting of the MNA/CPMA, which provides for close-out netting only in respect of early termination.~~

(c) Winding-up Directive

The Winding-up Directive, as implemented in the Banking Act, includes a number of derogations from the basic rule that the law of the home Member State of a European bank governs the effect of insolvency proceedings in relation to that bank. Most significantly, 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.

In conclusion:

Scenario 1

If Italian law is the governing law of the ~~MNA/CPMA~~Master Agreements, leaving aside the enforceability of early termination based on insolvency based Close-Out Event (see Part ~~C.I.1.7~~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 ~~Principal Agreements or Netted~~ 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 ~~Netted Agreements / Principal~~ 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.

~~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, which remain effective and enforceable despite the insolvency of a Party.~~

~~Scenario 2~~

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

Scenario 2

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

~~(iii)~~If a Debtor is an Italian bank, we are of the opinion that Article 95-*ter*, second paragraph, of the Banking Act would apply and therefore the enforceability of the close-out netting provisions under the ~~MNA/CMPA~~ Master Agreements would be assessed under the governing law of the ~~MNA/CPMA~~Master Agreements.

~~Scenario 3~~

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

~~If a law other than the Italian one is the governing law of the MNA/CPMA, in the event~~

~~that an Italian Party is subject to Insolvency Proceedings, the same opinions expressed under Scenario 2 above will apply.~~

~~*10. Do the laws of Italy recognize that the Close-Out netting applies to all transactions? Would we need the single agreement concept (as provided for in § 2.3 of the MNA and, if so selected in Section 10.6 of the Commodities Schedule in the CPMA) in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in Italy, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some but not all Netted Agreements or Principal Agreements and some and not all transactions thereunder might impact termination and close-out rights generally, as well as subsequent rights to terminate transactions remaining under the MNA/CPMA following a previous Partial Close-Out*~~

~~*We believe that an Italian Court cannot ignore the Parties' explicit intention to recognise a single agreement relationship (collegamento negoziale) between all the Netted Agreements or Principal Agreements and all transactions thereunder. However, this must be separately assessed in respect of each of the three scenarios considered in this 2015 Opinion Letter.*~~*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].

[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 (*amministrazione 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

[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.

In conclusion:

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 contemplate 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*).

~~Even~~ 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~~, under case law~~, when the parties decide to establish a relationship between agreements in order to pursue a common economic goal, events (including termination events) affecting one agreement automatically affect all other related agreements as ~~well[71]~~well[64].

~~[71] 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.~~

~~As far as we are aware, there is no case law applying the single agreement relationship to the termination of agreements under Insolvency Proceedings[72]. Nevertheless, since no reason exists to apply different principles, we are of the view~~

~~that the exercise of termination rights with respect to a Netted Agreement or Principal Agreement would result in the termination of the other Netted Agreements or Principal Agreements and all transactions thereunder.~~

~~In this vein, we maintain that a reference to this concept is necessary to hold that a single agreement relationship between all the Netted Agreements or Principal Agreements and all transactions thereunder exists (please refer to Part B.6 and Part C.VI).~~

~~Moreover, if the non-defaulting Party were unable, or in any event failed, to terminate the Netted Agreements or Principal Agreements before or upon admission of the Italian Party to Insolvency Proceedings, or if early termination rights exercisable as the result of insolvency-based Close-Out Events are deemed unenforceable (please refer to Part C.I.1.7.(e)), then the question which is raised is whether the Insolvency Official would be entitled to make an election to continue only some of the outstanding transactions and elect to terminate the others.~~

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

~~Traditionally, there were often believed to be certain exceptions to the principle that the Insolvency Official must take agreements as he found them: in particular, it was often held that the Insolvency Official was entitled to modify or disregard those contractual provisions which are incompatible with the Insolvency Proceedings, such as an arbitration~~

~~clause or a prohibition against sale by the Debtor. More recently, however, both the case law and legal theory have reinforced the general rule, and this concept seems unaffected by the recent reformulation of Article 72 of the Insolvency Act~~[7374]~~.~~

~~In relation to the restructuring extraordinary administration proceedings and to the amendments introduced for these proceedings by Decree No. 134, we believe that Decree No. 134 does not introduce a material risk of cherry-picking for transactions under a single MNA/CPMA. As discussed above under Part C.I.1.1.(a)(v), Decree No. 134 broadens the scope of the powers of the extraordinary commissioner of identifying business lines, parts of business lines, single assets and single contracts for sale. However, these powers seem to have been included in Decree No. 134 primarily for the purposes of facilitating transfer of part of a business and dealing with employee rights related to such transfers. Though there is no relevant case law for the time being on this, we believe that these provisions could not be construed as giving new powers to the extraordinary commissioner allowing the extraordinary~~

~~[72] In Court of Cassation No. 1807 of 28 January 2013 the single agreement concept was recognised but in favour of the insolvency estate, which provided evidence that the relationship between two agreements (which were considered a single agreement) was made by the parties with the specific aim of circumventing the *pari passu* parinciple.~~

~~[73] In the words of one Italian legal scholar, "The insolvency official cannot modifiy the agreement: it is entitled to terminate the agreement or to continue it as a whole", Caputo Nassetti, *I contratti derivati finanziari*, Milan, 2011, 161-162; Alessi, *L'amministrazione straordinaria delle grandi imprese*, Milano, 2000, 162; Ferrara, *Il Fallimento*, Giuffré, 1995, p. 377.~~

~~[74] The Court of Cassation (No. 11216 of 14 October 1992) has provided further support for this view by holding that a bankruptcy liquidator (*curatore*) is bound by an arbitration clause contained in an agreement for which he elects to continue performance under Article 72 of the Insolvency Act; Court of Cassation No. 6165 of 17 April 2003; Court of First Instance of Reggio Emilia No. 816 of 2 December 2005.~~

~~commissioner to elect which contracts to terminate, disregarding the Parties' express intention to recognise a single agreement relationship (*collegamento negoziale*) between the Netted Agreements or Principal Agreements and all transactions.~~

~~With respect to discretionary~~ In this respect a partial Close-Out, in the context of the ~~MNA/CPMA~~Master Agreements, the termination of some but not all ~~Netted Agreements or Principal~~ Underlying Agreements and some and not all transactions ~~thereunder, upon election of the Terminating Party/Closing Out Party after the occurrence of the Close-Out Event,~~ 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 ~~Netted Agreements or Principal~~ Underlying Agreements and the transactions subject to Close-Out could lead to believe that, despite the relevant clause in the ~~MNA/CPMA~~Master Agreements, a relationship between all ~~Netted Agreements or Principal~~ 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 ~~automatic~~ global Close-Out could be used as an argument to hold that ~~a Physical Transaction must be terminated~~, despite the prohibition under Article 72, ~~sixth~~ 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.~~In fact~~

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.

In conclusion:

Scenario 1

If Italian law is the governing law of the Master Agreements, one may argue that the limitations applicable ~~to termination of Physical Transactions under Article 72, sixth paragraph, of~~ under the Insolvency Act would not apply if those transactions were not terminated because of the insolvency of a Party but ~~they were terminated automatically~~ (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 ~~no case law and authoritative scholarship exist in this respect. Therefore, there is a risk that~~ this construction ~~would~~ could be not upheld by a competent ~~Court on the ground~~ court, given that in this case the aim of Article 72, ~~sixth~~ paragraph 6, of the Insolvency Act would be ~~frustrated~~jeopardised and the prohibition set out therein would be circumvented.

~~In conclusion:~~

~~Scenario 1~~

~~If Italian law is the governing law of the MNA/CPMA, we are of the opinion that:~~

~~(i) § 2.3 of the MNA and, if so selected, Section 10.6 of the Commodities Schedule in the CPMA are necessary to hold that a single agreement relationship (*collegamento negoziale*) between all the Netted Agreements or Principal Agreements and all transactions thereunder exists; in light of that provision, the Netted Agreements or Principal Agreements and all transactions thereunder cannot be severed from the other Netted Agreements or Principal Agreements without affecting the single agreement concept (please also refer to Part C.IV.5.(b)(ii)(A));~~

~~(ii) as a consequence, the exercise of termination rights with respect to a Netted Agreement or a Principal Agreement the MNA/CPMA would result in the termination of all other Netted Agreements or Principal Agreements and transactions thereunder; in this respect we suggest to apply a global and not partial Close-Out; and~~

~~(iii)~~

~~(iv) the single legal agreement architecture of the MNA/CPMA would also be binding on any Insolvency Official and precluding any right to elect to continue only a portion of the Netted Agreements or Principal Agreements outstanding and, as a consequence, an Insolvency Official would be bound to respect the single agreement concept and could not elect to perform less than all of the Netted Agreements or Principal Agreements. This however, does not apply with respect to those agreements which are Financial Derivative Instruments given that they are automatically terminated by operation of law in case of bankruptcy.~~

Scenario 2

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

~~(ii) On the other hand, we cannot exclude that the Italian Courts will rule in a different way if an Italian Party is a Debtor but the MNA/CPMA is governed by a law other than Italian law. The termination of all Netted Agreements or Principal Agreements and all transactions thereunder by a Close-Out under the MNA/CPMA depends on the existence of a single agreement relationship (*collegamento negoziale*) which is a matter of interpretation of the agreement.~~

~~Since Article 12, first paragraph, letter (a),~~
~~of the Regulation Rome I states that an agreement is interpreted according to its governing law[75], an Italian Court would rule applying the law governing the MNA/CPMA.~~

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

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

~~Scenario 3~~

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

~~*11. Is the insolvent counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or EFET/IECA Commodities Schedule) enforceable under the laws of Italy or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?*~~

~~[75] 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.~~

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 ~~of~~ Article 52 or Article 59 the Insolvency Act, although there is some debate among legal scholars as to which of the ~~above-~~ above-mentioned provisions applies to debts owed in a foreign ~~currency~~[76] 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 ~~MNA/CPMA~~Master Agreements.

Therefore, the Final Net Settlement Amount owed under the ~~MNA/CPMA~~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~~[77]bankruptcy[67].

~~[76] In the absence of specific case law, as clarified by Vassalli – Luiso – Gabrielli (*Trattato di Diritto Fallimentare*, Turin, 2014, 92) it is uncertain whether Article 59 of the Insolvency Act can also be applied to debts in a foreign currency. Some scholar considers that debts in a foreign currency are pecuniary debts (*debiti pecuniari*) and therefore regulated by Article 55. See, Inzitari, *Sub Articolo 59*, in *Il nuovo diritto fallimentare*, edited by Jorio, 2007,833. To the contrary, Tedeschi, *Manuale del nuovo diritto fallimentare*, Padova, 2006, 249.~~

~~[77] Tribunal of Bologna, 17 September 1984 and Tribunal of Florence, 3 December 1997.~~

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

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

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

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

~~(i) super priority claims (*crediti prededucibili*, i.e. those claims rank first against all other creditors – e.g. costs and expenses for the management of the insolvency~~

~~proceedings, fees for the Insolvency Official and other professionals, credits arising in connection with the performance of contracts continued by Insolvency Official);~~

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

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

~~On a separate angle, the classification of a Party as Financial Institution or another entity falling in the categories under Decree No. 170 would render the more favourable discipline for close-out netting of collaterals and agreements including collaterals applicable (please refer to Part C.IV.5.(b)).~~

~~**2. Termination for Non-Insolvency Based Material Reasons**~~

~~*1. Please discuss and advise on the issues outlined above under Parts C.I.1.9, C.I.1.10 and C.I.1.11 in the context of non-insolvency related Close-Out Event, as well as the following question: are the rights of the Terminating Party or Close-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions enforceable in accordance with the terms of the MNA/CPMA, irrespective of the insolvency of Party A?*~~

~~(i) Early Termination~~

~~Depending on the nature of the relevant Close-Out Event, it may be classified as:~~

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

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

~~(ii) Close-out netting provisions~~

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

~~In conclusion:~~

~~Scenario 1~~

~~If Italian law is the governing law of the MNA/CPMA, we are of the opinion that termination for non-insolvency Close-Out Events and close-out netting correspond to concepts specifically provided for under the Civil Code and, therefore, would be enforceable under Italian law. It is, however, important to note that the Close-Out set out in § 3.1(A)(II) and Section 2.1(c) of the CPMA ("violation of a covenant") is drafted in a general way and hence could be ineffective as express termination clause (therefore, with no need to prove the materiality of the default(please refer to Part C.I.1.7.(a)). Therefore, we would recommend amending this clause by listing specific defaults, if any, which for the Parties are so serious to justify the termination of theagreement.~~

~~Scenario 2~~

~~Not applicable. Scenario 3~~

~~If a law other that the Italian one is the governing law of the MNA/CPMA, the enforceability of termination for non-insolvency Close-Out Events and close-out netting will be assessed by Italian Courts in accordance with the rules of the relevant governing law of the MNA/CPMA.~~

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.

[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.

[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. ~~II~~Multibranch Parties

1. Italian Multibranch Party

~~*Please base your opinion also on the following additional assumptions: Party A has entered into transactions under the MNA/CPMA through offices in Italy as well as through one or more branches located abroad. After entering into these transactions and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Italy. Please discuss and advise on the following issues: would there be any change in your conclusions reached under Part C.I.1 or Part C.I.2 above based upon the fact that Party A has conducted business under some or all of the Netted*~~

~~*Agreements or Principal Agreements on a multibranch basis prior to its insolvency? Would the MNA and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, the CPMA be treated as a single unified agreement by the Italian receiver under the laws of Italy, regardless of the treatment of the MNA/CPMA or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?*~~

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.

~~*and*~~

~~2.~~Foreign Multibranch Party

~~*a corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country ("Country H") other than Italy has entered under some or all Netted Agreements or Principal Agreements into*~~

~~transactions both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Italy (the "Italian Branch"). After entering into these transactions and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H. Based on the assumptions above, please discuss and advise on the following issues:~~

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

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~~courts, under and regulated by Italian law.

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

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

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

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

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

Pursuant to Article 3, second paragraph, of the Insolvency Regulation if the centre of a Debtor's main interests is situated within the territory of an EU Member State, the Courts of another EU Member State shall have jurisdiction to open insolvency proceedings against that Debtor only if it possesses an establishment within the territory of that other 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 ~~29~~ 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).

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

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

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

~~(ii)~~

(ii) ~~(iii)~~If the close-out has not been enforced by a ~~the~~ competent Insolvency Official in Country H before the opening of Italian secondary proceedings, there is the risk that the Italian Insolvency Official might deem the 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.

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

Pursuant to Article 3, second paragraph, of the Insolvency Regulation, if ~~the~~ Party F has no branches located in Italy, Italian Courts will have no jurisdiction to open secondary proceedings. However, ~~if the assets subject to the main proceeding consist of Italian real estate~~ under Article 11 of the Insolvency Regulation, the Court of the main proceedings will apply Italian Law to ~~the real estate holdings.~~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).

~~**III Collateral**~~

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

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

~~Since the Rome Convention (and therefore, now, Regulation Rome I) 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, Italian Courts must uphold the governing laws chosen by the Parties. Whenever the law applicable to the contract has not been chosen in accordance with Article 3 of the Regulation Rome I, the contract will be governed by the law of the country with which it is most closely connected. With regard to the EFET Cross Product Credit Support Annex, this could be the law of the state where the Party providing the Eligible Credit Support has its centre of main interests.~~

~~However, under Article 51 of Law No. 218 the possession, the ownership and other similar rights (*diritti reali*) on movables are governed by the law where such goods are located. Therefore, regardless of the law of the EFET Cross Product Credit Support Annex, those rights would be governed by the law where the good in question is located.~~

~~*(b) Would the laws of Italy characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such*~~

~~*(c)*~~

~~*transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?*~~

~~Assuming that the laws of Italy govern the transfer of collateral, it is advisable to analyse separately each Eligible Credit Support provided pursuant to the EFET Cross Product Credit Support Annex.~~

~~The letters of credit are provided directly by the issuer to the beneficiary and assuming that this letter of credit is a stand-by letter of credit pursuant to the definition provided in the EFET Cross Product Credit Support Annex, we believe that the stand-by letter of credit would be considered as an independent and autonomous agreement, in which a Party (usually a bank) undertakes to pay a certain amount of money if so required by the relevant counterparty. Accordingly, the Insolvency Official would not be able to challenge any payments made under~~

the stand-by letter of credit and the issuer of the letter would not be excused from its payment obligations under the letter by virtue of the insolvency of the Debtor. In the event of a payment under the letter made after the declaration of bankruptcy, the issuer will have the right to be paid together with the other creditors under the *pari passu* principle[78]. For sake of clarity, it is worth noting that Party B may enforce the relevant stand-by letter also after the insolvency declaration.

Cash collateral consisting of the transfer of a certain amount of money to the Transferee to guarantee the performance of the obligations under the relevant transaction might be construed as an irregular pledge (*pegno irregolare*) pursuant to Article 1851 of the Civil Code referring to pledge over fungible assets where the pledgee is allowed to use the assets, being obliged to return to the pledgor a same amount of goods. This interpretation is supported by the uniform interpretation by the Court of Cassation[79].

The irregular pledge may not be construed as a security interest because there is an unconditional transfer of the ownership of the relevant assets from the Transferor to the Transferee while a security interest provides its beneficiary with certain preferential rights in the disposition of the secured assets.

More questionable is the qualification of a cash collateral consisting of the transfer of a certain amount of money into a credit account held by a third party (i.e. a bank) in the name of the Transferee. It has been argued that that in order to constitute an irregular pledge, it would be necessary to have a coincidence between the pledgee and the depository[80]. 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 law[81] 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. In those case, the pledge is over the receivables (*pegno su crediti*) owed by the debtor vis-à-vis the depository. This would not be the case of the cash collateral under the EFET Cross Product Credit Support Annex, since it appears that there is no relationship between the Transferor and the bank of the Transferee.

Therefore, it has been argued that, even in absence of a coincidence between the pledgee and the depository, if the parties intended to transfer the ownership of the pledged goods, the

[78] Court of Cassation No. 903 of 17 January 2008.

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

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

[81] Court of Cassation No. 9528 of 29 September 1997.

agreement must be qualified as an irregular pledge, formed by the functional relationship (*collegamento negoziale*) between the pledge agreement and the deposit agreement[82] according to which the depository is obliged to return a same amount of those goods to the pledgor or to the pledgee in the event of pledgor's default[83]. Other authors point out that the rules applicable to the irregular pledge do not set out restrictions in this respect and, therefore, if the agreement of the parties is that the pledgee has full ownership of the fungible goods with the obligation to render back to the pledgor the same amount received,

once that the guaranteed obligation is fulfilled, such agreement is an irregular pledge even if the depositor is a third party[84]. This seems to be the case of the cash collateral under the EFET Cross Product Credit Support Annex.

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

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

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

The same applies also if the cash collateral is granted under an arrangement with a Financial

~~Institution or another entity under Decree No. 170 and the transfer of ownership is provided. However, the transfers of collateral pursuant to Decree No. 170 must comply with the following requirements:~~

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

~~(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.~~

~~*(d) What is the effect, if any, under the laws of Italy of the right to substitute collateral pursuant to § 6 of the EFET Cross Product Credit Support Annex? Does the presence or absence of consent to substitution by Party B 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 law[85], this substitution right must provide that~~

~~[82] Given the fungible nature of the money, the deposit would be in the form of an irregular deposit (*deposito irregolare*), under Article 1782 of the Civil Code.~~

~~[83] 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).~~

~~[84] Bullo, Pavasini, Rizzieri, Sandei, *Il pegno nei rapporti commerciali*, 2005, 237.~~

~~[85] 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.~~

~~the substitutive Eligible Credit Support has a maximum value equal to the value of Eligible Credit Support originally provided. If the substitutive Eligible Credit Support has a value above the value of the original Eligible Credit Support, it may be possibly subject to claw- back action.~~

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

~~*(e) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the CMPA together with §11 of the EFET Cross Product Credit Support Annex. Assuming that Section4 of the CPMA is valid and enforceable in Italy insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is § 11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the CPMA?*~~

~~In light of the remarks above, we are of the opinion that the Eligible Credit Support in the form of a stand by letter of credit, (as described above) being independent of the underlying obligation, does not give rise to a direct relationship between the relevant Parties and, consequently, it should not be included in the Final Net Settlement Amount.~~

~~*(f) Are the rights of Party B enforceable in accordance with the terms of the CPMA and the EFET Cross Product Credit Support Annex, irrespective of the insolvency of Party A?*~~

~~The rights of Party B arising from the stand-by letter of credit Eligible Credit Support under the EFET Cross Product Credit Support Annex may be enforced notwithstanding the insolvency of Party A. As better specified above, the stand-by letter of credit being independent of the underlying contractual obligations entitles the relevant beneficiary to enforce it even in case of insolvency of the Debtor.~~

~~With respect to cash collateral, assuming that this is qualified as an irregular pledge, after a harsh debate, the case law confirmed that in case of an irregular pledge (*pegno irregolare*), no any further action has to be taken by the Transferee to enforce its right even in the context of Insolvency Proceedings, since the pledgee has already absolute ownership of the fungible goods covered by the pledge[86].~~

~~The only possible risk is the subjection of the cash collateral to a claw back action if it is constituted during a "suspect period" and in this case, the relevant cash must be re- transferred to the Insolvency Official.~~

~~*(g) Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral*~~

~~*provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value*~~

~~[86] See Court of Cassation No. 202 of 14 May 2001; Court of Cassation No. 23164 of 11 October 2013.~~

~~*than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Cross Product Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*~~

~~Cash collateral might be subject to claw-back if it were constituted by the Debtor, acting as Transferor, within one year or six months, as the case may be, (in this respect please see Part C.I.1.(a)(i)) before the bankruptcy declaration of the Debtor. However, also in this case, cash collaterals might not clawed back by an Insolvency Official, provided that:~~

~~(i) the above transfer occurred before the claw-back periods[87]; or~~

~~(ii) the Transferee proves that, when it received the relevant transfer, it was not aware of the Debtor's insolvency[88].~~

~~With regard to claw-back actions, it is worth noting that, as noted in Part C.I.1.(a)(i), under certain circumstances, they do not apply in relation to securities. The exemption from claw-back actions applies when the security is granted as a consequence of a plan for the restructuring of the Debtor[89].~~

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

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

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

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

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

~~[87] 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 C.I.3(a)(ii) are met. Special rules applies 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.~~

~~[88] 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).~~

~~[89] The same exemption applies to securities granted under a debt restructuring agreement (please refer to Part C.I.1.(a)(iii)) or a compositions with creditors (please refer to Part C.I.1.(a)(ii)). No other exemptions apply with specific reference to securities.~~

F. ~~IV.~~ General Enforceability

1. ~~*Are the MNA/CPMA and the EFET Cross Product Credit Support Annex*~~ *Are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA* ~~*enforceable under the laws of Italy in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the ordre public in Italy and that may be challenged by the courts in Italy irrespective of the law that governs the Agreement*~~*legal, valid and binding under the laws of Italy*

Without prejudice to all Parts of this ~~2015~~ 2020 Opinion Letter, including, but not limited to, the assumptions listed in Part ~~B~~II and all our remarks in a insolvency scenario, we are of the opinion that the MNA/CPMA and the ~~EFET Cross Product Credit Support Annex is~~ 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 ~~MNA/CPMA~~Master Agreements, in accordance with both the Rome Convention and Law No. 218.

~~*2. Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?*~~

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 ~~MNA/CPMA~~ Master Agreements Given a Choice of Italian Law

If the Parties wish to choose Italian law as the as the governing law of the ~~MNA/CPMA~~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 ~~MNA/CPMA~~ 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 ~~regulations~~, 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 ~~MNA/CPMA~~ Master Agreements to an arbitration chamber based in ~~Italy~~[90]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.~~On this point, please note that the rule above does not apply to listed companies (*società quotate*).~~

~~**V. Confirmation Practices**~~

~~*1. Requirements relating to applicable procedure formalities in the formation of legally binding transactions and its inclusion in the Netted Agreement or Principal Agreement and related MNA/CPMA and a Confirmation complying with the procedural laws of Italy in order to be sufficient for all purposes to evidence a binding transaction and its inclusion in the Principal Agreement and Netted Agreement*~~

(iii) Certain Date (*Data certa*)

~~[90] Possible models of arbitration clause are available on the website www.camera-arbitrale.com.~~

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

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

[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~~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. However, single confirmations for each transaction under a written master agreement may occur also not in writing.~~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 addition~~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~~[91]insolvency[79].

Under Italian law, the certain date of law is granted when the agreement is executed by a public deed (*atto ~~pubblico~~*[92]*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~~*[93]*autenticata*[81]); or

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

~~(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 drawnup.~~

~~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*.~~

[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.

~~[91]~~ [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.

~~[92]~~ [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.

~~[93]~~ [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~~[94]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~~[95]evidence[83];

(ii) Italian law provides for strict limitations on the admission of witness evidence with regard to ~~agreements~~[96]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.

~~In conclusion:~~

~~Scenario 1~~

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.

~~Transactions may be concluded in any form, including verbally and electronically, with no specific signature requirements. However, Principal Agreements / Netted Agreements which are Derivative Financial Instruments must be executed in writing.~~

~~In addition, with the aim of attributing to the transactions a certain date of law (*data certa*), which will allow these agreements to be asserted against third parties (especially in the context of Insolvency Proceedings), we suggest to execute each of the Netted Agreements or Principal Agreements and the transactions in the form of either (i) a public deed (*atto pubblico*) under Article 2699 of the Civil Code or (ii) a private deed with notarised signature (*scrittura privata autenticata*) under Article 2703 of the Civil Code. Alternatively, other circumstances could grant the transaction a certain date of law (*data certa*), such as sending the signed confirmation by mail provided that the postmark is on the document or by creating an electronic document with a timestamp.~~

~~[94]~~ [82] See Guglielmucci, *Lezioni di diritto fallimentare*, Turin, 2000, 224-225, and Iorio, *Le crisi di impresa. Il fallimento*, Milan, 1999, p. 618.

~~[95]~~ [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.

~~[96]~~ [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.

~~Scenario 2~~

~~Not applicable. Scenario~~

~~3~~

~~If a law other than the Italian one is the governing law of the Netted Agreements or Principal Agreements, the Rome Convention will apply. Under Article 9 of the Rome Convention:~~

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

~~Accordingly, transactions may be concluded in any form, provided that, alternatively:~~

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

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

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

~~(b) *At what point in time does a transaction agreed upon verbally become legally enforceable?*~~

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

~~Therefore, a written confirmation is not a requirement for the formation of a transaction agreed upon verbally which is already, *per se*, legally enforceable. The confirmation only provides evidence that the Parties have entered into a transaction.~~

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

~~Under Italian law, silence is normally not sufficient to form a legally binding agreement since it is not considered a valid way of demonstrating the intention of a party to enter into an agreement. However, Courts and legal scholars consider silence as acceptance when an obligation to reject the proposal is imposed by either the nature of the transaction or by trade practice. In these circumstances, the failure to communicate rejection of the proposal may be considered as acceptance of an amendment to a transaction previously entered into verbally[97].~~

~~Therefore, if under the Netted Agreement or Principal Agreement, the Parties undertake to promptly review the confirmation terms and to notify the other Party of any inconsistency with the terms applicable to the transaction without delay, we cannot exclude the possibility that a Court may consider the failure to object to incorrect terms as an acceptance of those terms.~~

~~(d) *Is reference to a Netted Agreement or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?*~~

~~Unless the Parties have agreed in writing to adopt a specific procedure to both enter into the transaction and to include them in the Netted Agreement or Principal Agreement, because in general Italian law does not require specific formalities to be complied with for the formation of transaction (please refer to Part C.V.1.(a)), these are validly included~~

~~in the Netted Agreement or Principal Agreement regardless of their form (including the form of the reference to the Netted Agreement or Principal Agreement).~~

~~With regard to the evidence of a transaction entered into and making reference to a Netted Agreement or a Principal Agreement verbally, if so admitted under the law, Article 2721, first paragraph, of the Civil Code provides that evidence from witnesses is not admissible when the value of the subject matter exceeds Euro 2.58. However, as stated in Article 2721, second paragraph, of the Civil Code, Courts have the discretion to admit (and regularly exercise this discretion) evidence from witnesses beyond this limit, taking into account the nature of the parties, the nature of the agreement and other circumstances.~~

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

~~Authoritative legal theory states that, for the valid inclusion of a single transaction in the master agreement, it is not necessary that the parties 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 master agreements even if the Parties entered into them verbally and without making reference to the specific Netted Agreement or Principal Agreement, provided that the Parties do not include in the transaction anything inconsistent with the applicability of the Netted Agreement or Principal Agreement. Therefore, a subsequent confirmation of the transactions stating the intention of the Parties to include such transactions in the Netted~~

~~[97] Court of Cassation No. 6162 of 16 March 2007, Court of Cassation No. 3403 of 20 February 2004, Court of Cassation No. 5363 of 14 June 1997, Court of Cassation No. 8191 of 22 July1993.~~

~~Agreement or Principal Agreement does not constitute a requirement for its valid inclusion.~~

~~*2. Means of Evidence*~~

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

~~With regard to the taped recording, the relevant provisions of the Data Protection Code and the Employees' Act must be examined.~~

~~(i) Data Protection Code~~

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

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

~~instructions.~~

~~The data controller must:~~

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

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

- ~~to execute or perform the agreement entered into by the data controller and the data subject; and/or~~
- ~~to comply with specific requests made by the data subject prior to entering into an agreement.~~

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

~~In light of the above, if the recording of a telephone conversation relating to a transaction involves the collection and recording of personal data of a natural person, the recording Party should:~~

- ~~inform such natural person of the processing (i.e. recording) of its personal data, including information on the purpose and methods of such processing; and~~
- ~~obtain the natural person's consent to the recording of its personal data (unless one of the exemptions mentioned above applies).~~

~~(ii) The Employees' Act~~

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

~~Article 4 of the Employees' Act contains a general ban on the use of audio-visual devices and other devices for the purpose of monitoring the activities of an employee at a distance. Monitoring devices required due to organisational or production needs or health and safety requirements may only be installed following agreement between the employer and the local labour unions or, failing agreement, in accordance with the Labour Inspectorate's (*Ispettorato del Lavoro*) instructions. For instance, Financial Institutions must obtain the prior consent of local labour unions to record phone calls between their employees and clients.~~

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

~~Therefore, with the consent of the labour unions to install devices to "listen" to the "content" of telephone calls between employees and clients, a Party may record those telephone conversations. In any case, the Party must inform the employees of the recording of telephone conversations and obtain their consent according to the privacy provisions mentioned under (i) above. In particular, the consent to the recording of the telephone conversation must be given by the person who is being recorded and, therefore, it is not possible for the Party to give that consent on behalf of its employees.~~

~~Therefore, it is advisable to include in the Netted Agreement or Principal Agreement a new clause similar to that recommended under Part C.IV.5.(a).~~

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

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

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

~~With reference to the electronic exchange of data as a valid means of entering into an Individual Contract under the MNA/CPMA please refer to Part C.V.1.(a).~~

~~With reference to the admissibility as evidence of a confirmation by electronic exchange of data under Italian law, the rules on electronic documents (*documenti informatici*) would apply. In this respect, the level of admissibility will depend on the legal classification of the electronically transmitted confirmation under Decree No. 82. In particular, this Decree draws a distinction between an: (i) an electronic document signed by way of advanced electronic signature (*firma elettronica avanzata*)[98], qualified electronic signature (*firma elettronica qualificata*)[99] or digital signature (*firma digitale*)[100]; (ii) an electronic document signed by electronic signature (*firma elettronica*)[101]; and (iii) an electronic document (*documento informatico*)[102] that is not signed by the parties (e.g. e-mail, point-and-click).~~

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

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

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

~~No weight of evidence is attributed to an electronic document that is not signed by the parties. As clarified above, this does not mean that the transaction is not valid, given that no requirements of forms apply with respect to transactions (however, Principal Agreements / Netted Agreements which are Derivative Financial Instruments must be executed in writing).~~

~~[98] The advanced electronic signature (*firma elettronica avanzata*) is a kind of electronic signature created by means that only the signatory may control and which allows to verify whether after the signature the datas have been modified.~~

~~[99] The qualified electronic signature (*firma elettronica qualificata*) is a kind of electronic signature obtained through an IT procedure which guarantees the univocal provenance from the signatory.~~

~~[100] The digital signature (*firma digitale*) is based on a pair of asymmetric keys system.~~

~~[101] The electronic signature (*firma elettronica*) is a series of electronic data used as an IT authentication method.~~

~~[102] The electronic document (*documento informatico*) is the IT representation of acts, facts, or data legally relevant.~~

~~VI. Core Provisions~~

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

~~Without prejudice to all Parts of this 2015 Opinion Letter, including, but not limited to, Part A.I. and the assumptions listed in Part B, we are of the opinion that no~~

~~elections contemplated by the MNA/CPMA or any of the annexes change the substance of our conclusions reached under Parts C.I or C.II, with the exception of the remarks made under Part C.I.1.10 with respect to the discretionary non-global Close-Out.~~

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

~~Without prejudice to all Parts of this 2015 Opinion Letter, including, but not limited to, Part C.IV.5 of this 2015 Opinion Letter, we have identified the following Core Provisions with respect to the 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;~~

~~with respect to the 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.~~

~~VII. Governing Law, Arbitration and Jurisdiction~~

~~1. *Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§12 of the MNA and Section 6 of the CPMA) be upheld in Italy and what would be the consequence if it were not?*~~

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

~~Without prejudice to all Parts of this 2015 Opinion Letter, including, but not limited to, the assumptions listed in Part B, we are of the opinion that, in accordance with Article 4 of Law No. 218 and, with respect to EU Member States, 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:~~

- ~~the agreement conferring jurisdiction is in writing or evidenced in writing or in a form which accords with practices which the parties have established between themselves; and~~

- ~~the dispute relates to rights which a party is entitled to dispose of (*diritti disponibili*)[103].~~

~~VIII. Other Provisions~~

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

~~Please refer to Part C.IV.5.~~

* * *

Yours faithfully,

Avv. Lorenzo Parola

PAUL HASTINGS (Europe) LLP

~~103 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.~~

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~~*2.cont'. Whether the different rules applicable to the different contracts above result in a splitting-up or segregation of the portfolio of transactions under the relevant Netted Agreements into multiple "netting pools" of disparate treatment or limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the MNA/CPMA*~~*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*	30

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~~5'cont We would also like to know whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.).~~	~~38~~
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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
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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	
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~~3. The most significant problem arising would be if an Italian receiver, liquidator or~~	~~59~~62

~~Court considering a single MNA/CPMA were to require a counterparty of the Italian Branch of Party F to pay the mark-to-market value of transactions entered into with the Italian Branch to the liquidator or receiver of the Italian Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual transactions with Party F under the same MNA/CPMA. In considering this issue, please assume that close-out netting under the MNA/CPMA would be enforced in accordance with its terms in the proceedings for Party F in Country H.~~E. CSA Specific Permutations	
~~*4. Please also assume instead that Party F has no branch located in Italy, but has assets in Italy*~~*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*:	~~60~~62
~~III. Collateral~~*(a) The providing party is a branch located in your jurisdiction of a bank organised outside your jurisdiction;*	~~60~~62

Summary Report	
Title	**pdfDocs compareDocs Comparison Results**
Date & Time	22/03/2022 18:50:51
Comparison Time	42.24 seconds
compareDocs version	v5.0.200.14

Sources	
Original Document	2015_CPMA_MNA_LO_Italy.PDF
Modified Document	DocumentCPMA_MNA_LO_Italy 2020 - rev SA.pdf

Comparison Statistics	
Insertions	747
Deletions	433
Changes	281
Moves	702
Font Changes	0
Paragraph Style Changes	0
Character Style Changes	0
TOTAL CHANGES	2163

Word Rendering Set Markup Options	
Name	Insert Delete Move
Insertions	
~~Deletions~~	
Moves / ~~Moves~~	
Font Changes	
Paragraph Style Changes	
Character Style Changes	
Inserted cells	
Deleted cells	
Merged cells	
Changed lines	Mark left border.

compareDocs Settings Used	Category	Option Selected
Open Comparison Report after saving	General	Always
Report Type	Word	Redline
Character Level	Word	False
Include Comments	Word	True
Include Field Codes	Word	True
Flatten Field Codes	Word	False
Include Footnotes / Endnotes	Word	True
Include Headers / Footers	Word	True
Image compare mode	Word	Insert/Delete
Include List Numbers	Word	True
Include Quotation Marks	Word	False
Show Moves	Word	True
Include Tables	Word	True
Include Text Boxes	Word	True
Show Reviewing Pane	Word	True
Summary Report	Word	End
Detail Report	Word	Separate (View Only)
Document View	Word	Print