REPUBLIKA SLOVENIJA
MINISTRSTVO ZA PRAVOSODJE
DIRECTORATE FOR CIVIL LAW

Župančičeva ulica 3, 1000 LjubljanaT : 01 369 53 42
F: 01369 57 83
E: gp.mp@gov.si
www.mp.gov.si

International Swaps and Derivatives Association, Inc.
Dr Peter M. Werner
Senior Counsel
pwerner@isda.org

European Federation of Energy Traders
Michaela Duve
Chair of the EFET Legal Committee
m.duve@efet.org

Number: 007-113/2023-2030-3
Date: 6. 10. 2023

Zadeva: **Predlog zakona o spremembah in dopolnitvah ZFPPIPP (ZFPPIPP-H) predstavlja tveganje nejasnosti glede izvršljivosti dogovorov o izravnavi in finančnih zavarovanj – odgovor**
Alliance: Letter from ISDA dated 6.9.2023 and letter of support from EFET dated 13.9.2023

On 6 September 2023, we received a letter from the Department of Justice to the International Swaps and Derivatives Association, Inc. ("ISDA"), which represents participants in the privately negotiated derivatives industry and is the world's largest financial trade association in terms of membership. The letter received, which was also addressed to the Ministry of Finance, shows, inter alia, that the ISDA Master Agreement (ISDA Master Agreement) has been facilitating standardisation in the derivatives market for more than 35 years. In the event of a default on a transaction covered by an ISDA Master Agreement, the amounts owed to each other by the parties to the transaction can be pooled using a close out netting arrangement to determine a single payment between the parties, which significantly reduces the credit risk of the parties to the contract. ISDA notes that Slovenia is in the process of transposing the Restructuring and Insolvency Directive through the Draft Law on Amendments and Additions to the Law on Financial Transactions, Insolvency Proceedings and Compulsory Winding-up (the "Draft Law"), but has some concerns with the Draft Law related to the provision of legal certainty for netting arrangements and financial collateral in insolvency proceedings and the proposed insolvency proceedings.

The European Federation of Energy Traders (EFET), which represents the interests of energy traders in Europe and works to build confidence in the electricity and gas markets, also wrote a letter of support to the Ministry of Justice and the Ministry of Finance on 13 September 2023. EFET plays a key role in the development of regulations, standards and good practices in energy markets, including the development of standardised

Contracts for trading electricity and natural gas on the wholesale market. The Framework Agreements, known as EFET General Agreements, together with additional or supplementary documentation, provide a user-friendly mechanism for energy trading, with standardised contractual provisions for individual arrangements for the purchase, sale, delivery and receipt of electricity, thereby reducing transaction costs on the wholesale market for electricity and/or natural gas. The above documentation includes, inter alia, a close out netting arrangement as a means of settling the parties' mutual obligations in the event of termination of the contractual relationship. Netting arrangements between parties to sales contracts significantly reduce credit risk and other related costs and risks. In its letter, EFET associates itself with the concerns raised by ISDA in relation to the Bill. It stresses that clarity on the enforceability of netting agreements and financial collateral arrangements should also be ensured in insolvency proceedings.

Both ISDA and EFET suggest that the Bill should provide clear clarifications on:
– explicitly exempting netting agreements from the provisions on the suspension of individual enforcement proceedings and the prohibition on repudiation of key contracts (proposed new Article 24c of the ICAPF), as allowed for Member States by the Restructuring and Insolvency Directive in Article 7(6);
– explicitly stating that the provision of Article 483 of the ICAPL also applies to the proposed insolvency proceedings;
– making it clear that the transposed provisions of the Restructuring and Insolvency Directive do not apply to financial collateral.

We would like to start by stressing that we have pursued a broad professional dialogue in the development of the proposed solutions. The Bill was first submitted for public consultation and expert coordination (including by publication on the E-democracy portal - Proposals for Regulations) on 2 December 2020, with a deadline for responses from the expert public of 18 January 2021. On the basis of the responses from the expert public, the amended and supplemented Bill was re-published on the E-democracy portal on 30 November 2021, with a public response period of 31 January 2021. During the course of the coordination process, comments and suggestions from a number of stakeholders were received and addressed, either in the introduction to the Bill in the context of the expert coordination presentation (the comments received in the context of the public response following the publication of the amended proposal in November 2021 are addressed), or in the explanatory notes to the individual proposed solutions, in order to improve clarity. In view of the fact that, during the course of the expert consultation between 30 November 2021 and
31.1.2022, we have not received your proposals[1] and have not been able to take a position on them in the same way in the context of the preparation of the Bill. Notwithstanding the above, we consider that the current and proposed arrangements provide sufficiently clear answers to the issues raised.

ISDA's letter points out that the current Slovenian legislation protects the enforceability of close out netting arrangements in insolvency proceedings (Articles 164a, 264a and 483 of the current ZFPPIPP) and proposes to provide the same level of certainty also in insolvency proceedings where insolvency is imminent.

The above-mentioned provisions are not affected by the Bill, which was also adopted by the National Assembly of the Republic of Slovenia on 20 September 2023[2] (hereinafter referred to as the amended ZFPPIPP-H), or, as is evident from the introductory explanation of the main solutions and the explanatory notes to the individual provisions of the amended Articles, the amended ZFPPIPP-H does not amend or supplement the Articles related to these **qualifying arrangements or qualifying financial contracts.**

[1] In the context of the 2020/2021 harmonisation process, we received comments from Špec on 8 January 2021, which were largely taken into account in the drafting of the provision of Article 24c in the drafting of the amended and supplemented Draft Law, which was published on the E-democracy portal on 30 November 2021.
[2] Official Journal of the RS, No 102/23.

As a result of the transposition of the Restructuring and Insolvency Directive, a new insolvency proceedings procedure has been added to the law, namely the insolvency proceedings for the purpose of judicial restructuring. The rules of that procedure are laid down in new Articles 221aa to 221ad. The first paragraph of Article 221ab[3] contains a clear rule that the rules governing compulsory administration proceedings shall apply mutatis mutandis to the insolvency proceedings, unless otherwise provided in this new Section 4.9, which governs the insolvency proceedings. As the new Section
4.9, the special rules for the netting of qualifying financial contracts (current Article 164a of the ICAPF), regulated under Section 4.3: Legal consequences of the opening of compulsory administration proceedings, shall apply in that procedure as well.

As regards the suggestion that it should be made clear that the transposed provisions of the Restructuring and Insolvency Directive do not apply to financial collateral, while we believe that in the case described it is clear which rules apply in the context of a judicial restructuring procedure for the purpose of removing impending insolvency, for the avoidance of any doubt, the legislative procedure has been amended by an amendment to 75. Article 221b of the Bill, an explicit rule was added to Article 221b of the Bill in a new eleventh paragraph, which provides that *neither the opening of a judicial restructuring procedure to remedy an impending insolvency nor the decision to confirm a compulsory composition in a judicial restructuring procedure to remedy an impending insolvency shall have any effect on financial collateral under the law governing financial collateral and the claim secured by such collateral*. The new eleventh paragraph thus explicitly provides that the new insolvency proceedings shall not have any effect on financial collateral under the Financial Collateral Act[4] (hereinafter "FCA") and on claims secured by such collateral. 11. Article 11 of the ZFZ provides that the financial collateral agreement and the rights acquired thereunder, including rights to enforce the collateral, remain in force even after the commencement and continuation of compulsory administration, bankruptcy or involuntary liquidation proceedings against the beneficiary or grantor of the financial collateral. The same will therefore also apply to the new insolvency restructuring proceedings. The latter is also in line with the basic rule of Article 221ab(1), which provides that the rules governing compulsory administration proceedings shall apply mutatis mutandis to a judicial restructuring procedure for the purpose of removing an insolvency threat, unless otherwise provided in this Section.

With regard to the suggestion that the Restructuring and Insolvency Directive gives Member States the right to exempt netting arrangements from the effects of staying individual enforcement proceedings, we would like to clarify that the Restructuring and Insolvency Directive provides for this rule as an option and not as an obligation for Member States. Indeed, in accordance with Article 7(6) of the Restructuring and Insolvency Directive, Member States may (but are not obliged to) provide that the stay of individual enforcement proceedings shall not apply to netting arrangements, including early termination netting arrangements, in the financial, energy and commodity markets, including in circumstances where Article 31(1) does not apply, provided that such arrangements are enforceable under national insolvency law. We would like to reiterate here the provisions of the special regime in the SFO, which are not affected by the amendments to the Law, and moreover, as explained above, are contained in the amended 221.ab in paragraph 11, expressly provides that neither the opening of court restructuring proceedings to remedy threatened insolvency nor the order confirming a compulsory composition in court restructuring proceedings to remedy threatened insolvency shall have any effect on financial collateral under the law governing financial collateral and on the claim secured by such collateral. Nor are the provisions of the amended AML/CFTIPP-H without prejudice to Articles 164a, 264a and 483, which, according to the ISDA Letter, provide a sufficient degree of certainty for insolvency proceedings. In addition, it may be pointed out that the regime in the ZFPPIPP already existed prior to the amendment of the ZFPPIPP-

[3] Article 221ab lays down the basic rules of the judicial restructuring procedure for the purpose of removing impending
insolvency.
[4] Official Journal of the RS, No 67/11 - officially consolidated text, 82/13 and 90/15 - Decree of the US.

H was familiar with a substantially similar type of procedure aimed at removing impending insolvency - the preventive restructuring procedure. In view of the fact that the regime of the preventive restructuring procedure[5] addresses or regulates in the same way the effects on qualified financial contracts referred to in Articles 24a and 24b, we do not consider that the amendment to the ZFPPIPP-H and, within its framework, the rules of the new procedure of judicial restructuring for the purpose of the removal of impending insolvency affect the position of the parties to such contracts.

With regard to ISDA's observation that the current wording of the Bill in Article 11 (proposed new 24.c) does not exclude the risk that the debtor's key contracts include derivative transactions (including qualifying and other qualifying contracts under the MiFIDPA), i.e. that a counterparty may be able to prevent the assignment of such a contract and consequently prevent the execution of a netting arrangement under the terms of that Article, and EFET's suggestion that, for the same reasons that led to the adoption of Article 24.11, it would be reasonable for ISDA to consider that Article 24.b of the ICAPF (and Articles 24a, 164a, 264a and 483. In order to avoid misinterpretations of the relevant provisions in potential disputes, it is necessary to explicitly exempt balancing agreements from the provisions on the suspension of individual enforcement proceedings and the prohibition on the withdrawal from key contracts (the proposed new Articles 24.c of the ICAPRD), as allowed to Member States by the Restructuring and Insolvency Directive in Article 7(6), we would like to clarify that the very placement of, and consequently the delimitation of, key contracts from the previously specifically regulated contract types - qualified financial contracts, netting agreements and other qualified agreements (Articles 24a and 24b), excludes the application of Article 24c to such contracts or agreements. It is for this reason that the notion of key contract has been placed after the subject matter covered by Articles 24a and 24b and not before it, as otherwise there could be doubt as to whether key contracts constitute a broader definition which may also include the contracts and arrangements defined in Articles 24a and 24b. We consider that the inclusion of this content in the
Article 24c excludes such doubt, as explained above.

The provision defining key contracts is based on Article 7 of the Restructuring and Insolvency Directive, which defines in its fourth paragraph the notion of "key outstanding contracts", which, in line with the Restructuring and Insolvency Directive, is understood to mean outstanding contracts that are necessary for the day-to-day operation of the business, including supply contracts, the termination of which would bring the debtor's activities to a halt. The provision of the proposed new Article 24c is therefore placed in Section 1.2, Definitions and abbreviations. This section also contains Article 24a, which defines the concept of a qualifying financial contract and a netting arrangement, and Article 24b, which defines another qualifying contract to which the rules applicable to qualifying financial contracts and netting arrangements also apply mutatis mutandis. The application of the specific rules of the Act to those contracts (defined in Articles 24a and 24b) is thus clearly established. The newly proposed provision of Article 24c, which defines key debtor contracts, does not exclude the latter rules. This is further confirmed by the provision of Article 1(3) of the MPLF, which provides that only in respect of relationships not governed by the MPLF are the rules laid down by other laws applicable. Since Articles 11, 12, 13 and 14 deal with the effect of the opening of compulsory administration, bankruptcy or involuntary liquidation on financial collateral contracts and the rights acquired thereunder, and with set-off arrangements for the purpose of early termination, these rules prevail over any rules laid down by other laws. Only insofar as Articles 11 to 14 of the ZFZ do not expressly provide otherwise, the provisions of the law governing insolvency proceedings shall apply with regard to the legal effects, nullity and voidability of financial collateral agreements and the provision of financial collateral (Article 14(2) of the ZFZ).

The provisions of the current Article 483 of the ZFPPIPP, which should also protect compensatory arrangements in insolvency proceedings, have not been affected by the amendment to the ZFPPIPP-H, but we would add that this provision is placed in Chapter 8, which regulates the rules on insolvency proceedings with an international element, and the scope of this provision should therefore be accordingly

[5] Cf. Article 44l(4) and (5) of the ICAPF Act.

be taken into account and interpreted in the light of the fundamental rule of the i n s o l v e n c y proceedings referred to in the first paragraph of Article 221ab.

Yours sincerely.

Prepared by:
Mojca
Secretary

Miha Verčko
LobnikManaging Director

For your information:
Ministry of Finance, urska.cvelbar@gov.si