Neutral Citation Number: [2024] EWHC 3236 (Comm)

Claim No. FL-2022-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (COMMERCIAL COURT – KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 December 2024

Before :

The Hon. Mr Justice Bryan

- -

Between :

DEXIA S.A.

Claimant

– and –

REGIONE EMILIA ROMAGNA

Defendant

- -
- -

Andrew Lodder (instructed by **Bonelli Erede Lombardi Pappalardo LLP**) for the **Claimant**
The Defendant has solicitors on the record but did not appear.

Hearing date: 21 November 2024

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN:

A. INTRODUCTION

1. This is the trial of the claim brought by the Claimant Dexia S.A ("Dexia") against the Defendant Regione Emilia Romagna ("Emilia Romagna"/the "Region") in these proceedings (the "English Proceedings").

2. After acknowledging service of Dexia's claim, and indicating an intention to challenge the Court's jurisdiction, Emilia Romagna subsequently decided not to participate further in the English Proceedings. Whilst Emilia Romagna has retained solicitors on the record (Spencer West LLP ("Spencer West")), Emilia Romagna has not participated in the steps leading up to the trial, and did not appear at the trial. For its part, Dexia has ensured that all documents in the claim, and all steps in the English Proceedings, have been brought to Emilia Romagna's attention, and the electronic trial bundle has been made available to, and accepted, by Spencer West. I address the applicable legal principles for uncontested trials in Section D below.

3. At the outset of the trial I was satisfied that it was appropriate to proceed in the absence of Emilia Romagna in circumstances where I was satisfied that Emilia Romagna had chosen to voluntarily absent itself from the trial (as I address further in Section D below).

4. In this trial, and in order to prove its case, Dexia has relied upon the available contemporary documentation, previous judgments in other cases in this jurisdiction raising similar issues (in respect of which hearsay notices have been served), a factual witness statement of Samir Belarbi ("Belarbi") of Dexia, an expert report of Professor Emanuele Rimini on Italian law ("Rimini"), and an expert report of Professor Paolo Cucurachi on derivatives analysis ("Cucurachi"). Each of Mr Belarbi, Professor Rimini and Professor Cucurachi were available to be cross-examined if required. In the event Emilia Romagna did not indicate that they wished to avail themselves of the opportunity to do so, and I did not consider that it was necessary for them to attend to give oral evidence. Accordingly, their respective statements and expert reports stand as their evidence in the English Proceedings.

5. The English Proceedings form part of a series of Business and Property Court cases over the last decade or more concerning English law governed derivative transactions on standard ISDA terms, and subject to exclusive English jurisdiction, in circumstances where Italian local authorities have sought to challenge derivatives into which they had entered by relying on Italian law arguments as to capacity, authority, validity and/or breaches of mandatory laws.

6. The present claim largely involves the application of principles recognised and established in previous decisions of the Commercial Court and the Court of Appeal in relation to similar facts and transactions. Dexia submits, rightly in my view, that the present case is toward the more straightforward end of the spectrum of such cases that have arisen for consideration in the English courts, and that is so for two reasons. First, the derivative itself is a simple one as derivatives go, being a plain vanilla interest rate collar swap for the first five years and for the remainder of its tenor it swaps variable rate for fixed rate interest. Secondly, there was no alternative transaction available at the time on better terms for Emilia Romagna, and the evidence before me is that Emilia Romagna would have been financially worse off if it had not entered into the Transaction.

7. There are two features of the present case that differ from previous cases in the English courts. The first is that the derivative transaction took place in 2004 (whereas most of the previous English cases date from 2006 or later). The second is that, as an Italian region, Emilia Romagna is a territorial authority rather than a local authority and, as a consequence, and as is addressed by Professor Rimini, it has more autonomy than the local authorities commonly considered in the English cases. The consequence of these features is that there is no basis for arguing that many of the Italian laws relied on by Emilia Romagna existed in 2004, or applied to Italian regions if they did.

B. THE TRANSACTION AND SUBSEQUENT EVENTS

8. Dexia's claim concerns an interest rate swap transaction entered into between Dexia and Emilia Romagna on or around 17 September 2004 (the "Transaction"). The Transaction was documented pursuant to a 1992 ISDA Master Agreement (Multicurrency – Cross Border) dated as of 29 October 2004 (the "Master Agreement"), a bespoke Schedule thereto (the "Schedule") and a Confirmation dated on or around 17 September 2004 (the "Confirmation") and, together with the Master Agreement and the Schedule (the "Transaction Documents"). The circumstances in which the Confirmation was executed prior to the Master Agreement (rather than the other way around which is the norm), are addressed further below. Suffice it to say at this point, that I am satisfied that this feature has no effect on the validity or effectiveness of the Transaction.

9. The Transaction was entered into to hedge Emilia Romagna's interest rate risk under a 2002 floating rate loan with Cassa Depositi e Prestiti S.p.A ("CDP**"**) in a principal amount of €516,456,899 with an amortisation period of thirty years (the "CDP Loan**"**). The Transaction was concluded together with similar transactions with two other banks – JPMorgan Securities (UK) Ltd ("JPM") and Unicredit Banca Mobiliare S.p.A. ("UBM"), and together with Dexia, the "Banks**"**.

10. To date, Emilia Romagna has complied with and/or discharged its payment obligations under the Transaction. However, after performing the Transaction for more than 15 years without any suggestion of any issue as to its validity or enforceability, Emilia Romagna issued proceedings in the Italian Courts in December 2021 seeking various relief in respect of the Transaction, including declarations that it is null and void because of alleged breaches of Italian law (the "Italian Proceedings").

11. In response thereto, and in the context of the Transaction being governed by English law and any claims in relation thereto being subject to the exclusive jurisdiction of the English courts, Dexia issued the English Proceedings in February 2022 seeking declaratory, and further or other, relief in connection with the Transaction. By its claim, Dexia seeks declaratory relief in terms that track the wording of the Transaction Documents, together with certain other relief that it submits either follows inevitably from such declaratory relief or should be granted. No money claims are advanced by Dexia in the English Proceedings.

12. In previous cases of this kind, the Business and Property Courts and the Court of Appeal have consistently granted, and upheld, relief in substantially identical terms to the relief sought by Dexia in respect of the Transaction Documents. Dexia has filed a notice under section 4 of the Civil Evidence Act 1972 (the "Hearsay Notice") in respect of the relevant findings of Italian law in previous decisions of this Court.

13. These decisions include:-

(1) *Banca Nazionale del Lavoro v Provincia di Catanzaro* [2023] EWHC 3309 (Comm) ("*Catanzaro*") (Cockerill J).

(2) *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), [2022] EWHC 219 (Comm) ("*Busto*") (Cockerill J).

(3) *Banca Intesa Sanpaolo SpA and Dexia Credit Local SA v Comune di Venezia* [2023] EWCA Civ 1482 ("*Venice CA"*) (Court of Appeal) (overturning the decision of Foxton J in [2022] EWHC 2586 (Comm) ("*Venice*")).

(4) *Dexia Crediop SpA v Provincia di Pesaro e Urbino* [2022] EWHC 2410 (Comm) ("*Pesaro*") (Peter MacDonald Eggers KC, sitting as a Deputy High Court Judge).

(5) *Deutsche Bank AG London v Provincia di Brescia* [2024] EWHC 2967 (Ch) ("*Brescia*") (Hildyard J).

14. Dexia's Written Opening contained two annexes (Annexes 1 and 2) which were of considerable assistance in identifying points of distinction between this case and the previous cases, as identified above, and the sources of Italian law and issues of Italian law on which declarations are sought. More specifically:-

(1) Annex 1, in the left hand column sets out the relevant declaration sought by Dexia, together with footnotes to the wording in the Transaction Documents that is the source for the declaration whilst in the right hand column the text common to all four precedent orders is shown in black, with any material differences between the *Busto*, *Pesaro*, *Catanzaro* and *Brescia* judgments shown in blue, red, green and yellow respectively.

(2) Annex 2 identifies the relevant Italian laws relied upon by Emilia Romagna in the Italian Proceedings and sets out where those arguments are addressed by Dexia's expert Professor Rimini, together with references to the relevant precedent and the equivalent declaration sought in each precedent.

15. I annex each of Annex 1 and Annex 2 to this Judgment without alteration as Annexes 1 and 2 hereto. I confirm that I have had careful regard to the matters there identified when making my findings in this judgment. At Annex 3 hereto I attach the declarations that I consider it appropriate to make in the light of my findings herein.

16. The Italian law arguments that Emilia Romagna has raised in the Italian Proceedings, and could have raised in England if it had continued to participate after acknowledging service, fall into three categories (of which the first, going as it does to capacity, is of potential relevance in the context of any valid challenge to the Transaction under English law):

<u>Capacity</u>

(1) Emilia Romagna has raised two arguments in Italy that could conceivably go to its **capacity** to enter into the Transaction (although Emilia Romagna has not clearly put the argument in terms of capacity):-

(i) The first is a suggestion that the Transaction was "speculative", essentially because the initial mark-to-market ("MTM") was negative for Emilia Romagna (the "Speculation Ground"). Dexia submits that

this is a *non sequitur* and is a suggestion without merit. As an Italian region, Emilia Romagna has wide powers to enter into derivatives it considers appropriate. Even if the national laws relied on by Emilia Romagna in the Italian Proceedings applied to it (and Dexia submits that they do not), the Transaction is a plain vanilla derivative, falling within the categories expressly permitted under the relevant laws, and it was expressly designed and intended to hedge Emilia Romagna's exposure under the CDP Loan.

(ii) The second is a suggestion that the Transaction involved resorting to "indebtedness" otherwise than for the purpose of financing investment expenditure (the "Indebtedness Ground"). This argument is made on the same basis: that because the initial MTM was negative (and no upfront was paid), it constituted a form of borrowing. Dexia submits that this is again a *non sequitur*, and that such suggestion is without merit, because the test for indebtedness under Italian law is whether the derivative involved the payment (rather than non-payment) of an upfront, or substantial modification or extinction of the underlying borrowing. Dexia says that there is no plausible basis for suggesting the Transaction involved "indebtedness" in any of these senses.

Authority

(2) Emilia Romagna raises a number of points that are said to go to its **authority** to enter into the Transaction. Dexia submits that they are (a) wrong as a matter of Italian law but also (b) irrelevant, as what is under consideration is the validity of the Transaction, which is governed by English law, and questions of ostensible authority and ratification fall to be decided by applying English law. Dexia submits that under English law (a) it cannot seriously be suggested that the relevant individuals at Emilia Romagna did not have ostensible authority to enter into the Transaction and (b) in any event, the Transaction has been repeatedly ratified by the Region over two decades.

Validity under Italian law

17. Emilia Romagna raises various points said to go to the **validity** of the Transaction under Italian law or to relief for breaches of mandatory rules of Italian law. Dexia submits that such points do not impact upon the validity of the Transaction, which is governed by English law, and there is no basis for any suggestion that mandatory rules of Italian law apply. Equally, to the extent that Emilia Romagna advances any non-contractual claims under Italian law, Dexia submits (a) that those claims do no more than repurpose the same arguments as its contractual claims, and (b) they are, in any event, wrong as a matter of Italian law.

C. THE STRUCTURE OF THIS JUDGMENT

18. I address below the issues that arise, my findings in relation thereto, and the relief that is sought, in the remainder of this judgment. The Sections that follow are structured as follows:-

(1) Section D addresses Emilia Romagna's non-participation in these proceedings and the trial.

(2) Section E introduces the evidence before the Court for the trial.

(3) Section F sets out the factual background.

(4) Section G addresses Dexia's claims in respect of the Transaction.

(5) Section H deals with the specific declaratory relief sought by Dexia, including in respect of the loss and damage it has suffered as a result of the Region's breaches of the Transaction Documents.

(6) Section I sets out my conclusions.

D. EMILIA ROMAGNA'S NON-PARTICIPATION

19. In *Catanzaro* Cockerill J considered the principles applicable to an uncontested hearing or trial in very similar circumstances to the present (at [2]–[6]), before deciding to proceed in the absence of the Province of Catanzaro. In summary, CPR 39.3 gives the Court a discretion to proceed with a hearing or trial in the absence of a party. In *R v Jones* [2001] EWCA Crim 168 the Court of Appeal stated the principles that are applied (in civil, as well as in criminal, proceedings).

20. The right to be present at trial and to be legally represented can be waived by a defendant. One circumstance in which these rights may be wholly waived is if, "knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him" (*R v Jones* quoted in *Catanzaro* at [3]).

21. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant, which must be exercised with great care. In exercising that discretion, the judge must have regard to all the circumstances of the case, relevantly including (among other matters) (a) the nature and circumstances of the defendant's behaviour in absenting himself from the trial and, in particular, whether the defendant's behaviour was deliberate, voluntary and such as plainly waived the right to appear, (b) whether an adjournment might result in the defendant attending voluntarily; and (c) whether the defendant is, or wishes to be, legally represented at the trial or has, by his conduct, waived the right to representation.

22. Where the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, the Court must ensure that the trial is as fair as the circumstances permit.

23. In the *Catanzaro* case, Catanzaro had not participated in the proceedings and it was clear that it would not respond to the claims, or attend the hearing, notwithstanding the efforts the claimants had made to ensure all documents and each step in the case were brought to its attention. Cockerill J held that it was appropriate to proceed in Catanzaro's absence because its conduct amounted to "a clear waiver both of the right to legal representation and to presence at the hearing*"* and it could be inferred *"*that an adjournment, of whatever length, would be pointless".

24. The White Book Guidance at 39.3.1 cites *Williams v Hinton* [2011] EWCA Civ 1123 for the proposition that "[i]t is of course of the first importance that a party is afforded a fair opportunity to present its case to the judge. It is also, however, of great importance that judges, as a matter of case management, act robustly to bring cases to a

conclusion". This guidance was cited, and applied, in the recent decision of *Maersk Guine-Bissau Sarl v Almar-Hum Bubacar Balde Sarl* [2024] EWHC 993 (Comm) at [5]–[12], where Jacobs J proceeded in the absence of a defendant who was well aware of the proceedings and had been afforded a fair opportunity to present his case but had made a deliberate decision not to participate in them. Jacobs J held that "any other approach would be seriously prejudicial to the Claimants, who were seeking to establish their rights in (what they contended to be) the agreed contractual forum" (at [9]).

25. Applying those principles to the facts of the present case, and having regard to the third witness statement of Mr Danusso, I am satisfied that, as in *Catanzaro*, and on the facts of the present case, it is appropriate to proceed in the absence of the defendant, Emilia Romagna. In this regard:-

    (1) Emilia Romagna is represented by Spencer West, who have confirmed that the Region has instructed them to remain on the record.

    (2) Emilia Romagna has been served with all of the relevant documents in the proceedings since its decision not to participate, including the Order to fix the trial date, the notice of the hearing, and all the witness statements and expert reports supporting the claim.

    (3) Emilia Romagna has generally declined to give Spencer West instructions to defend the claim. However, it initially engaged with the proceedings by filing an Acknowledgment of Service indicating its intention to contest the jurisdiction of this Court, although it never filed an application to that effect, and has given other instructions when it suits it, including by agreeing to extend the deadlines for filing Dexia's Particulars of Claim, and Emilia Romagna's Defence, on two separate occasions, and signing the relevant consent orders.

    (4) On 8 November 2024, in accordance with the provisions of the Commercial Court Guide, Dexia made the trial bundle available to Spencer West. Spencer West responded by requesting access to the trial bundle for the solicitor with conduct of the matter on behalf of Emilia Romagna, demonstrating Spencer West's continuing involvement to the (limited) extent chosen by its client.

    (5) Emilia Romagna has also been sent Dexia's Written Opening and transcripts of the trial direct from Opus 2 (at the same time as Dexia and the Court) from which it was clear that Dexia would, and did, invite the Court to proceed in Emilia Romagna's absence, and no complaint, or indication of objection, was received contemporaneously or thereafter.

26. In those circumstances, I was satisfied that Emilia Romagna had clearly waived its right to attend the trial, and had chosen to voluntarily absent itself from the trial (including through Spencer West) and I was also satisfied that, in such circumstances, an adjournment, of any length, would have been pointless. Accordingly, I exercised my discretion to proceed with the trial of the claim in Emilia Romagna's absence.

27. Where a trial is undefended, but substantive relief is sought, the required approach of the Court, and the legal representatives of the represented party, is explained in a number of recent authorities, in particular *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [12]–[15] (HHJ Waksman QC) and *Lakatamia Shipping Co Ltd v Morimoto* [2023] EWHC 3023 at [12]–[13] (Foxton J) ("*Lakatamia Shipping*").

28. In short, the claimant can prove its case by reference to witness statements and documents, without calling oral evidence (see CPR 32.2(2)(b) and 32.5(1)(b)). In that regard, and as already foreshadowed, I was invited, in advance of the trial, to consider whether I would require any live evidence from any factual witness or expert, but considered that to be unnecessary, as I confirmed in an email dated 13 November 2024.

29. The Court must be satisfied, on the balance of probabilities, that the claim is made out. The represented party bears "an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application" such that they must draw to the attention of the Court "points, factual or legal, that might be to the benefit of [the unrepresented defendant]*"* (see *Lakatamia Shipping* at [13]).

30. I confirm that in those circumstances, I have been particularly concerned to consider, with especial care, the evidence and arguments put before me, and notwithstanding the additional assistance provided by earlier cases, to assess whether in this particular context, the claims that are advanced in the present action have been proved, and the need for the relief sought established.

31. On behalf of Dexia, Mr Andrew Lodder, both in Dexia's Written Opening, and in his oral submissions before me, has addressed all the matters that arise with meticulous attention to detail, and he has assiduously sought to identify any and all points that Emilia Romagna might have sought to advance. I am grateful to him for the admirable assistance that he has provided to the Court. In his submissions before me, he carefully identified all relevant aspects of the Transaction and the issues that arise, including the differences that exist from previous cases.

E. THE EVIDENCE

32. Dexia has proved its claim at trial largely in reliance on the documentary evidence in the trial bundle, which it is entitled to rely on as evidence of the truth of its contents pursuant to paragraph 3 of the Order of Butcher J dated 12 November 2024 (and see section J.8.5 of the Commercial Court Guide).

33. As already foreshadowed, the claim is supported by a witness statement from Mr Belarbi (the Head of Debt Management for Dexia at the time of the Transaction), who gives evidence as to the negotiation of and entry into the Transaction, the structure and purpose of the hedge and the Region's approval of the Transaction. Dexia also relies on expert reports from Professor Rimini on Italian law and from Professor Cucurachi on technical derivatives analysis.

F. THE RELEVANT FACTUAL BACKGROUND

34. This Section sets out the relevant factual background to the Transaction, the issues that arise, and the relief that is sought. It is taken from Dexia's Written Opening and is supported by the underlying contemporaneous documentation that is before me.

35. I am satisfied that each of the factual matters that follow is supported by the relevant documentary and witness evidence, and I make findings of fact for the purposes of the claims advanced by Dexia accordingly. Unless otherwise expressly stated, the documents were provided to me in the bundles, and the evidence of fact is derived from the witness statement of Mr Belarbi.

F.1 Dexia's engagement in hedging Emilia Romagna's pre-existing indebtedness

36. In or around July 2002, Emilia Romagna entered into a floating-rate loan with CDP for a principal amount of €516,456,899 over an amortisation period of thirty years for the purposes of financing the CDP Loan. The Region was thus exposed to variable rates of interest on more than half a billion Euros for over 30 years with no hedging strategy in place.

37. During the course of 2002, Emilia Romagna also set up a European Medium Term Note ("EMTN") Euro-denominated bond programme "to access the capital market while ensuring the greatest flexibility and cost reduction as well as the broadest and most diversified investor base possible" (and see Resolution 2040 of 27 February 2003, pursuant to which Emilia Romagna appointed numerous leading international banks as dealers for its EMTN Programme). Accordingly, as Mr Belarbi explains at [13], by 2004 the Region "already had experience in financial transactions" and had "carried out all the relevant financial analysis and activities and [taken] all the necessary steps to establish an EMTN programme". At the time, Emilia Romagna was one of Dexia's main clients and likely one of its largest borrowers.

38. In late 2003 and early 2004, the Region initiated discussions with various banks regarding the possibility of hedging the CDP Loan and ultimately requested the Banks to submit a proposal for an interest rate swap.

39. Mr Belarbi explains that this was followed by "several months of ongoing interactions and negotiations among the Banks and the Region", during which the Banks jointly presented various proposed versions of the Transaction to the Region, from an initial presentation in November 2003 until the final presentation in September 2004. During the course of these presentations, the structure changed from a "cap knock-out" (i.e., an interest rate collar where the cap does not operate if the interest rate exceeds the knock-out barrier) to a plain vanilla interest rate swap with a collar for five years and a fixed interest rate thereafter. Mr Belarbi recalls that this was done to align with guidance published by the Minister of Economy and Finance on derivative transactions (Belarbi at [25]).

40. The Banks presented the initial structure for the Transaction to the Region on 14 November 2003 and in a letter dated 4 February 2004. The first of these referred to "the structure that the Region has already selected for optimis[ing] the risk profile of the [CDP Loan]". The Banks also provided the Region with the forward curve and indicative interest rate conditions from 2003 to 2018. In the February 2004 letter, the Banks noted that they "will only be able to execute the transaction once they have verified that the Emilia Romagna Regional Board has passed a resolution on the matter", which was required to "include as annexes the ISDA Master Agreement and Schedule … to be finalised at a later date". This was followed by a draft term sheet on 12 February 2004 that included a correlation analysis as between the Euribor forward rate and the Euribor benchmark rate, together with an analysis of the sensitivity of the MTM of the derivative to changes in the Euribor forward curve.

41. By resolution n. 337/2004 dated 1 March 2004 ("Resolution 337"), the Regional Board approved the hedging of the CDP Loan on the basis set out in the Banks' February proposal and authorised the General Manager of Financial and Instrumental Resources, Mr Pasquini, to (a) act as necessary to finalise, and define the final economic conditions of, the proposed swap transaction, including "any better alternative solutions proposed

after the adoption of this resolution" and (b) approve an ISDA Master Agreement and the Schedules thereto necessary for the conclusion of the IRS transaction, to be entered into by the Region with each of the Banks. On its cover page, the resolution noted that the object of the Transaction was, importantly, "aimed at hedging the Euro 516,456,899.09…", which corresponds with the test of a speculative directive which asks whether its purpose was to hedge. The resolution also noted that the CDP loan "is indexed to the Euribor parameter and therefore presents, over the fixed amortisation period (30 years), an exposure to the risk of an increase in interest rates" and identified the objective of the Transaction as being "hedging the risk in the event of an increase in interest rates achieved in practice, through the setting of a minimum rate (floor sale) and a maximum rate (cap purchase) of indebtedness".

42. On 4 March 2004, Emilia Romagna provided Dexia with a legal opinion from an Italian law firm opining on the legality of the proposed transaction, after having examined Resolution 337 and the draft ISDA documentation provided by the Banks. The Region's lawyers concluded that the Banks' proposals "do not contain any provisions contrary to Italian public order", were "entirely in accordance with the law, international financial market practice, and relevant commercial usage" and that the proposed Transaction was "a suitable instrument".

43. On 31 March 2004, the Banks delivered a joint presentation setting out "a pure hedging structure to optimise the risk profile" of the CDP Loan, which involved a collar swap from 2004 to 2009 to be followed by a simple fixed rate to maturity. This proposal was updated on 18 May 2004 and 16 June 2004, and information on the expected forward curve and indicative market conditions was provided on both occasions.

44. Pursuant to the authority conferred on him by the Regional Board in Resolution 337, Mr Pasquini signed Executive Resolution n. 8225/2004 on 18 June 2004 ("Resolution 8225"), which approved, inter alia, the ISDA documentation comprised of the draft ISDA Master Agreement and draft Schedule thereto, copies of which were attached to the resolution. The draft contracts were stated "to form an integral and substantial part" of Resolution 8225.

45. Resolution 8225 noted that:

    (1) The ISDA documentation was drafted "in the English language in view of the fact that the contractual relationships to be established, in execution of this order, will be governed by English law and subject to the jurisdiction of the Courts of the United Kingdom";

    (2) Dexia had nevertheless provided Italian translations of the contracts to the Region;

    (3) The assessment and consequent approval of the technical-economic conditions of the transaction would be postponed to a subsequent act of the Region "on the basis of the subsequent proposals that will be requested" from the Banks "and that will constitute the reference parameters of the subsequent interest rate swap transaction".

46. Resolution 8225 expressly stated that the Transaction was "for the purpose of ensuring the hedging of the risk of the debt arising from the [CDP Loan]" and the annexed draft ISDA Master Agreement and Schedule reiterated that the Transaction was being "entered into for purposes of managing [the Region's] debts and its investments and not for purposes of speculation".

47. The Banks made a final presentation to the Region on 8 September 2004. This contained the expected forward curve and indicative market conditions as at 8 September 2004.

48. The Transaction was approved on 17 September 2004 by Executive Resolution n. 12754/2004 ("Resolution 12754"), which reproduced the contents of the Confirmation to be signed on the same day. Resolution 12754 confirmed that Emilia Romagna had carried out its own "operational simulations" of the Banks' final proposal and concluded that they were "in line with the changes that have taken place in the financial market … in relation to the forecasts of future rates expected over the amortisation period (market value sensitivity), [to] allow the Region to achieve the objective of hedging the risk in the event of an upward trend in interest rates". It also stated that "the transaction is subject to mark-to-market variations throughout the duration as the reference market parameters change".

49. On the same day, Dexia and Emilia Romagna entered into the Confirmation setting out the final terms and conditions of the Transaction. Emilia Romagna also entered into trade confirmations on materially identical terms with each of the other Banks in respect of their shares of the notional amount of the CDP Loan. Dexia immediately entered into a back-to-back hedge with Goldman Sachs.

50. Mr Belarbi explains that this was "one of the unusual cases where the ISDA Master Agreement was signed a few weeks after the Confirmation" because the Region was not ready to execute the ISDA documentation at the closing meeting but "was keen to close the transaction on a specific date in order to take advantage of favourable market conditions" (Belarbi at [28], [31]). To cater for this, the Confirmation and Resolution 12754 provided that the Transaction "is entered into on the basis of the ISDA "Master Agreement", including the "Schedule", to be executed between the Region and the counterparty Banks in accordance with the scheme approved by [Resolution 8225]", which "the parties agree to enter … within 60 days", failing which "the Bank counterparties to the transaction will have the right to terminate".

51. Mr Belarbi explains that the Transaction "was tailored to the Region's specific financial needs and was based on the information provided to us by the Region", in particular the Region's concerns "about the risk of an increase in interest rates associated with the CDP Loan" in circumstances where "there was a general trend of rising interest rates due to the growth and expansion of the European financial market following the introduction of the Euro as single currency for all the Eurozone states" (Belarbi at [19]). Further, as "local authorities are required by law to set aside in their annual budget the estimated expenditure for servicing their debt …they need a certain degree of predictability when it comes to such costs to plan their public initiatives accordingly". Emilia Romagna therefore wanted "to limit its exposure to fluctuations in financial markets by using a swap contract to replace the floating rate under the CDP Loan with a fixed rate known in advance that was financially sustainable by the Region." (Belarbi at [20]).

52. On or around 21 October 2004, Emilia Romagna provided Dexia with a second legal opinion from the same firm of Italian lawyers, certifying the Region's power to enter into the ISDA documentation.

53. Accordingly, on or around 29 October 2004, pursuant to the terms of the Confirmation, Dexia and Emilia Romagna executed the ISDA Master Agreement and Schedule in the

exact same terms as the ISDA documentation the Region had approved earlier by Resolution 8225.

54. The report of the Court of Auditors (an independent body) for the 2004 financial year noted that the Transaction was "motivated by the need to hedge the risk related to the variability of rates" and concluded that Emilia Romagna had "positively carried out the economic-financial management of the budget".

55. As Mr Belarbi confirms (at [35]), the Region has performed its obligations under the Transaction for more than 20 years from 17 September 2004 to the present date. It has also routinely approved the Transaction after it was entered into. In particular, Emilia Romagna publishes annual financial statements and multi-year budgets, which include the payments due and detailed notes describing the financial effects of the Transaction. There are examples before me from March 2015 and December 2021.

56. The March 2015 budget note stated that "the Region decided, in order to protect the budget from market risks in a particular period of financial market turbulence and rising interest rates, to eliminate the risk arising from the fluctuation of the reference index (6-month Euribor) of the underlying [CDP Loan]".

57. There are similar statements in the December 2021 budget note, which goes on to conclude that the Transaction achieved "the objectives for which the operation is intended" and the fixed interest rate payable is "in line with the conditions in force at the date of negotiation of the derivatives for fixed-rate debt transactions with the same maturities". In other words, the Region recognised that it was paying interest rates in line with what it could have negotiated for a fixed-interest loan with the same tenor in 2004. The evidence before me, from Professor Cucurachi, is that Emilia Romagna has saved between €2 million and €3.3 million by entering into the Transaction, as compared with obtaining a fixed rate loan in 2004 or a fixed-for-variable interest rate swap for the duration of the Transaction at the prevailing rates in 2004 (see Cucurachi at [64] and Appendix 1 to Cucurachi).

58. For the entire duration of the Transaction so far, the Region has paid either a rate within the interest rate collar for the period from 2004 to 2009 (i.e., between 2.36% and 7%) or the fixed rate of 5.25% agreed from 2009 to 2032. In other words, Emilia Romagna has paid interest on its borrowings under the CDP Loan at exactly the rates it agreed and understood it would have to pay in 2004. The Region was thus able to determine with certainty the precise amounts due under the Transaction at all relevant times from 2009 to the present date.

F.2 <u>The Italian Proceedings</u>

59. On 16 December 2021, Emilia Romagna issued proceedings before the Court of Bologna, against Dexia, seeking various relief in connection with the Transaction. These claims are structured by Emilia Romagna in reverse order. As is set out in Dexia's Statement of Defence at [106]–[127] Dexia's case is that this order of claims was adopted in an attempt to seek to avoid the exclusive jurisdiction clause in the Master Agreement.

60. In summary, in the order presented by Emilia Romagna in its Writ of Summons, the Region:

(1) Alleges pre-contractual liability (the Italian concept of "pre-contractual liability" is a form of liability in contract – see Rimini at [179]) and/or non-contractual liability for alleged breaches of Italian laws and regulations in relation to Dexia's conduct in connection with the Transaction, in respect of which it seeks damages calculated by reference to unwinding the Transaction.

(2) Alternatively, Emilia Romagna seeks declarations that the Transaction is null and void because of alleged breaches of Italian law.

(3) In the further alternative, Emilia Romagna seeks a declaration terminating the Transaction and that Dexia is liable in contract for its conduct in negotiating the Transaction.

61. Emilia Romagna's claim in Italy is advanced on the basis of the following allegations in its Writ of Summons:

(1) In alleged breach of Article 21 of the Consolidated Law of Finance (commonly referred to as "TUF") and Articles 26, 27, 28, 29 and 32 of the Consob Regulation n. 11522 of 1998 (the "Consob Regulation"), Dexia was obliged, and failed, to:

(A) provide Emilia Romagna with certain information prior to its entry into the Dexia Transaction, including information about the negative initial mark-to-market value, alleged "implicit costs" and risks of the derivative, and a "probabilistic representation of the expected movement" of Euribor, including certain additional disclosure obligations under Articles 28 and 32 of the Consob Regulation;

(B) pursue the best trading conditions for the Region in breach of the best execution rule in Article 26 of the Consob Regulation;

(C) disclose and seek consent for its alleged conflict of interest under Article 27 of the Consob Regulation because it was allegedly acting both as the Region's advisor and its counterparty to the Transaction;

(D) assess properly the "suitability" of the Transaction for the Region pursuant to Article 29 of the Consob Regulation;

(E) communicate to the Region that the Transaction should have been authorised by its Regional Council rather than its Regional Board; and

(F) make an upfront payment to cancel out the initial negative MTM of the Transaction.

(2) The Transaction lacked the fundamental requirements for a valid contract under Italian law, in particular a valid "causa" and "oggetto" (meaning 'object'), because of the alleged failure to provide information as to the negative initial MTM, "hidden costs" and "probabilistic scenarios";

(3) Emilia Romagna's Regional Council was required to be, but was not, involved in the authorisation process for the Transaction, alternatively the Transaction fell outside the approval granted by the Regional Board;

(4) In breach of Article 23 of TUF and Article 30 of the Consob Regulation, the Master Agreement was executed after the Transaction, and also failed to state the Region's right of withdrawal;

(5) In breach of Article 119(6) of the Italian Constitution, the Transaction involved resorting to indebtedness otherwise than to finance investment expenditures;

(6) The Transaction lacked the requirement of "economic convenience" under Article 41 of Law n. 448 of 2001 ("Article 41"), it appears solely on the basis that the Transaction had a negative initial MTM that was not disclosed;

(7) In breach of Article 3(2)(d) of Ministry of Economy and Finance Decree n. 389 of 2003 ("Decree 389"), the value of the floor of the collar swap component was higher than the value of the cap; and

(8) The Transaction failed to pursue a hedging purpose, both because of the negative initial MTM and because of some relatively small discrepancies between the Transaction and the CDP Loan during a period of negative interest rates from 2016 onwards.

62. On 22 March 2022, Dexia filed its Statement of Defence in the Italian Proceedings, denying the Region's claim in full and contesting the jurisdiction of the Italian Court.

63. Between August and October 2022, the Claimant and the Defendant filed and exchanged their respective written briefs in the Italian Proceedings.

64. As explained by Mr Danusso, a report by a court-appointed technical expert was due in October 2024. However, the technical expert has recently requested an extension of time until January 2025 to file his report, resulting in a further postponement of the hearing. There has also been a change in the Judge who will hear the case. A decision by the Italian Court is currently expected by the end of 2025.

F.3 The procedural history of the English Proceedings

65. On 11 February 2022, Dexia issued the Claim against Emilia Romagna seeking, inter alia, declarations in connection with the Transaction.

66. Emilia Romagna filed an Acknowledgement of Service on 28 February 2022 indicating its intention to contest the jurisdiction of the English courts. However, it did not file any application to that effect. I am satisfied that in failing to contest the jurisdiction, Emilia Romagna has submitted to the jurisdiction of the English courts. Further, as already noted, Emilia Romagna subsequently agreed to extend the deadlines for Dexia to file its Particulars of Claim and for it to file a Defence, each of which, I am satisfied, constitutes a submission to the jurisdiction.

67. Emilia Romagna failed to file its defence by 10 January 2023, in accordance with the deadline set out in the consent Order approved by Foxton J on 16 September 2022. On 11 January 2023, Dexia's solicitors ("Bonelli") wrote to Emilia Romagna's English solicitors, Spencer West, identifying the failure to file and serve a Defence in the proceedings. By email of 12 January 2023, Spencer West confirmed that they had not been instructed to defend the claim.

68. I am satisfied that, in such circumstances, Emilia Romagna has consciously chosen to disengage from the proceedings, and absent itself from the trial, whilst retaining Spencer West who remain on the record (as confirmed to Bonelli by emails dated 5 July 2023 and 20 November 2023).

69. By order of Cockerill J dated 9 October 2023, Dexia was substituted as the Claimant in place of Dexia Crediop S.p.A., following the latter's merger by incorporation with Dexia, with effect from 30 September 2023 at 11:59pm.

70. By a CMC order dated 16 November 2023, following the first Case Management Conference (held on the papers), Robin Knowles J set out the timetable for the proceedings through to trial.

71. By the Cockerill J Order on 13 May 2024:

    (1) the trial, initially fixed for 16 July 2024, was vacated and re-listed on the first available date from 1 November 2024; and

    (2) the deadlines for filing and serving factual witness evidence and expert evidence were postponed to 13 and 20 September 2024, respectively.

72. On 16 May 2024, Bonelli informed Spencer West that the Listing Office had fixed the one-day trial in the proceedings on 21 November 2024. Emilia Romagna did not respond.

73. In accordance with the Cockerill J Order, Dexia gave disclosure on 26 July 2024. Emilia Romagna has, in line with its apparent disengagement with the Claim, not provided any disclosure.

74. Notwithstanding Emilia Romagna's disengagement from the Claim, and as already noted, Dexia's legal team has continued to serve all necessary documents on Spencer West.

G. THE TRANSACTION

75. In summary, the financial terms of the Transaction were as follows:

    (1) The Trade Date is 17 September 2004, the Effective Date is 31 December 2004 and the Termination Date is 30 June 2032, i.e., the Transaction duration is 28 years.

    (2) The initial Notional Amount was €142,025,647.17, decreasing as per Table 1 at Annex A to the Confirmation. This represented 30% of the outstanding amount of the CDP Loan as at the date of the Transaction.

    (3) Emilia Romagna agreed to pay Dexia interest on the Notional Amount on each Payment Date in two periods:

        (A) In the first period – from 31 December 2004 until 31 December 2009 – annual Euribor 6M subject to a cap and floor as follows:

            (i) if average Euribor 6M was lower than or equal to an annual rate of 2.36%, a Floor Rate of 2.36%; and

(ii) if average Euribor 6M was higher than an annual rate of 7.00%, a Cap Rate of 7.00%.

(B) Second, from 31 December 2009 until 30 June 2032, a fixed annual rate of 5.25%.

(4) In return, Dexia agreed to pay Emilia Romagna annual Euribor 6M on the Notional Amount on each Payment Date. As Professor Cucurachi explains, therefore, "the Region receives from Dexia interest payments calculated on the notional amount of the Transaction and based on the same reference rate as the [CDP] Loan (i.e. the average 6-month Euribor of the month preceding the six-month accrual period). The purpose of Dexia's payments is thus to match the interest payments on the underlying debt." (Cucurachi at [38]).

(5) The Payment Dates are 30 June and 31 December of each year, commencing from 30 June 2005 and ending on the Termination Date. The Calculation Periods are periods of 6 months, from 31 December 2004 to the Termination Date.

76. The relevant terms of the Transaction Documents are set out Annex 1 and summarised in Dexia's Re-Amended Particulars of Claim at paragraphs 22 to 33. The Transaction Documents provide the basis for Dexia's declarations (1) to (25), which for the most part track the contractual wording, as shown in Annex 1.

77. Key provisions of the Transaction Documents include the following:

(1) That Emilia Romagna had the power to execute and perform the Transaction Documents and had taken all necessary action and made all necessary determinations and findings to authorise such execution and performance (see Section 3(a)(ii) of the Master Agreement, as amended by Part 5(5)(ii) of the Schedule).

(2) That such execution and performance did not violate or conflict with any law applicable to Emilia Romagna (see Section 3(a)(iii) of the Master Agreement).

(3) That Emilia Romagna's obligations under the Transaction Documents constituted its legal, valid and binding obligations enforceable in accordance with their respective terms (see Section 3(a)(v) of the Master Agreement).

(4) That the Transaction was entered into for the purposes of managing Emilia Romagna's borrowing or funding investments and not for the purposes of speculation (see Section 3(g), as added by Part 5(5)(iv) of the Schedule).

(5) That Emilia Romagna was acting for its own account, had made its own independent decision to enter into the Transaction Documents based on its own judgment and upon advice from such advisors as it deemed necessary and was not relying on any communication from Dexia as investment advice or as a recommendation to enter into the Transaction (see Section 3(i), as added by Part 5(5)(vi) of the Schedule).

(6) That Emilia Romagna had received the Document on General Risks involved in the Investment in Financial Instruments referred to under the Consob Regulations and Dexia had requested, and Emilia Romagna had provided, information regarding its experience in investment in financial instruments, financial data, investment

objectives and risk propensity (see Section 3(i), as added by Part 5(5)(vi) of the Schedule).

(7) That the Transaction complied with Decree 389 (see Section 3(k), as added by Part 5(5)(viii) of the Schedule).

(8) That Emilia Romagna has a specific expertise and experience in transactions having as an object financial investment and is a professional investor pursuant to Article 31 of the Consob Regulations.

78. Dexia's position is that all of the declaratory relief sought in respect of the Transaction either tracks the wording of the representations contained in the Transaction Documents (as set out in Annex 1, including all of the examples set out in the previous paragraph) or follows straightforwardly from such declarations. Dexia seeks these declarations on the basis that they reflect the true position as a matter of fact and/or of law, or alternatively on the basis that the terms of the Transaction Documents give rise to a contractual estoppel to that effect. Dexia also submits that the declarations sought by it will be of significant utility in establishing the parties' rights and obligations as a matter of English law (as the governing law of the Transaction) in connection with the dispute that has arisen in Italy following Emilia Romagna's arguments in the Italian Proceedings that the Transaction is null and void or invalid or involved breaches of mandatory Italian laws.

79. Whilst Emilia Romagna has not engaged with the English Proceedings, Dexia has identified to me the arguments that Emilia Romagna would or could have raised in these proceedings. They are the arguments it has raised in the Italian Proceedings (which I have identified above in section B), and the arguments raised by Italian local authorities in cases brought before the English Courts, which have previously adjudicated on various points that Italian local authorities have identified to support their position that derivatives transactions of this kind are void or not binding upon them.

80. These arguments fall into three categories, which are addressed in turn below after considering the law on characterisation and applicable law:

(1) Capacity arguments, i.e., that Emilia Romagna lacked the substantive capacity to enter into the Transaction as a matter of Italian law;

(2) Authority arguments, i.e., that the relevant bodies/individuals within Emilia Romagna who authorised the Transaction lacked capacity to do so as a matter of Italian law;

(3) Validity and breach arguments, i.e., that the Transaction is invalid or damages or other relief is available to Emilia Romagna as a result of breaches of Italian law.

G.1 Characterisation and Applicable Law

81. The meaning of the concept of "**capacity**" in private international law was addressed by the Court of Appeal in *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549 ("*Haugesund*").

82. This is an issue of characterisation which is governed by English law as the *lex fori*. However, the effect of *Haugesund* is that the concept of capacity is given a broad internationalist meaning which refers to "the legal ability of a corporation to exercise

specific rights, in particular the legal ability to enter into a valid contract with a third party" and it was held that "a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of 'capacity', to use English terminology" (at [47]).

83. The approach to the capacity of foreign corporations that was adopted in *Haugesund* (at [27]-[30]) raises a question of Italian law as to Emilia Romagna's capacity (i.e., legal ability / substantive power to enter into contracts). However, the civil law consequences of a lack of capacity are determined under the putative applicable law of the relevant contract (i.e., English law in this case). As a matter of English law, the lack of capacity of a party results in the contract being void. Dexia therefore accepts that the Transaction would be void if Emilia Romagna lacked capacity to enter into it under Italian law.

84. It is important, however, for choice of law purposes, to distinguish capacity from other issues which may affect the validity of a contract including, in particular, authority and material validity – see the judgment of Lord Leggatt in *SR Properties v Rampersad* [2022] UKPC 24 at [23]–[24] distinguishing between issues of capacity, illegality and authority, which was applied to these Italian law issues in *Venice* at [111] and *Venice CA* at [15].

85. **Authority** is concerned with the ability of an agent to bind a corporation as principal. The actual authority of an agent will be determined by the constitution of the corporation (see *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217). However, where an agent does not have actual authority to enter into a contract, the agent may nevertheless have ostensible authority and/or the principal may ratify the contract. Issues of ostensible authority and ratification are governed by the putative applicable law of the contract, i.e., English law in the case of the Transaction (see *Venice* at [113] and [317] and *Busto* at [377] and [382]).

86. In relation to **material validity**, all legal systems have rules which determine the existence or validity of a contract. Under Article 8 of the Rome Convention, the material validity of a contract is generally determined under its putative applicable law. Some rules affecting the validity of a contract may be classified as mandatory rules (meaning, in the language of Article 3(3), a "rule of the law … which cannot be derogated from by contract").

87. However, these provisions are nevertheless generally irrelevant where the parties have chosen the law of a different legal system to govern their contract. In this regard, Article 3(3) of the Rome Convention only applies where all "elements relevant to the situation" are connected only with a country other than the one whose law has been chosen by the parties. The correct interpretation of this provision was considered by the Court of Appeal in *Dexia Crediop SpA v Comune di Prato* [2007] EWCA Civ 428, [2017] 1 CLC 969 ("*Prato CA*").

88. I am satisfied that, in the present case only a lack of capacity, in the *Haugesund* sense, would lead to a conclusion that the Transaction is not valid, binding and enforceable against Emilia Romagna in circumstances were (as further addressed below), I am satisfied that, as a matter of English law (a) the relevant individuals at Emilia Romagna had ostensible authority to enter into the Transaction, (b) in any event Emilia Romagna ratified the Transaction by its subsequent conduct and (c) Italian law rules of material validity have no application to the Transaction, which is governed by English law.

89. In the Italian Proceedings, Emilia Romagna also seeks compensation and other relief for alleged breaches of Italian mandatory laws, even if these breaches do not invalidate the Transaction. As pre-contractual liability for alleged breaches of Italian financial services law in the formation of a contract is a form of contractual liability (see Rimini at [179]), and as the parties have chosen English law to govern the Transaction, I am satisfied that these laws have no application to the negotiation and entry into of the Transaction (as to which see *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Walker J) ("*Prato*") at [208]–[209]). Insofar as the claims for compensation or other relief are also put on a non-contractual basis, Emilia Romagna repurposes the same arguments on nullity or invalidity to obtain different relief. However if the arguments are wrong as a matter of Italian law, the breach claims will fail for the same reasons.

G.2 Capacity arguments

90. As already noted, Emilia Romagna advances two arguments that could potentially go to its capacity to enter into the Transaction, i.e., the Speculation Ground and the Indebtedness Ground. However, it does not itself put its arguments in the Italian Proceedings expressly in terms of a lack of capacity – in the sense of "substantive power" – to enter into the Transaction. That is, perhaps, unsurprising in circumstances where Italian local authorities and regions have general civil law capacity (see Rimini at [89]) and the Italian Supreme Court has held that "[i]n our legal system there is no rule of *nec ultra vires* (which characterises the activity of public legal entities in the Anglo-Saxon system) so that both public legal entities and private legal entities have the same legal capacity*"* (Supreme Court, Joint Divisions, no. 11656 of 12 May 2008 at 7.1).

91. The civil capacity of local authorities has been considered in a number of recent judgments of the English Court, in particular *Busto, Pesaro*, *Venice*, *Venice CA* and *Catanzaro*, in respect of each of which Dexia has served the Hearsay Notice.

92. I am satisfied that these cases establish the following principles of Italian law:

    (1) There is no general limitation on the capacity of Italian local authorities to enter into private law contracts, such as derivatives transactions, and Italian law has no principle of an act being *ultra vires* the civil law capacity of a local authority (see *Venice* at [201] and *Busto* at [174] and [251]);and see also Rimini at [83]–[91]).

    (2) Any specific limits on the capacity of Italian local authorities must be specifically prescribed by Italian law (see *Venice* at [200(ii)] and *Busto* at [177]–[179] and [184]–[190]).

    (3) At the time of the Transaction, there were no such limits on Italian local authorities' capacity to enter into derivatives, save for the following two points which are said to arise from Article 119 of the Italian Constitution as interpreted by the Italian Supreme Court in decision no. 8770/2020 (the "Cattolica Decision") (see *Catanzaro* at [76(iii)]):

        (A) A prohibition on Italian local authorities entering into "speculative" derivative transactions (as opposed to hedging derivative transactions) (see *Venice* at [196]–[197], *Venice CA* at [159]–[179], *Busto* at [277]–[280] and *Catanzaro* at [76(iii)]). This is the basis for the Speculation Ground advanced by Emilia Romagna in the Italian Proceedings.

(B) The requirement under Article 119(6) of the Italian Constitution that Italian local authorities may resort to "indebtedness" only as a means of funding investments (see *Venice* at [233]–[234] and [248]–[252], *Venice CA* at [159]–[179], *Pesaro* at [91]–[97] and *Catanzaro* at [76(iii)]). This is the basis for the Indebtedness Ground advanced by Emilia Romagna in the Italian Proceedings.

93. As the Speculation Ground and Indebtedness Ground have been identified as points going to capacity by Italian local authorities, and this has been accepted in the English cases, Dexia addressed me as to why it says that neither of these Grounds applies to the Transaction.

94. Dexia makes three preliminary points, which I will address in turn.

95. First, Emilia Romagna is an Italian Region. I am satisfied on the evidence before me that, as such, Emilia Romagna has a higher degree of autonomy than the municipalities, metropolitan cities and provinces considered in the previous English cases, and has its own legislative powers in relation to (among other things) public finance and access to capital markets (see Rimini at [61]–[67]). Emilia Romagna exercised this autonomy by passing Regional Law no. 22 of 3 July 1998 ("Regional Law 22") and Regional Law no. 40 of 15 November 2001 ("Regional Law 40"), which empowered the Regional Board in broad terms to issue bonds or use other financial instruments on domestic and international markets (see Rimini at [82]).

96. Second, on the evidence before me, I am satisfied that both Regional Laws and Italian national laws (insofar as applicable) conferred on the Region a right to enter into the Transaction. In this regard, Article 1(5)–(7) of Regional Law 22 and Article 34(8) of Regional Law 40 gave the Regional Board the power to use financial instruments provided for by the practice of the financial markets, including instruments to "transform … rates" (see Rimini at [95]–[99]).

97. Further, if (contrary to Dexia's case) Decree 389 applied to Emilia Romagna (as addressed in due course below), Article 3(2)(a) provided that regions may enter into variable-for-fixed interest rate swaps and Article 3(2)(d) provided that they may enter into an interest rate swap with a collar (see Rimini at [139] referring to paragraphs (a) and (d) of Article 3(2) of Decree 389). In *Pesaro,* at [108], it was held that a collar IRS transaction is "of a type which was specifically permitted by the Decree 389". In such circumstances I am satisfied that Dexia therefore does not need to rely on Emilia Romagna's general civil law capacity as there is no doubt it had the substantive power to enter into a derivative transaction of this type.

98. The third point that Dexia makes (by way of note), is that Professor Rimini in fact disagrees with the conclusion reached in the English cases that Italian local authorities (as distinct from regions) lack capacity to enter into speculative derivatives or to incur indebtedness for purposes other than funding investments. He considers these to be mandatory rules of Italian law, which are sanctioned by nullity pursuant to Article 30(15) of Law no. 289/2002 (the statutory provision that sets out the consequences of a breach of Article 119 of the Italian Constitution (see Rimini at [110])). He recognises that the Cattolica Decision "seems to have reached a different conclusion on this point" but he maintains his position in that regard. Dexia made clear at the hearing that it is content for the Court to proceed at trial on the basis that the Speculation Ground and the Indebtedness Ground identify limitations on Emilia Romagna's general civil law

capacity and/or its express powers to enter into the Transaction under Regional Law 22, Regional Law 40 and/or Decree 389.

99. I turn, in the sections that follow, to the Speculation Ground and Indebtedness Ground. No other argument going to capacity has been identified by Emilia Romagna in the Italian Proceedings, nor has any other capacity argument advanced by any Italian local authority found success in the English Courts.

G.2.1 The Speculation Ground

100. I am satisfied that there is no serious argument that the Transaction was speculative (as opposed to hedging) as a matter of Italian law. As the Court of Appeal held in *Venice CA* at [159]–[166], the Italian Supreme Court in Decision 19013 of 2017 and the Italian financial regulator, Consob, have clarified that a derivative will not be speculative when it satisfies two conditions, those conditions being set out in Professor Rimini's report at [245(i)] and [245(ii)], namely:

    (1) The derivative must be entered into expressly for the purpose of reducing the riskiness of other positions held; and,

    (2) There must be a high degree of correlation between the technical and financial aspects (maturity, interest rate, type, etc.) of the exposure being hedged and the financial instrument used for that purpose.

101. Although Foxton J had held at first instance in *Venice* at [208]–[209] and [222] that the Consob definition was not exhaustive and certain other indicia may be relevant in identifying speculative derivatives, that conclusion was reversed in *Venice CA* (see at [159]–[160]). The evidence of Professor Rimini (which I accept) is that this correctly states Italian law (see Rimini at [256]). Accordingly, in assessing whether the Transaction is speculative, the Court should simply apply the two conditions set out in the Consob definition.

102. I am satisfied that the first condition of the Consob definition is fulfilled here because the Transaction was entered into by Emilia Romagna explicitly on the basis that it would reduce the riskiness of its existing indebtedness under the CDP Loan. As already addressed above in relation to Resolution 337, Resolution 8225, and Resolution 12754, and as explained by Mr Belarbi at [19]–[20], to which I also referred above, Emilia Romagna's stated intention in entering into the Transaction was to hedge the variable interest rate risk arising from the CDP Loan. The Court of Appeal of Milan decision no. 921 of 2021 relied on the customer's declaration of its hedging objectives as sufficient evidence of compliance with this limb (see Rimini at [251(i)]).

103. Further, as Foxton J held in *Venice* at [210], whether a transaction is speculative has to be assessed *ex ante* and Emilia Romagna's *ex ante* assessment was that the Transaction reduced its risk exposure. Professor Cucurachi also opines that the Transaction, from a technical perspective, "has the sole objective of protecting the Region from the risk of an increase in interest rates*"* see Cucurachi at [20] and [65]. In this regard Emilia Romagna itself took the view, <u>at the time it entered into the Transaction</u>, that it complied with the relevant laws and declared the same to Dexia, including by providing the two legal opinions to that effect, as already referred to above in section F.1.

104. The second condition of the Consob definition (i.e., a high degree of correlation between the derivative and the underlying borrowing being hedged) will be satisfied if (but not only if):

(1) the notional amount of the derivative instrument matches a portion (or the entirety) of the notional amount of the underlying liability;

(2) the maturity of the derivative instrument matches the maturity of the underlying liability; and

(3) the cash flows received (as either interest or principal amounts) match what is due pursuant to the underlying liability.

See Rimini at [251]–[254] citing the Court of Appeal of Milan decision 921 of 2021, the Court of Reggio Emilia decision 227 of 2023, and the decision of the Appellate Division of the Court of Accounts 12 of 2024.

105. As Professor Rimini explains in his report (at [252]-[254]), the above are examples of high correlation, not specific requirements; the correlation does not need to be exact, and a mismatch will not render a derivative speculative.

106. In the present case, however, as Professor Cucurachi rightly explains (at [20]), there "is a perfect correlation between the financial and technical characteristics of the Region's underlying borrowing (notional, rate, frequency of payments, etc.) and those of the Transaction".

107. In this regard, and as is identified by Professor Cucurachi:

(1) The notional amount under the Transaction exactly matches Dexia's 30% share of the notional amount of the CDP Loan and the aggregate notional amount of the three transactions entered into with the Banks sums to the notional amount outstanding on the date of the Transaction (see Cucurachi at [29] and [35]). The evolution of the Notional Amount also always matches the same percentage of the outstanding amount of the Regions' underlying debt under the CDP Loan (see Cucurachi at [36]).

(2) The maturity of the Transaction and the underlying debt is identical (see Cucurachi at [42] and Table 1).

(3) The cashflows received by Emilia Romagna, for both principal payments and interest payments, precisely replicate the cashflows due to CDP under the CDP Loan (see Cucurachi at [42] and Figure 2).

108. Yet further:

(1) As regards the interest rate collar swap for the first five years from 2004 to 2009, the Transaction was a plain vanilla interest rate swap whereby the Region hedged its variable rate borrowing under the CDP Loan with a variable interest rate floating within a range of maximum and minimum interest rates provided for by the cap and the floor of the swap. As Cockerill J stated in *Busto* (at [305]–[306]), interest rate collar swaps of this kind were "…a classic form of hedging – seeking to manage and contain the interest rate risks to which Busto was already exposed on its borrowing" and "were not speculative". I respectfully agree.

(2) Thereafter, for the 23 years from 2009 to 2032, the precise amount of interest to be paid by Emilia Romagna on every Payment Date was known when it entered the Transaction, given the rate was fixed in advance. In such circumstances any suggestion that this element of the Transaction was, in any sense, speculative does not bear examination.

(3) As Professor Cucurachi rightly explains, therefore, "the overall interest cost for the Region under the [CDP] Loan and the Transaction was already known in advance with certainty. For the first 5 years of the Transaction, the cost of the debt was within the collar in 100% of the cases; for the subsequent years the cost of the debt was 5.25% in 100% of the cases" (Cucurachi at [74]).

109. I am satisfied that none of the arguments Emilia Romagna has made in the Italian Proceedings affects the conclusion that the Transaction complied with both limbs of the Consob test and was thus a hedging transaction:

(1) Emilia Romagna's principal point in the Italian Proceedings is that the Transaction had a negative MTM for the Region on the trade date that was not offset by an upfront payment, which it says made the Transaction "ineffective" as a hedge because the absence of an upfront payment "frustrates the suitability of the derivative to offer an adequate hedge". I am satisfied that that does not follow. As Professor Rimini explains (at [255]), the Italian Supreme Court made clear at paragraph 4.6 of the Cattolica Decision that derivative transactions are non-par transactions and will always have a negative MTM at inception for one of the parties (this is because anyone offering a derivative will have to cover their costs and would also expect to make a profit). Likewise, the Council of State held in decision no. 5962 of 2012 of the Council of State (the "*Pisa* decision") that a negative MTM is not a "hidden cost" and a zero MTM merely represents "the value that the swap could have had in an abstract and hypothetical (but absolutely unrealistic and not real) negotiation" (decision no. 5962 of 2012 of the Council of State, as explained in Rimini at [204(v)]). Accordingly, whether the Transaction as a whole, or any of its component parts, has a negative MTM, forms no part of, and is irrelevant when applying either limb of, the Consob test.

(2) Emilia Romagna also argues that various disclosures should have been made by Dexia prior to the Transaction, including in particular the negative MTM for the Transaction, the "method of calculation" and a "probabilistic representation of the expected movement of" Euribor. As Professor Rimini observes (at [202]), and as decided in *Busto* at [263] and *Venice* at [192]–[201], these arguments do not go to whether a derivative is speculative (and so to capacity). I am satisfied that these arguments are in any event wrong, as addressed in Section G.4 below.

(3) Emilia Romagna also relies on relatively small discrepancies during a period of negative interest rates, which it claims "eliminat[ed] the hedging relationship for which the derivative was initially intended" (Writ of Summons at p.21). As Professor Cucurachi explains, as a result of an unprecedented period of negative interest rates after the global financial crisis and during the Covid pandemic, there were minor discrepancies in the interest amounts in the years from 2016–2022. This appears to have been the result of a decision of the Italian Ministry of Economy and Finance on 21 March 2016 – 12 years after the Transaction was executed – to apply a zero floor to government bonds in an environment of negative interest rates. In Professor Cucurachi's view, this led the MEF to apply "a zero floor to the [CDP]

Loan (and not to the Transaction) that created a discrepancy between the interest payments under the Transaction as compared to the Region's underlying borrowing." If the CDP Loan had been performed according to its terms, "the Transaction would have perfectly matched the [CDP] Loan, even during the negative interest rate period" (Cucurachi at [75]). As the Transaction is to be assessed *ex ante* (see the judgment of Foxton J in *Venice* at [210]), I am satisfied that this point is irrelevant.

(4) In any event, the discrepancies amount only to a difference of €1.27 million over seven years in the context of interest payments of €94.97 million over the life of the Transaction i.e. around 1.3%. In this regard:-

(A) I am satisfied that the differences are sufficiently small that the interest amounts received by Emilia Romagna under the Transaction retain a high degree of correlation with its interest payment obligations under the CDP Loan (Professor Rimini gives examples of cases involving small discrepancies of this kind at [252]–[254], and [258]–[259]).

(B) The Italian case law shows that a close correlation with the notional amount and maturity of the underlying indebtedness is sufficient, on its own, to satisfy the second limb of the test (see Rimini at [253] and the cases he cites in footnote 79).

(5) Emilia Romagna also suggests (albeit in a different context rather than as part of any argument on speculation) that the value of the floor of the collar swap component was higher than the value of the cap. Professor Rimini explains (at [257]) that Italian law does not require a reasonable balance between the cap and the floor of a swap (and in any event, the point does not go to capacity – see *Busto* at [316]). Further, to the extent that there is authority for this proposition, it suggests that the MTM of the cap has to be "<u>much</u> lower than the mark-to-market of the floor option" and for there to be a "<u>significant</u> discrepancy between the value of the two options" (see Rimini at [257]). In this case, the MTM of the cap was €463,608.16 and the MTM of the floor was negative €602,964.92, meaning the difference was just €139,356.76 in the context of a swap with a notional amount of €142,025,647.17 and an overall initial negative MTM of €1.6 million (see Cucurachi Table 2). As Professor Cucurachi explains (at [56]), that is significantly within the margin that was considered a "prudential" estimate of the risks to and costs incurred by the banks in the *Pisa* decision.

110. In this case, the position is that the Transaction was a plain vanilla derivative transaction that effected a straightforward hedge through an interest rate swap with a collar under Article 3(2)(d) of Decree 389, followed by a variable-for-fixed interest rate swap under Article 3(2)(a) of Decree 389. It was entered into expressly to reduce the riskiness of Emilia Romagna's unlimited variable rate exposure on the half-a-billion Euros it borrowed under the CDP Loan and was perfectly correlated with that exposure when the Transaction was entered into. I accordingly reject Emilia Romagna's arguments under the Speculation Ground.

G.2.2 <u>The Indebtedness Ground</u>

111. As already noted, Emilia Romagna is alleging in the Italian Proceedings that the Transaction involved a resort to indebtedness otherwise than as a means to fund investments in breach of Article 119(6) of the Italian Constitution. Its argument is that

the Transaction involved indebtedness because the Transaction had an initial negative MTM and no upfront payment was made to the Region to balance that out. As I address below, I am satisfied that the negative MTM is irrelevant to whether the Transaction involved indebtedness and the absence of an upfront payment in fact means the Transaction did not involve any resort to indebtedness, within the meaning of Article 119 of the Italian Constitution.

112. Article 119(6) of the Italian Constitution permits local authorities and regions to resort to "indebtedness" but only to finance their investment expenditure. The meaning of "indebtedness" for this purpose is set in Article 3(17) of Law 350/2003, by way of a list of transaction types which are apparently exhaustive (see *Venice* at [236]–[240] and *Busto* at [198]–[199] and [328]). The list in Article 3(17) was amended from 1 January 2009 (after the Transaction and with prospective effect only) to include the upfront payment component of a derivative, highlighting that derivatives more generally are excluded from the definition of "indebtedness" in Italian law, as Foxton J held in *Venice* at [233] and Cockerill J held in *Busto* at [195], [280] and [328]. The Circular issued by the MEF on 22 June 2007 stated in terms that derivatives are classified as "debt management instruments and not as indebtedness". It is only the underlying borrowing (in this case the CDP Loan) that has to be used for investment expenditure.

113. In the Cattolica Decision, however, the Italian Supreme Court held that, while interest rate swaps typically do not fall within the definition of indebtedness:

    (1) The upfront component of a derivative could constitute indebtedness, even prior to the legislative change that added upfronts to the relevant list of transactions in Article 3(17) (see *Venice* at [190] citing paragraphs [10.1.3]–[10.1.4] of the Cattolica Decision). For the reasons given in *Busto* at [200]–[202] and [325]–[328], that conclusion is hard to defend, and also has the consequence that the list in Article 3(17) is not exhaustive, despite the plain legislative intention to the contrary.

    (2) Derivative transactions that involve either extinguishing or significantly modifying the underlying debt could themselves involve a resort to indebtedness.

114. However, even if the Cattolica Decision is assumed to be correct on these points, I am satisfied that it has no bearing on the Claims. That is because no part of the Transaction could potentially constitute indebtedness for the purposes of Article 119(6). In this regard:

    (1) The Transaction did not involve the payment of any upfront to Emilia Romagna (see Cucurachi at [41]).

    (2) The Transaction did not affect the underlying debt owed by Emilia Romagna to CDP. The underlying CDP Loan was not extinguished or modified, whether significantly or at all. Emilia Romagna still had (and has) to make the exact same repayments of principal and interest under the CDP Loan as it did prior to entering into the Transaction.

    (3) It is clear from previous case law that a plain vanilla interest rate swap with a collar does not involve any significant modification to the underlying borrowing being hedged - see *Pesaro* at [93]–[97] and *Busto* at [336]–[342] (and see also Rimini at [122]). I am satisfied that a straightforward variable-for-fixed interest swap is *a fortiori*.

115. I accept Professor Rimini's conclusion that the Transaction did not involve "a 'significant modification' in the sense intended by the Cattolica Decision", nor did it "purport to extinguish the existing CDP Loan between Emilia Romagna and CDP" (Rimini at [122] and [129]), and so cannot be considered a form of indebtedness within the meaning of Article 119(6) of the Italian Constitution, as defined in Article 3 of Law 350/2003.

116. In circumstances in which I am satisfied that neither the Speculation Ground nor the Indebtedness Ground applies to the Transaction, it follows that the Transaction complied with Article 119(6) of the Italian Constitution and, as requested by Dexia, I make a declaration accordingly (Declaration 16(a)).

G.3 Authority arguments

117. As already noted, Emilia Romagna contends in the Italian Proceedings that the Transaction was required to be approved by Emilia Romagna's Regional Council and this was not done, alternatively that the Transaction was beyond the approval granted by the Regional Board.

118. It is well established that such an argument does not go to Emilia Romagna's capacity to enter into the Transaction, but rather its authority to do so under Italian law (see Cockerill J in *Busto* at [372]–[373] and Foxton J in *Venice* at [304]–[317], and see also Rimini at [53]). As such, and as already addressed, such arguments do not assist Emilia Romagna in defending Dexia's claims because the Transaction is governed by English law, not Italian law, and matters of ostensible authority and ratification are governed by English law (see *Busto* at [377]–[382] and *Venice* at [317]).

119. I address these matters under English law in due course below. However, before doing so, I address Emilia Romagna's argument that it lacked actual authority to enter into the Transaction as a matter of Italian law. As set out below I am satisfied that Emilia Romagna's argument is wrong as a matter of Italian law.

120. Emilia Romagna relies on the reasoning in the Cattolica Decision, which was directed to Article 42 of the Consolidated Law on Local Authorities (known as "TUEL"). As Professor Rimini explains:

    (1) Article 42 of TUEL does not apply to Emilia Romagna because it is a Region.

    (2) Emilia Romagna has passed its own laws regarding the power to enter into derivative transactions, namely Regional Law 22 and Regional Law 40. By these laws, the Regional Council empowered the Regional Board to:

        (A) Use financial instruments such as financial derivative transactions as per the practice of domestic and international financial markets (Article 1(5)-(7) of Regional Law 22); and

        (B) Redefine its indebtedness by entering into transactions that transform maturities or interest rates (Article 34(8) of Regional Law 40).

121. In such circumstances, I am satisfied that Emilia Romagna's argument that Regional Council approval was required is wrong, not least in circumstances where it applies the wrong Italian legislation. I accept Professor Rimini's evidence that under the relevant Regional Laws, "the Transaction will have been validly approved if it is preceded by a

valid resolution of the Regional Board of the Region". As already addressed above, Resolution 337 of the Regional Board analysed the proposed Transaction and approved the Region entering into the derivative transactions proposed by the Banks to hedge the interest rate risk arising from the CDP Loan. Further, the Regional Board authorised Mr Pasquini to:

(1) act as necessary to finalise, and define the final economic conditions of, the proposed swap transaction, including any alternative structures proposed after the date of Resolution 337; and

(2) to execute such derivative transaction, including signing the ISDA Master Agreement to be entered into by the Region with each of the Banks.

122. The Regional Board thus specifically acknowledged that Mr Pasquini may identify a derivative transaction with a structure different from the structure of the transaction mentioned in Resolution 337 and authorised him to enter into such a transaction by executing the Master Agreement. I am satisfied that it was pursuant to that power conferred on him by Resolution 337 that Mr Pasquini issued Resolution 8225 and Resolution 12754, approving the terms of the Master Agreement and the Transaction. In such circumstances I am also satisfied, as Professor Rimini concludes (at Rimini [305]-[307]), that Mr Pasquini had actual authority to enter into the Transaction Documents.

123. Even if Emilia Romagna were right that the principles set out in the Cattolica Decision apply to the Transaction, I accept Professor Rimini's evidence that the Transaction complied with the requirements of Article 42 of TUEL (Rimini at [309]-[310]).

124. In such circumstances, and as Dexia requests, I declare that the Transaction complied with the requirements of Regional Law 22 and Regional Law 40, and make Declarations 16(e) and (f).

125. In any event, and considering matters under English law, I am satisfied that Emilia Romagna held out Mr Pasquini as having been properly authorised and represented to Dexia that all necessary authorisations had been obtained, and as such Mr Pasquini had ostensible authority as a matter of English law.

126. In addition to Resolution 337 authorising Mr Pasquini to enter into the Transaction, as referred to above in section F.1, Emilia Romagna held out Mr Pasquini as having such authority in the legal opinions provided to Dexia, which (among other things) confirmed that the "Region has approved with [Resolution 337] the entering into of the Master Agreement…. Pursuant to said resolution the authority to sign the Master Agreement is delegated to the Financial and Instrumental Resources' General Director dott. Luciano Pasquini".

127. Yet further, and if necessary, I am satisfied that the Transaction was ratified as a matter of English law by virtue of the Region's subsequent conduct in performing its obligations under the Transaction for more than 20 years until this date, which I described above, and which includes:

(1) The payments made by Emilia Romagna pursuant to the Transaction from 2004 to date, which, until at least December 2021, were made without any suggestion that the sums were not due; and

(2) Emilia Romagna's annual approval of its budgets and financial statements, which included the cashflows from the Transaction and specific information about Emilia Romagna's obligations thereunder.

128. I note, in this regard, that Cockerill J concluded that very similar conduct amounted to ratification under English law in *Busto* at [383]–[386], as did Peter MacDonald Eggers KC in *Pesaro* at [100]–[101], and as did Hildyard J in *Brescia* at [149].

129. I am satisfied that Emilia Romagna's authority arguments have no merit. The Transaction was duly authorised as a matter of Italian law and, even if it was not, Mr Pasquini had ostensible authority to enter into it, and Emilia Romagna repeatedly ratified the same by its subsequent conduct over nearly two decades.

G.4 Validity and breach of mandatory law arguments

130. The other arguments that are relied upon by Emilia Romagna to attack the Transaction in the Italian Proceedings all raise questions of the Transaction's compliance with mandatory rules of Italian law, i.e.:

(1) The alleged breaches of Article 21 and 23 of TUF and Articles 26, 27, 28, 29, 30 and 32 of the Consob Regulation;

(2) The allegation that the transaction lacked the fundamental requirements for a valid contract under Italian law, in particular a valid "causa" and "oggetto", because of the alleged failure to provide information as to the negative initial MTM, "hidden costs" and "probabilistic scenarios*"* (see the Writ of Summons at pp 56–57);

(3) The alleged breach of Article 41; and

(4) The alleged breach of Decree 389.

131. Insofar as these arguments are said to go to the validity of the Transaction, I am satisfied that they are all wrong for the same simple reason, which is that none of these points goes to Emilia Romagna's capacity and the Transaction is governed by English law, not Italian law, meaning that Italian requirements for a valid contract do not apply. For example, an English law contract is valid whether or not it has a valid "causa" or "oggetto" and English law does not recognise a form of contractual liability for breaches of Italian financial services regulation in relation to an English law contract. Insofar as the same points are put on a non-contractual basis, I am satisfied that they are wrong as a matter of Italian law, as I address in due course below.

132. The Banks make four over-arching points about Emilia Romagna's Italian mandatory law arguments. The first is that Emilia Romagna does not contend in the Italian Proceedings that any of these points go to its capacity. I am satisfied that that is correct.

133. Secondly, Dexia rightly identifies that the English cases have identified only two limits on the capacity of Italian public authorities, namely the limits on speculative derivatives and indebtedness, each of which is derived from Article 119 of the Italian Constitution. Italian public authorities and regions otherwise have general civil law capacity.

134. Thirdly, Dexia rightly identifies that, on analysis, none of the points identified by Emilia Romagna is in the nature of a point going to its capacity to enter into the Transaction.

There is considerable prior English authority to this effect, as summarised in the table set out below.

Emilia Romagna's argument	Prior English authority
Article 21 and 23 of TUF and Article 30 of the Consob Regulations	*Pesaro* at [124]–[125]; *Busto* at [211] and [263]
"*Causa*" and "*Oggetto*"	*Busto* at [206]–[265]
Article 41	*Pesaro* at [118] and [124]–[125]; *Catanzaro* at [41] and [100].
Decree 389	*Pesaro* at [118] and [124]–[125]; *Busto* at [316]; *Venice* at [331]–[332] and [343]; *Catanzaro* at [41] and [100].

135. Fourthly, and as Professor Rimini explains (at [149]), breaches of TUF and the Consob Regulations generally do not go to the material validity of a contract, unless this is expressly provided in the provision itself. Of the relevant provisions above, only breaches of Article 23 of TUF are expressed to go to the validity of a contract (Rimini at [269] – [272] and [284] – [287]). A breach of Article 21 of TUF or Article 30 of the Consob Regulations, by contrast, sounds only in liability to pay compensation on the part of the financial intermediary (see Rimini at [149]).

136. Emilia Romagna's position in the Italian Proceedings is that the relevant provisions of Italian law apply by virtue of Article 3(3) of the Rome Convention (see the Writ of Summons at p 30). I am satisfied that the argument that Article 3(3) applies here is untenable, for the reasons given in *Pesaro* at [77]–[79], *Prato CA* at [126]–[137], *Venice* at [338]–[342] and *Catanzaro* at [102]. This is not a case where all the elements relevant to the situation at the time of the choice of law are connected with Italy alone. In this regard:

    (1) The ISDA Master Agreement chosen was the 'Multicurrency – Cross Border' agreement rather than the 'Local Currency-single Jurisdiction form' and thus contemplated more than one currency and the involvement of more than one country, as well as being in the English language;

    (2) The Transaction was part of a wider set of derivative agreements entered into with the Banks, which included JPM, a foreign bank; and

    (3) The Transaction was the subject of a back-to-back hedge with Goldman Sachs, a foreign bank.

137. It follows that none of Emilia Romagna's Italian law arguments, as identified above, has any effect on the validity and enforceability of the Transaction. I am satisfied that, subject to the point in the next paragraph, such conclusion, in and of itself, is sufficient to justify most of the declaratory relief sought by Dexia at trial as to the Transaction.

138. Dexia is, however, as is typical in cases of this kind, also seeking substantive declaratory relief in respect of some of the Italian law arguments Emilia Romagna is advancing in Italy. It is therefore necessary to address these Italian law points in more detail where Dexia is seeking an associated declaration in relation to the same.

139. In this regard, Dexia seeks declarations in respect of the following Italian laws (Declarations (13), (14), (16) and (22)):

(1) Article 31 of the Consob Regulation regarding Emilia Romagna's status as a professional investor.

(2) Article 41;

(3) Decree 389 and the MEF Circular of 27 May 2004 (the "2004 MEF Circular");

(4) Article 21 of TUF and Article 26 of the Consob Regulation;

(5) Article 23 of TUF; and

(6) Article 1337 of the Italian Civil Code (the "ICC").

140. I address each of these points in turn below.

G.4.1.1 Professional Investor

141. Dexia seeks a declaration (Declaration (14)) (that has customarily been made) that Emilia Romagna was a professional investor pursuant to Article 31 of the Consob Regulations, in circumstances where it made a declaration that it was a professional investor in the Transaction Documents (as set out above in section B).

142. The relevant paragraph of Article 31 of the Consob Regulations, paragraph (2), provides that professional investors include "companies or legal persons possessing specific expertise and experience in matters of transactions in financial instruments expressly declared in writing by their legal representative." As Professor Rimini explains (at [318]), the effect of this provision is that, when a local authority or region declares "in writing its possession of a specific expertise and experience in transactions involving financial instruments, it can be classified as a professional investor for regulatory purposes" and "the intermediary has no duty to verify that the written statement rendered by the investor is correct and the burden of provid[ing] evidence to the contrary is on the investor." I am satisfied that this is clear from Italian Supreme Court decision 20179/2022 (see, also Supreme Court decision 1461/2020 and Rimini at [315]–[316]).

143. In the Italian Proceedings, Emilia Romagna argues that it is not a professional investor on the basis of three points:

(1) The Region lacked the required experience;

(2) The written declaration it provided was in the wrong legal form; and/or

(3) The written declaration should be disregarded because it post-dated the Transaction.

144. As regards the first point (the Region lacked the required experience), Dexia rightly points out that Emilia Romagna, in contrast (for example) to the small municipality in the Cattolica Decision, is one of the largest and richest Italian Regions and had significant experience in financial markets and instruments when it entered into the Transaction. It had total borrowing of around €1.2 billion (per Dexia's Statement of Defence in the Italian Proceedings at para 22, citing the Court of Accounts for the

Region in Resolution n.8/2005) and had set up a sophisticated EMTN programme for borrowing on international capital markets. In any event, I accept Professor Rimini's evidence at [313] that the Region's self-declaration of its professional investor status is presumptively true, even if Emilia Romagna in fact lacked the relevant expertise and experience, unless there is evidence that Dexia knew or should, with ordinary diligence, have known that it was not a professional investor. In Part 5 of the Schedule to the Master Agreement, section 5(ix) amends section 3 of the Master Agreement, by adding subsection (l): "(l) Further Representations and Warranties. Party B [Regione Emilia Romana] has a specific expertise and experience in transactions having as an object financial investments and thereby it is a professional investor pursuant to art. 31 of the Regulation no.11522 of July 1998, brought in by CONSOB". I accept Mr Belarbi's evidence (at Belarbi [12] –[13] and [33]) that Dexia understood that Emilia Romagna was a sophisticated investor, not least in circumstances where the evidence before me is that it was one.

145. I note that the Italian Court of Accounts has rejected a similar argument made by the Province of Brescia in accounting proceedings brought by the Public Prosecutor in Italy. It found that:

> (1) "the reasons put forward by the plaintiff to demonstrate the incorrectness of the self-declaration (and, consequently, the qualification of the Province as a "retail" customer) are devoid of evidence capable of undermining the value of simple presumption that the … Supreme Court … recognises to the formal declaration pursuant to Article 31, paragraph 2, of Consob Regulation no. 11522/1998;" and
>
> (2) "... no evidence has been produced of the alleged knowledge or awareness of the aforesaid deficiency on the part of the Banks: therefore, the legitimate expectation of Deutsche Bank and Dexia Crediop that they were in the presence of a qualified investor, which arose with the receipt of the formal declaration issued by the Director of the Provincial Financial Services (which, as per the consolidated principle of the Supreme Court … "is valid to exempt the intermediary from the obligation to carry out further verifications on its behalf in this regard")."

146. As regards the second point (the argument that the written declaration Emilia Romagna provided was in the wrong legal form), Professor Rimini (at [312]) explains that Article 31(2) does not impose any particular requirements of form for a professional investor declaration beyond that it be stated in writing, and I accept his evidence in that regard. I note that the Italian Supreme Court gave effect to a declaration in a contractual clause in decision 24654/2022, specifically rejecting the argument that the regulation requires "precise elements (pre-existence, specificity, clarity and origin from the legal representative of the investing company)". I am satisfied that the declaration contained in the ISDA Master Agreement is in a form that is effective for the purpose of Article 31(2).

147. As regards the third point (the argument that the written declaration should be disregarded because it post-dated the Transaction), I am satisfied that there are two complete answers to this point:

(1) First, and as already addressed, the declaration was approved by the Region in Resolution 8225, which pre-dated the Transaction and appended the Master Agreement containing the Schedule containing the written declaration to Dexia. Resolution 8225 was in writing, signed by Mr Pasquini as the representative of Emilia Romagna, and incorporated by reference the terms of the Master Agreement and Schedule as "an integral and substantial part thereof". The professional investor declaration was thus "expressly declared in writing by [Emilia Romagna's] legal representative" on 18 June 2004, which was prior to the Transaction being entered into on 17 September 2004.

(2) Secondly, and in any event, I am satisfied that there is no requirement that the professional investor declaration be made before the execution of the transaction. In this regard, the Italian Supreme Court stated in decision 24654/2022 that the "provision does not require that the written declaration in question be drawn up prior to the execution of the contract" (see also Rimini at [323]).

148. I also note that Emilia Romagna has not adduced any evidence to show that it lacked the relevant experience and expertise in financial instruments. In this regard, I am satisfied that Dexia is entitled to rely on the declaration that the Region provided to Dexia. Dexia also investigated the position at the time in relation to Emilia Romagna (which was a main client of Dexia) and was itself satisfied that the Region was so qualified (as Mr Belarbi addresses at [12]).

149. The consequence of the Region's professional status is set out in Article 31(1) of the Consob Regulation, which provides that Articles 27, 28, 29, 30 and 32 of the Consob Regulation did not apply to Emilia Romagna when entering into the Transaction Documents and the Transaction (see Rimini at [313] and [318]). Article 30 of TUF also expressly does not apply to professional investors (see Article 30(2) of TUF and Rimini at [294]–[295]).

150. I am accordingly satisfied that Dexia is entitled to the declaratory relief it seeks in Declaration (14).

G.4.1.2 Article 41

151. Article 41 places an obligation on Emilia Romagna to ensure that any refinancing of its existing indebtedness is cost effective, meaning that it ensures "a reduction of the financial value of total liabilities to be paid by the bodies themselves" (see Rimini at [128]).

152. As already noted, Emilia Romagna argues that the Transaction breached Article 41, it appears on the basis that the Transaction had a negative initial MTM and this was not disclosed by Dexia. However I am satisfied that the economic convenience requirement has no application to the Transaction. As Professor Rimini explains (at [129]–[130]), to fall within Article 41 it is necessary for a transaction to replace existing debt with new debt. In this case the Transaction did not extinguish or substantially modify Emilia Romagna's underlying debt pursuant to the CDP Loan. It follows that any purported requirement of "economic convenience" does not apply to the Transaction, as this Court recognised in *Prato* at [163]–[181] and *Prato CA* [80]–[100]. It was in such context that Peter MacDonald Eggers KC granted Dexia summary judgment on the Article 41 point in *Pesaro* (see at [105]–[106]).

153. I am satisfied that the Transaction complied with Article 41 and that Dexia is entitled to the declaratory relief it seeks in Declaration (16)(b).

G.4.1.3 Decree 389 and the 2004 MEF Circular

154. Decree 389 sets out the "Rules on access to capital markets by provinces, municipalities, metropolitan cities, mountain communities and island communities and consortia of local authorities and regions, as per article 41, paragraph 1, Law No. 448 of December 25, 2001". It was issued pursuant to Article 41 and is the general regulatory framework setting out the specific technical rules on the use of derivative contracts by Italian public authorities. By virtue of Article 3(5), Articles 2 and 3 apply to Regions, like Emilia Romagna, but only in the absence of "specific regional regulations".

155. I am satisfied that, for the reasons set out by Professor Rimini at [132]–[135], Decree 389 has no application to Emilia Romagna, because its power to enter into derivatives is set out in Regional Law 22 and Regional Law 40 – there is thus no question of the Transaction having been entered into in breach of Decree 389.

156. In any event, I am satisfied, as Professor Rimini explains (at [142]), that the Transaction falls within sub-paragraphs (a) and (d) of Article 3 of Decree 389, which allow respectively:

    (1) An "interest rate swap between two parties taking the commitment to regularly exchange interest flows connected to major financial market parameters according to the procedures, timing and conditions stated in the contract"; and

    (2) "The acquisition of an interest rate "collar" whereby the buyer is guaranteed an interest rate level payable, varying between pre-established minimum and maximum levels".

157. Applying the guidance in the 2004 MEF Circular, the Transaction was therefore a "plain vanilla" derivative (see Rimini at [146(i)]).

158. Emilia Romagna only resists the conclusion that the Transaction complied with Decree 389 in two ways, each of which I have already addressed, and each of which is without merit:

    (1) First, the Speculation Ground, which is based in part on Decree 389 and which I have already rejected in Section G.2.1, and

    (2) Second, the alleged imbalance between the cap and floor, which I have also rejected (at paragraph 109.(5) above).

159. No points are taken by Emilia Romagna in the Italian Proceedings as to its compliance with the directive in Article 3(3) of Decree 389 that it should "gradually strive" to ensure that the total nominal amount of transactions entered into with each counterparty does not exceed 25% of the total outstanding transactions. There is also no evidence to suggest that the Region was not striving to achieve this over time. In any event, I accept Professor Rimini's evidence that "[t]his is not a formal mandatory requirement in Decree 389, but rather a requirement that the local authority or region endeavour over time to ensure that the credit risk of the counterparty bank is under control and properly managed" (Rimini at [141]).

160. Decree 389 is augmented by the MEF's guidance in the 2004 MEF Circular. Professor Rimini explains that the 2004 MEF Circular "only seeks to explain and to assist with the interpretation of Ministerial Decree 389... It does not impose further requirements on local authorities wishing to enter into derivative transactions and, in any case … it is an interpretative tool which is not binding on a court" (Rimini at [147]). In any event, Emilia Romagna does not suggest in the Italian Proceedings that the Transaction breached any part of the guidance in the 2004 MEF Circular.

161. It follows that the only two requirements for the Transaction to comply with Article 3 of Decree 389 and the 2004 MEF Circular are that (i) the type of derivative falls within Article 3(2) and (ii) the derivative relates to an existing debt of the local authority or region. I am satisfied that both requirements are satisfied here. Accordingly, I find that the Transaction complied in all respects with Decree 389 and the 2004 MEF Circular, insofar as they apply, and I am satisfied that Dexia is entitled to the declaratory relief it seeks in Declarations 16(c) and (d).

G.4.1.4 Article 21 of TUF and Article 26 of the Consob Regulation

162. Article 21 of TUF is a rule of conduct for Italian financial intermediaries that sets out the duties a financial intermediary shall comply with when carrying out its financial services, being to:

> "a) conduct themselves with diligence, fairness and transparency, in the interest of their clients and the integrity of the markets;
>
> (b) acquire the necessary information from clients and operate in such a way that they are always adequately informed;
>
> (c) organise itself in such a way as to minimise the risk of conflicts of interest and, in conflict situations, act in such a way as to ensure, in any case, transparency and fair treatment of clients;
>
> (d) have adequate resources and procedures, including internal control procedures, to ensure the efficient performance of services;
>
> (e) conduct independent, sound and prudent management and take appropriate measures to safeguard the rights of customers over the assets entrusted to them."

163. Professor Rimini explains that these rules are to be applied proportionately in light of their ultimate objective, which is to put an investor in a position to make informed and rational investment decisions (see Rimini at [154]). He also explains that this requires a case-by-case analysis of the financial experience and sophistication of the financial intermediary's customer, having regard to the particular factual circumstances of the case (see Rimini at [154]).

164. In addition, Article 26 of the Consob Regulation specifies some of the more general duties set out under Article 21 of TUF as follows:

> "a) act independently and consistently with the general principles and rules of the Consolidated Law;

b) comply with the operating rules of the markets in which they operate;

c) refrain from any conduct that might benefit one investor to the detriment of another;

d) promptly execute the instructions given to them by investors;

e) acquire knowledge of the financial instruments, services and products other than investment services, whether their own or those of third parties, which they offer, appropriate to the type of service to be provided;

f) operate with a view to keeping costs to investors low and obtaining the best possible result from each investment service, also in relation to the level of risk chosen by the investor."

165. As already noted above in section F.2, Emilia Romagna argues in the Italian Proceedings that Dexia breached these obligations because it was obliged, and failed, to:

(1) provide Emilia Romagna with certain information prior to its entry into the Dexia Transaction, including information about the negative initial MTM, alleged "implicit costs" and risks of the derivative, and a "probabilistic representation of the expected movement" of Euribor;

(2) pursue the best trading conditions for the Region in breach of the best execution rule;

(3) communicate to the Region that the Transaction should have been authorised by its Regional Council rather than its Regional Board; and

(4) make an upfront payment to cancel out the initial negative MTM of the Transaction.

166. First, in relation to points (1) to (4), and as Professor Rimini explains, claims under Article 21 of TUF and Article 26 of the Consob Regulation are subject to a 10-year limitation period under Italian law that commences on the date of breach of the relevant duty in respect of the financial services transaction in question (see Rimini at [180]–[186], citing Court of Milan decision 2295/2024 and Court of Appeal of Florence decision 739/2020). Furthermore, the Italian Supreme Court has held that delay "due to ignorance of one's right, and thus to uncertainty of having it, does not prevent the running of the limitation period". If (contrary to Professor Rimini's view) the limitation period only began to run when, using ordinary diligence, the customer could reasonably have had knowledge of the breach, the first reference to the disclosure of the MTM and costs of a derivative transaction and probability scenarios in the Italian regulatory framework was Consob Communication no. 9019104 of 2 March 2009 (Communication 9019104). Emilia Romagna could therefore have reasonably discovered the basis for its complaints about the negative initial MTM, "hidden costs" and probability scenarios in or around March 2009. It follows that all of the Regions' claims under Article 21 of TUF and Article 26 of the Consob Regulation are time-barred under Italian law, as the alleged breaches date, in every case, from 2004, and time either began to run then or, at the very latest, in or around March 2009.

167. Returning to the first of these arguments – i.e., the alleged failure to provide information about the negative initial MTM, alleged "implicit costs*"* and risks of the derivative, and a "probabilistic representation of the expected movement" of Euribor – Dexia makes the following further three points:

(1) First, at the time of the Transaction, on 17 September 2004, Article 21 of TUF did not require or recommend that a financial intermediary disclose to the customer the initial MTM, probabilistic scenarios and implicit costs of a derivative transaction (see Rimini at [188]-[193]). The first suggestion of any such requirement in the Italian regulatory landscape was the non-binding recommendation in Communication 9019104, which was issued on 2 March 2009 with prospective effect in connection with the introduction of MifiD I (which post-dated the Transaction) (see Rimini at [188(ii)]). As Professor Rimini explains (at [190]), it is not tenable to argue that a financial intermediary will have fallen below the standard required by Article 21 of TUF "by not disclosing the mark-to-market, probabilistic scenarios and implicit costs at the time of the Transaction, in the absence of regulatory provisions imposing a duty on financial intermediaries to disclose such information, thus breaching its information and transparency duties". I note that this was also the conclusion reached by the Italian Council of State in decision 5962/2012.

(2) Secondly, Communication 9019104 also applies only to retail customers, not professional investors (see Rimini at [192]).

(3) Thirdly, in Professor Rimini's view, Dexia would have complied with its obligations under Article 21 of TUF so long as it had:

(A) properly informed Emilia Romagna about the terms of the Transaction;

(B) diligently proposed a transaction which is consistent with the customer's needs and its level of risk appetite; and

(C) set out the risks of the transaction in light of the degree of financial sophistication of Emilia Romagna and the factual circumstances.

168. In the opinion of Professor Rimini (which I accept), these requirements were satisfied because the Region was in the position to make an informed and rational decision about the Transaction, the Transaction was of a plain vanilla character, the Region was professional investor, it received several proposals and presentations from banks, including the forward rate curve and the sensitivity of the MTM to movements in market rates, which was sufficient for it to understand the risks underlying the Transaction, and it performed its own simulations to evaluate the risks and understand the sensitivity of the Transaction to interest rate changes, as can be seen from a PowerPoint presentation, prepared by Dexia Crediop (as it then was), on their analysis of loans entered into by the Emilia Romagna Region with Dexia Crediop. The Italian Supreme Court and the Court of Appeal of Milan have both made clear that disclosure of the negative initial MTM, "hidden costs" and "probabilistic scenarios" is not required or advisable in all cases and that a case-by-case approach should be adopted, taking account of the complexity of the transaction, the sophistication and experience of the counterparty and the information provided (see Rimini at [188(vi)], [198–199] and [201(i)-(ii)] referring to the Italian Supreme Court decisions no. 15192/2024 and no. 2157/2021, and the Court of Appeal of Milan decision no. 2278/2024). I note that

Cockerill J reached the same conclusion in *Busto* at [267] and that Professor Rimini agrees with this statement of Italian law (see Rimini at [199]).

169. As regards the second argument of Emilia Romagna (alleged breach of the best execution rule under Article 26 of Consob), it is parasitic on Emilia Romagna's allegation that the Transaction was not concluded at par because it had a negative initial MTM. As already addressed, I am satisfied that this is a *non sequitur*. The size of the negative MTM Transaction was below the prudential amount approved by the Council of State in the *Pisa* decision, to which I referred above, and which is explained by Professor Cucurachi at [56]. Moreover, as the evidence of Professor Cucurachi demonstrates, the alternative transactions available to Emilia Romagna at the time were more costly by between €2 million and €3.3 million (see Cucurachi at [64] and Appendix 1 thereto).

170. As regards the third argument of Emilia Romagna (the alleged requirement to disclose to the customer which body within the customer should approve a derivative transaction), I am satisfied that there is no such requirement under Italian law and that there was no such requirement at the time of the Transaction (see Rimini at [207]). On the contrary, and as Professor Rimini also identifies, it is for the customer to identify the relevant body to the bank and not the other way around.

171. As regards the fourth argument of Emilia Romagna (an alleged obligation to make an upfront payment to cancel out the initial negative MTM of the Transaction), I am satisfied that there is no requirement to make an upfront payment to the counterparty in a "non-par" swap (i.e., where the initial MTM is not zero), nor was there any such requirement at the time of the Transaction (see Rimini at [208]–[215]). As Professor Rimini explains, the suggestion of such a requirement is based on a misreading of Annex 3 of the Consob Regulation. Both the Council of State in decision 5962/2012 and the Cattolica Decision recognise that it is normal, and not unlawful, for a derivative to have a negative initial MTM. I note that there is no Italian authority to support an obligation for one of the parties to rebalance the value of the initial MTM with an upfront payment in favour of the other party (see Rimini at [213]).

172. I am satisfied, therefore, that there is no basis for Emilia Romagna's allegations of a breach of Article 21 of TUF or Article 26 of the Consob Regulation, and that Dexia is entitled to the declaratory relief it seeks to this effect in Declaration 16(g).

G.4.1.5 Article 23 of TUF

173. Article 23(1) of TUF requires that contracts relating to the provision of financial services (such as the Master Agreement) are in written form and provided to the customer. However, as Professor Rimini explains (at [276]–[280]), the conclusion of a framework agreement between the financial intermediary and the customer does not need to take place before the financial intermediary begins providing financial services. The only relevant requirement under Article 23 of TUF is that the customer is provided with the contract and that it is in writing.

174. Further, as already addressed above in section F.1, the Region received and in June 2004 approved the terms of the relevant framework agreement, namely the Master Agreement, in Resolution 8225 (which described it as the "framework Master Agreement"), prior to executing the Transaction. The suggestion that the Region entered into the Transaction without being provided with the Master Agreement on the basis of which it was contracting is wrong (see Rimini at [281]–[283]).

175. I am satisfied that in the above circumstances, there was no breach of Article 23 of TUF, and that Dexia is entitled to the declaratory relief it seeks to this effect in Declaration 16(g).

G.4.1.6 Article 1337 of the ICC

176. Article 1337 of the ICC provides as follows: "The parties, in the conduct of negotiations and the preparation of the contract, shall behave according to good faith". As Professor Rimini explains (at [220]), if a court ascertains that a financial intermediary has not breached Article 21 of TUF in its dealings with a customer, it will follow that the financial intermediary has not breached Article 1337 of the ICC, because the two articles are an expression of the same duty to act in good faith. Accordingly, it follows from my analysis of Article 21 of TUF, and my findings in section G.4.1.4 above, that the Transaction did not breach Article 1337, and I am accordingly satisfied that Dexia is entitled to the declaratory relief it seeks in Declaration (16)(i).

H. THE INDEMNITY AND DAMAGES DECLARATIONS

177. In addition to the declaratory relief that Dexia has sought, and I have granted, above, Dexia also seeks declarations that:

    (1) Emilia Romagna has commenced the Italian Proceedings in breach of Clause 13(b) of the Master Agreement, and so Dexia is entitled to damages in respect of the loss and damage incurred as a result, including the legal fees Dexia has incurred in Italy and England (Declaration (24)); and

    (2) Dexia is entitled to be indemnified by Emilia Romagna pursuant to Clause 11 of the Master Agreement in respect of all loss and damage arising out of its breaches of the Transaction Documents, again including the legal fees incurred in Italy and England (Declaration (25)).

178. As already noted, on 20 November 2024 (the day before the trial in the present action), Hildyard J handed down judgment in *Brescia*. The same day Dexia filed an application notice to amend the current iteration of its Claim Form and Particulars of Claim so as to amend Declaration (24) to align with the relief granted by Hildyard J in *Brescia* (at [231]). I am satisfied that the amendments stand (very much more than) real prospects of success and I grant Dexia permission to amend in the respects sought. The amended Declaration (24) (with the amendments underlined) ("Amended Declaration (24)") is as follows:-

> "(24) The Italian Litigation is within the definition of "Proceedings" in clause 13(b) of the ISDA Master Agreement, and the Italian Claim was commenced by the Defendant against the Claimant in breach of the Transaction Documents and the Claimant is entitled to damages in respect of all loss and damage incurred by the Claimant arising out of or as a result of the commencement of the Italian Proceedings, including but not limited to legal fees incurred in respect of the Italian Proceedings and the present proceedings."

179. Clause 13 of the Master Agreement is the usual ISDA-form exclusive English jurisdiction clause, which requires Emilia Romagna to submit to the jurisdiction of the English Courts in respect of all disputes "relating to this [Master Agreement]" and to waive any objection it might have to English jurisdiction, and also prevents it from bringing proceedings in Italy, such as the Italian Proceedings. I am satisfied that Emilia Romagna's institution of the Italian Proceedings was a clear breach of this Clause, and that Dexia is entitled to the same declaration as was made in *Brescia* in relation to a similar such breach, namely Amended Declaration (24).

180. As regards Declaration (25), Clause 11 of the Master Agreement contains an indemnity requiring a "Defaulting Party" to "indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement".

181. A Defaulting Party is defined under Clause 6(a) as a party with respect to which an "Event of Default" has occurred. Events of Default are in turn listed in Clause 5(a) of the Master Agreement, and include breaches of the Master Agreement (Clause 5(a)(ii)) and the falsity of any of the representations given by Emilia Romagna (Clause 5(a)(iv)).

182. In circumstances where Emilia Romagna is arguing in Italy that a number of the representations it has given to Dexia under the Master Agreement are false, Dexia submits that, in the alternative to its position that Emilia Romagna's representations in the Master Agreement were true and it should be held to them, it is entitled to be indemnified by Emilia Romagna for all expenses incurred in enforcing and protecting its rights under the Master Agreement in respect of any representations that were relevantly false. I am satisfied that Dexia is entitled to such a declaration.

183. The evidence before me is that as a result of Emilia Romagna's conduct in breach of the Transaction Documents Dexia has incurred significant costs in prosecuting the present Claims and defending the Italian Proceedings. In such circumstances I am satisfied that Dexia is entitled to the declarations it seeks, that it is entitled to be paid the costs of doing so and/or to be indemnified by Emilia Romagna in respect of the same.

I. CONCLUSION

184. For the foregoing reasons I am satisfied that Dexia is entitled to the relief it seeks, and I make the declarations which are set out at Annex 3 to this judgment.

Annex 1: Declaratory Relief in respect of the Transactions

In the first column, the relevant declaration sought by Dexia is set out, together with footnotes to the wording in the Transaction Documents that is the source for the declaration. In the second column, the text common to all three precedent orders is shown in black, with any material differences between the *Busto*, *Pesaro* and *Catanzaro* judgments shown in blue, red and green respectively.

Dexia (as amended)	**Previous cases**
(1) The Defendant (a) has, and at all material times had, the power (a) to execute the Transaction Documents and any other documentation relating to the Transaction Documents (b) to deliver the Transaction Documents and any other documentation relating to the Transaction Documents that it was required by the Transaction Documents to deliver, and (c) to perform its obligations under the Transaction Documents; (b) has taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance as referred to in sub-paragraph 1(a) above;[1] and/or	[(2)] [(2)] [(8)] The Defendant has, and at all material times had, the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and it has, and had at all material times, taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance.
(2) The execution and delivery of the Transaction Documents, and the performance by the Defendant of its obligations under the Transaction Documents does not, and did not at any material time, violate or conflict with any law applicable to the Defendant, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets;[2] and/or	(3) The [Defendant's] execution and delivery of and the [Defendant's] performance of its obligations under the Transaction Documents [by the Defendant] does not, and did not at any material time, violate or conflict with any law applicable to the Defendant[, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets] [any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets]
(3) All governmental and other consents that are, or were, required to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and are, or were at all material times, in full force and effect, and all conditions of any such consents are being, or have been, complied with;[3] and/or	(4) All governmental and other consents that were to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and are, or were at all material times, in full force and effect and all conditions of any such consents have been complied with.

[1] Clause 3(a)(ii) Master Agreement as amended by the Schedule: Emilia Romagna represented to Dexia that "*It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action and made all necessary determinations and findings to authorize such execution, delivery and performance*" {C/2/26}.

[2] Clause 3(a)(iii) Master Agreement: Emilia Romagna represented to Dexia that "*Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets*" {C/2/3}.

	(10) All governmental and other consents that were or are required to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and, at all material times, any such consents have been in full force and effect and all conditions of any such consents have been complied with.
(4) The Defendant's obligations under the Transaction Documents-constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their respective terms[4]	(1) The Defendant's obligations under the Transaction Documents constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their terms. (1) The Defendant's obligations under the Transaction Documents constituted and, in the case of the Cash Flow Swap, constitute, its legal, valid and binding obligations enforceable in accordance with their terms. (7) The obligations of the Defendant under the Transaction Documents constitute its legal, valid and binding obligations enforceable in accordance with their terms.
(6) All applicable information that was furnished in writing by or on behalf of the Defendant for the purposes of the Dexia Transaction or the Transaction Documents (and, in particular, the information identified as such in Part 3(b) of the Schedule to the ISDA Master Agreement) was at the date of that information true, accurate and complete in every material respect[5]	(5) All applicable information that was furnished in writing by or on behalf of the Defendant to the Claimant and was identified for the purpose of Section 3(d) of the Master Agreement, namely (a) "*Certificate or other documents evidencing the authority of the party entering into this Agreement or a Confirmation, as the case may be, together with the relevant specimen signatures*", (b) "*Duly certified copies of the relevant resolutions of the Provincial Board (Giunta Provinciale) and of the Provincial Council (Consiglio Provinciale) authorising this Agreement and each Transaction entered into hereunder*" and (c) "*Duly certified copy of Provincial Board's Resolution ratifying the execution of this Agreement*" was, as of the date of the information, true, accurate and complete in every material respect.
(9) The Defendant entered into the Transaction Documents and the Dexia Transaction not for speculative purposes but solely for the purpose of hedging interest rate risk and managing its liabilities arising from a loan as permitted by law, and the Dexia Transaction was carried out on underlying amounts that were actually due from the Defendant at the date of the Dexia Transaction, and the	(7) The Transactions were entered into by the Defendant solely for the purposes of hedging interest rate risk and for managing its liabilities resulting from bond issues, loans and other forms or recourse to the financial markets permitted by law and not for speculative purposes.

[3] Clause 3(a)(iv) Master Agreement: Emilia Romagna represented to Dexia that "*All governmental and other consents that are required to have been obtained by it with respect to this Agreement or any Credit Support Document to which it is a party have been obtained and are in full force and effect and all conditions of any such consents have been complied with*" {C/2/3}.

[4] Clause 3(a)(v) Master Agreement: Emilia Romagna represented to Dexia that "*Its obligations under this Agreement ... constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms…"* {C/2/3}.

[5] Clause 3(d) Master Agreement: Emilia Romagna represented to Dexia that "*All applicable information that is furnished in writing by or on behalf of* [Emilia Romagna] *to the other party and is identified for the purpose of this Section 3(d) in the Schedule is, as of the date of the information, true, accurate and complete in every material respect*" {C/2/4}.

Defendant undertook to maintain for the duration of the Dexia Transaction an underlying indebtedness that financially matches the Dexia Transaction with particular regard to the duration and type of interest rate;[6] and/or	(8) The Transactions were carried out in respect of underlying amounts that were, or are, actually due from the Defendant. (12) The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation. (16) The Transaction was entered into by the Defendant for purposes of managing its borrowings and not for purposes of speculation.
(10) In entering into the Transaction Documents and the Dexia Transaction, and on each date (if applicable) that the Dexia Transaction was amended, extended or otherwise modified, the Defendant: (a) was acting for its own account and made its own independent decisions to enter into each of them and as to whether the Transaction Documents and the Dexia Transaction were appropriate or proper for the Defendant based on its own judgement and upon advice from such advisers as it deemed necessary;[7]	[(5)] [(11)] [By Section 3(i) of the Master Agreement (as added by Part 5, paragraph 5(vi) of the Schedule), t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that in entering into the Transactions, the Defendant was acting for its own account and had made its own independent decisions to enter into the Transactions and as to whether the Transactions were appropriate or proper for it based upon its own judgement and upon advice from such advisers as it had deemed necessary. (12) In entering into the Transaction, the Defendant was acting for its own account and had made its own independent decisions to enter into the Transaction and as to whether the Transaction was appropriate or proper for it based upon its own judgement and upon advice from such advisers as it had deemed necessary.
… (b) did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transaction Documents and the Dexia Transaction, it being understood that (i) information and explanations related to the terms and conditions of the Transaction Documents and the Dexia Transaction would not be considered to be investment advice or a recommendation to enter into the Transaction Documents and the Dexia Transaction, and (ii) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Dexia Transactions;[8] and/or	(9) The execution of the Transactions did not constitute an assurance or guarantee of financial results. [(6)] [(12)] [By Section 3(i) of the Master Agreement (as added by Part 5, paragraph 5(vi) of the Schedule), t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that in entering into the Transactions, the Defendant did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transactions, it being understood that (a) information and explanations related to the terms and conditions

[6] Clause 3(g) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*This Agreement has been, and each Transaction hereunder will be (and, if applicable, has been), entered into for purposes of managing its borrowings or investments and not for purposes of speculation*" {C/2/27}. In the Confirmation, Emilia Romagna further declared that "*it has decided to enter into this IRS transaction not for speculative purposes but solely for the purpose of hedging the interest rate risk and managing its liabilities arising from bond issuances, passive loans and other forms of recourse to the financial markets as permitted by the law. In particular, this transaction is therefore carried out on underlying amounts that are actually due by the Region, which undertakes to maintain for the entire duration of the transaction an underling indebtedness with a high degree of financial correspondence towards the swap transaction with particular attention to the duration and type of rate*" {C/1T/4}

[7] Clause 3(i) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*it is acting for its own account, and has made its own independent decisions to enter into* [the Transactions] *and as to whether this* [Master] *Agreement and* [Transaction] *is appropriate or proper for it based on its own judgment and upon advice from such advisors as it has deemed necessary.*" {C/2/27}.

	of the Transactions would not be considered to be investment advice or a recommendation to enter into the Transactions, and (b) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Transactions. (13) In entering into the Transaction, the Defendant did not rely on any communication (written or oral) of the Claimant/Dresdner Bank AG (**Dresdner**) as investment advice or as a recommendation to enter into the Transaction, it being understood that (i) information and explanations related to the terms and conditions of the Transaction would not be considered to be investment advice or a recommendation to enter into the Transaction, and (ii) no communication (written or oral) received from the Claimant/Dresdner would be deemed to be an assurance or guarantee as to the expected results of the Transaction.
(11) Prior to entering into the Transaction Documents and the Dexia Transaction: (a) the Defendant received from the Claimant the Document on General Risks involved in the Investments in Financial Instruments ("*Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari*") as established by CONSOB decree n. 11522, attachment no. 3 (Regolamento CONSOB n. 11522 del 1 luglio 1998); (b) the Claimant requested, and the Defendant provided, information regarding its experience in the investment in financial instruments, its financial data, investment objectives, and its risk propensity;[9] and/or	*This declaration was not sought in Busto, Pesaro or Catanzaro but as explained in footnote 9 there is a specific bespoke declaration to this effect in the Master Agreement in these terms.*
(13) The Transaction Documents and the Dexia Transaction: (a) were entered into by the Defendant in conformity with the provisions of the Decree n. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette n. 28 of 4 February 2004 (the "Decree"); and (ii) in compliance with Article 3, paragraph 4 of the Decree, were entered into by the Defendant with the intention of gradually tending towards ensuring that the nominal amount of the Dexia Transaction would not exceed 25% of the totality of the derivative transactions entered into by the	*This declaration was not sought in Busto, Pesaro or Catanzaro but as explained in footnote 10 there is a specific bespoke declaration to this effect in the Master Agreement in these terms.*

[8] Clause 3(i) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*It is not relying on any communication (written or oral) of* [Dexia] *as investment advice or as a recommendation to enter into* [the Transaction]*, it being understood that information and explanations related to the terms and conditions of* [the Transaction] *shall not be considered to be investment advice or a recommendation to enter into this* [Master] *Agreement or* [the Transaction]. *No communication (written or oral) received from* [Dexia] *shall be deemed to be an assurance or guarantee as to the expected results of* [the Transaction]" {C/2/27}.

[9] Clause 3(i) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that it "*acknowledges: 1) to have received from* [Dexia] *the Document on General Risks involved in the Investment in Financial Instruments ("Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari") as established by CONSOB decree n. 11522, attachment n°. 3 (Regolamento CONSOB n. 11522 del 1° luglio 1998); 2) That* [Dexia] *has requested* [Emilia Romagna]*, and* [Emilia Romagna] *has provided, the information regarding its experience in the investment in financial instruments, its financial data, its investment objectives and its risk propensity"* {C/2/27}.

Defendant;[10] and/or	
(14) When entering into the Transaction Documents and the Dexia Transaction:, (a) the Defendant had specific expertise and experience in transactions having as an object financial investments and was thereby a professional investor pursuant to art. 31 of the Regulation n. 11522 of 1 July 1998, brought in by CONSOB ("*Commissione Nazionale per le Societa e la Borsa*") in Italy; and/or (b) Article 30 of TUF and Articles 27, 28, 29, 30 and 32 of CONSOB Regulation n. 11522/1998 did not apply to the Defendant;[11] and/or	(9) Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Regulation no.11522 of 1 July 1998 issued by Consob. (20) Prior to and when entering into the Transaction, the Defendant had specific expertise and experience in transactions having as an object financial investments and therefore was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Italian Regulation number 11522 of 1 July 1998 issued by CONSOB by virtue of the specific declaration delivered to the Claimant/Dresdner when entering into the Transaction.
(15) The Defendant has, and at all material times had, complied in all material respects with all applicable laws and orders to which it may be, or was, subject if failure so to comply would have materially impaired its ability to perform its obligations under the Transaction Documents;[12] and/or	*Cockerill J declined to make this declaration in Busto for the reasons at [19]–[21] {AB/3.1/5} and in Catanzaro for the reasons at [114(i)] {AB/7/28–29}. In the event that the Court grants declaration (16) below, Dexia does not press this declaration.*
(16) In resolving to enter into the Transaction Documents and the Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:	(6) Save to the extent provided at paragraph 5 of this Order, the Transactions were entered into in conformity with (a) Article 119(6) of the Italian Constitution; (b) Article 41 of Law no. 448/2001; (c) Article 3 of Decree no. 389 of 1 December 2003

[10] Clause 3(k) of the Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*(i) it is entering into this* [Master] *Agreement and* [the Transaction] *in conformity with Decree no. 389 of 1st December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no. 28 of 4th February 2004 (the "Decree") and that (ii) in compliance with Article 3, paragraph 4, of the Decree,* [Emilia Romagna] *shall gradually tend towards ensuring that this* [Master] *Agreement and* [the Transaction] *are entered into in a manner which ensures that the nominal amount of derivative transactions entered into by* [Emilia Romagna] *with* [Dexia] *will not exceed 25% of the totality of the derivative transactions entered into by* [Emilia Romagna]" {C/2/28}. The Confirmation also contained a representation by Emilia Romagna that "*The Region declares that this interest swap transaction is in accordance with Ministerial Decree no. 389 of 1 December 2003 and the subsequent explanatory Circular of 27 May 2004; in particular with reference to the underlying indebtedness, it is fully compliant with Article 3, paragraph 3 of the abovementioned Decree no. 389/2003; with reference to the 25% limit, it is also completely in line with Article 3, paragraph 4 of the abovementioned Decree no. 389 of 1 December 2003*" {C/1T/4}.

[11] Clause 3(l) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*it has a specific expertise and experience in transactions having as an object financial investments and thereby it is a professional investor pursuant to art. 31 of the Regulation no.11522 of 1 July 1998, brought in by CONSOB ("Commissione Nazionale per le Società e la Borsa") in Italy*" {C/2/28}. Part (b) follows expressly from the statutory exclusion of these articles of TUF and Consob Regulation in the case of a professional investor. See Written Opening at paragraph [115].

[12] Clause 4(c) Master Agreement: Emilia Romagna agreed that, so long as it has or may have any obligations under the Master Agreement, "*It will comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform its obligations under this Agreement or any Credit Support Document to which it is a party*" {C/2/4}.

(a) Article 119(6) of the Constitution of Italy, as the Dexia Transaction does not fall within the definition of 'indebtedness' as set out in Article 3 of Law n. 350/2003. (b) Law n. 448 of 28 December 2001 (Finance Act 2002) and in particular, Article 41 thereof, as amended by Article 2(1-bis) of the Legislative Decree n. 13 February 2002, converted with amendments by the Law No 75 of 24 April 2002 (La Legge 28 Dicembre 2001, n.448 (Legge Finanziaria 2002) ed in particolare l'art.41 come modificato dall'art.2 comma 1-bis del D.L. 22 Febbraio 2002 n.13 convertito con modificazioni dalla Legge 24 Aprile 2002, n.75); (c) Decree 1 December 2003 n. 389 of the Ministry of Economy and Finance as published on the Official Gazette n. 28 of 4 February 2004 on the "*Regulation concerning access to the capital market for provinces, municipalities, metropolitan cities mountain communities and islands communities as well as consortia of territorial entities and Regions, pursuant to Article 41, paragraph 1 of Law n.448 of 28 December 2001*" and in particular Article 3 thereof (Il decreto 1 dicembre 2003, n. 389 del Ministero dell'Economia e delle Finanze pubblicato sulla G.U. n.145 del 4 febbraio 2004 avente ad oggetto "*Regolamento concernente l'accesso al mercato dei capitali da parte delle Province, dei Comuni, delle Città Metropolitane, delle Comunità Montane e delle Comunità Isolane, nonché dei Consorzi tra Enti Territoriali e delle Regioni, ai sensi dell'articolo 41, comma 1, della legge 28 dicembre 2001, n.448"* ed in particolare l'art.3); (d) The Circular of the Ministry of Economy and Finance of 27 May 2004 published on the Official *Gazette* n. 128 of 3 June 2004 (la Circolare del Ministero dell'Economia e delle Finanze del 27 maggio 2004 pubblicata sulla Gazzetta Ufficiale n. 128 del 3 giugno 2004); (e) The L.R. n. 22 of 3 July 1998 on *the "Renegotiation of Mortgages"* (La L.R. n. 22 del 3 luglio 1998 concernente la "Rinegoziazione Mutui"); (f) The L.R. n. 40/01 "Accounting Regulations of the Emilia-Romagna Region. Repeal of Regional Law n.31 of 6 July 1977 and Regional Law n.4 of 27 May 1972" (L.R. n.40/01 "*Ordinamento Contabile della Regione Emilia-Romagna. Abrogazione della L.R. 6 luglio 1977 n.31 e 27 maggio 1972 n.4*"); (g) Articles 21 and 23 of TUF and Article 26 of CONSOB Regulation n. 11522/1998; and (i) Article 1337 of the Civil Code; and/or[13]	issued by the Treasury Department of the Ministry of Economy and Finance and published in the Official Gazette no. 28 of 4 February 2004; (d) Circular of the Ministry of Economy and Finance of 27 May 2004; (e) Article 42 of the Local Entities Act (Testo Unico Enti Locali), and (f) Article 30(15) of Law no.289/2002. (19) The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, (i) Article 119(6) of the Italian Constitution; (ii) Article 41 of Italian Law number 448 of 2001; (iii) Article 3 of Italian Ministerial Decree number 389 of 2003 (including as interpreted by the Circular dated 27 May 2004 issued by the Italian Ministry of Economy and Finance); (iv) Article 30(15) of Italian Law number 289 of 2002; and (v) Article 1(736) of Italian Law number 296 of 2006 (including as interpreted by the Circular dated 31 January 2007 issued by the Italian Ministry of Economy and Finance).

[13] As identified above, Emilia Romagna represented to Dexia in Clause 3(a) of the Master Agreement (as amended by the Schedule) that it had the power to execute, deliver and perform the Transaction Documents and that this did not violate or conflict with any law applicable to it, that it had obtained all governmental and other consents necessary and that its obligations under the Transaction Documents are legal, valid and binding {C/2/3} {C/2/26}. It also specifically declared that the Transactions complied with the Decree (see footnote 10 above). However, contrary to these agreements, representations and declarations, it has alleged breaches of the laws listed in the declaration in the Italian Proceedings.

(17) The Transaction Documents constitute the entire agreement and understanding of the Parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto;[14] and/or	[(4)] [(10)] The Transaction Documents constituted [and constitute] the entire agreement and understanding of the parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto. (11) The Transaction Documents constitute the entire agreement and understanding of the parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto.
(18) When entering into the Dexia Transaction, the Defendant: (a) was capable of assessing the merits of and evaluating and understanding (on its own behalf or through independent professional advice), and understood, assessed and accepted, the terms, conditions and risks associated with the Dexia Transaction; and/or (b) was capable of assuming, and assumed, the financial and other risks of the Dexia Transaction; and/or (c) acknowledged that the execution of the Dexia Transaction did not constitute an assurance or guarantee of financial performance;[15] and/or	[(7)] [(13)] [By Part 5, paragraph (4), (a) of the Schedule, t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of [and evaluating and] understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the Transactions and the Defendant was capable of assuming and assumed the [financial and other] risks of the Transactions. (8) When entering into the Transactions, the Defendant was able to make and did in fact make an informed assessment of the risk of the Transactions and had the information required to enable it to carry out that assessment. (14) Prior to and when entering into the Transaction, the Defendant was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks, of the Transaction, and the Defendant was capable of assuming and assumed the risks of the Transaction.
(19) The Claimant was not acting as a fiduciary for, or advisor to, the Defendant in respect of the Dexia Transaction;[16] and/or	(14) By Part 5, paragraph (4)(b) of the Schedule, the Defendant represented to the Claimant that the Claimant did not act as fiduciary for or advisor to the Defendant in respect of the Transactions.

[14] Clause 9(a) Master Agreement: Emilia Romagna agreed "*This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto*" {C/2/12}.
[15] Paragraph 4(a) of Part 5 of the Schedule: Emilia Romagna represented to Dexia that "*It is capable of assessing the merits of and evaluating and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transactions. It is also capable of assuming, and assumes, the financial and other risks of that Transaction*." {C/2/26}. Further, Section 3(i) Master Agreement as added by the Schedule: Emilia Romagna represented to Dexia that "*No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of any Transaction hereunder*" {C/2/27}. In the Confirmation, Emilia Romagna represented to Dexia that "*the Region is able to understand, assess and accept the risks associated with this transaction, the execution of which does not constitute an assurance or guarantee of financial performance"* {C/1T/4}.
[16] Paragraph 4(b) of Part 5 of the Schedule: Emilia Romagna represented to Dexia that it was "*not acting as a fiduciary for or advisor to* [Emilia Romagna] *in respect of that Transaction"* {C/2/26}.

	(10) The Claimant and the Defendant made representations to each other in the Transaction Documents (under the heading '*Status of Parties*') that the other party was not acting as a fiduciary for or an advisor to it in respect of the Transactions. (15) The Claimant/Dresdner did not act as fiduciary for or adviser to the Defendant in respect of the Transaction.
(20) When entering into the Dexia Transaction, the Defendant was able to make and did in fact make an informed assessment of the risk of the Dexia Transaction and had the information required (whether under English or Italian law) to enable it to carry out that assessment;[17] and/or	[(7)] [(13)] [By Part 5, paragraph (4), (a) of the Schedule, t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of [and evaluating and] understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the Transactions and the Defendant was capable of assuming and assumed the [financial and other] risks of the Transactions. (8) When entering into the Transactions, the Defendant was able to make and did in fact make an informed assessment of the risk of the Transactions and had the information required to enable it to carry out that assessment. (14) Prior to and when entering into the Transaction, the Defendant was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks, of the Transaction, and the Defendant was capable of assuming and assumed the risks of the Transaction.
(22) By reason of sub-paragraphs 47(1) to (20) above, and in any event, the Claimant has to date complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Dexia Transaction (including any obligations arising prior to the execution or approval by the Defendant of the Transaction Documents, as a result of pre-contractual negotiations between the Claimant and the Defendant or otherwise, and any obligations arising after the execution or approval by the Defendant of the Dexia Transaction and/or the Transaction Documents, including any relevant obligations arising in connection with the Civil Code, Italian Legislative Decree n. 58/1998, Regulation n. 11522/1998 issued by CONSOB, or any other applicable Italian law), and the Claimant is not liable in respect of any claim under any system of law or regulation, whether by reference to the Dexia Transaction or otherwise in contract	*Cockerill J declined to make this declaration in Busto for the reasons at [52]–[59] {AB/3.1/10-12} . See also Catanzaro at [115] {AB/7/29}. In the event that the Court grants declaration (16) above, Dexia does not press this declaration.*

[17] Paragraph 4(a) of Part 5 of the Schedule: Emilia Romagna represented to Dexia that "*It is capable of assessing the merits of and evaluating and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes, the financial and other risks of that Transaction*" {C/2/26}.

tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent negligent or fraudulent) or breach of statutory or regulatory obligations arising out of or in connection with the Dexia Transaction and/or the Transaction Documents (including but not limited to its suitability, pricing, notional amount, terms, execution, approval, and/or the circumstances of entry into them)	
(24) The Italian Litigation is within the definition of "Proceedings" in clause 13(b) of the ISDA Master Agreement and the Italian Claim was commenced by the Defendant against the Claimant in breach of the Transaction Documents;[18]	*This declaration was not sought in Busto, Pesaro or Catanzaro but reflects clause 13(b) of the Master Agreement.*
(25) The Claimant is entitled to an indemnity from the Defendant, payable on demand, and/or damages in respect of all loss or damage incurred by the Claimant arising out of, or in respect of any claim by the Defendant brought in breach of the Transaction Documents (including, but not limited to, the claims advanced in the Italian Claim) and in respect of all reasonable out of pocket expenses, including legal fees and Stamp Tax, incurred in the enforcement and protection of the Claimant's rights under the Transaction Documents, including but not limited to costs of collection.[19]	*This declaration was not sought in Busto, Pesaro or Catanzaro but reflects clause 11 of the Master Agreement.*

[18] Clause 13 Master Agreement provides that "*With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:— (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law … and (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party"* {C/2/13}.

[19] Clause 11 Master Agreement provides that "A *Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement… including but not limited to costs of collection"* {C/2/12–13}.

Annex 2: Sources of Evidence on Italian law declarations

Relevant Italian Law	Declaration sought by Dexia[20]	References to Italian Law Report {B/2}	References to cases cited in CEA Notice {B/4}	Equivalent Declaration in *Busto / Pesaro / Catanzaro*
Article 119(6) of the Italian Constitution {F/3T/3–4}, which permits Italian regions and local authorities to "*resort to indebtedness only as a means of funding investments*". The definition of indebtedness for the purposes of this law is in Article 3(17) of Law No. 350/2003 {F/15T}. The consequences of a breach of Article 119(6) are prescribed by Article 30(15) of Law No. 289/2002 {F/14T}.	Declaration 16(a) {A/3/24}: "*In resolving to enter into the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:* *(a) Article 119(6) of the Constitution of Italy, as the Dexia Transaction does not fall within the definition of 'indebtedness' as set out in Article 3 of Law n. 350/2003."*	§§103–122 {B/2/27–35} As regards the argument that the Transaction breached Article 119(6) because it was speculative, see §§243–260 {B/2/89–98}. As regards the argument that Transaction involved indebtedness, see §§261–267 {B/2/98–100}.	*Venice* [196]–[197] [205]–[213] [222]–[267] {AB/REF/59–60} {AB/REF/63–67} {AB/REF/69–86} *Venice CA* [159]–[166] [170]–[174] {AB/REF/47–51} *Busto* [173]–[265] [275]–[280] [305]–[306] [325]–[342] {AB/REF/44–60, 62–63, 66–67, 70–73} *Pesaro* [89]–[97] {AB/REF/27–29} *Catanzaro* [76] [80]–[96] {AB/REF/18–23}	*Pesaro*: "*… the Transactions were entered into in conformity with (a) Article 119(6) of the Italian Constitution…*" *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, (i) Article 119(6) of the Italian Constitution; …"*
Article 41 of Law no. 448/2001 {F/13T}, i.e. the so-called requirement of "*economic convenience*" for Italian local authorities incurring new indebtedness.	Declaration 16(b) {A/3/24}: "*In resolving to enter into the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(b) Law n. 448 of 28 December 2001 (Finance Act 2002) and in particular, Article 41 thereof"*	§123–130 {B/2/35–38}	*Busto* [307]–[316] {AB/REF/67–69} *Prato* [163]–[181] (Walker J) {AB/REF/34–40} and [68]–[118] (Court of Appeal) {AB/REF/14–23} *Pesaro* [102]–[118] {AB/REF/30–37} *Catanzaro* [76] [105] {AB/REF}	*Pesaro*: *"… the Transactions were entered into in conformity with … (b) Article 41 of Law no. 448/2001…*" *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (ii) Article 41 of Italian Law number 448 of 2001; …*"
Decree 389/2003 {F/16T} and the **Explanatory Circular of**	Declaration 16(c)–(d) {A/3/24–25}: "*In resolving to enter into*	§§131–147 {B/2/38–44}	*Venice* [343]–[350] {AB/REF/112–114}	*Pesaro*: "*… the Transactions were entered into in conformity with … (c)*

Relevant Italian Law	Declaration sought by Dexia	References to Italian Law Report {B/2}	References to cases cited in CEA Notice {B/4}	Equivalent Declaration in *Busto / Pesaro / Catanzaro*
the Ministry of Economy and Finance of 27 May 2004 {F/17T}, which sets out the derivative transactions into which local authorities are permitted to enter. This applies to Italian regions unless there is a relevant regional law.	*the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(c) Decree 1 December 2003 n. 389 of the Ministry of Economy and Finance as published on the Official Gazette n. 28 of 4 February 2004 … and in particular Article 3 thereof;* *(d) The Circular of the Ministry of Economy and Finance of 27 May 2004"*		*Busto* [307]– [316] {AB/REF/67–69} *Prato* [183]–[190] (Walker J) {AB/REF/40–42} *Pesaro* [102]–[118] {AB/REF/30–37} *Catanzaro* [76], [104] {AB/REF}	*Article 3 of Decree no. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and published in the Official Gazette no. 28 of 4 February 2004; (d) Circular of the Ministry of Economy and Finance of 27 May 2004…"* subject to the caveat as to Article 3(2)(d) for the reasons given in the judgment at [115]–[116] {AB/4/36–37} (which has been overtaken by *Venice CA*) *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (iii) Article 3 of Italian Ministerial Decree number 389 of 2003 (including as interpreted by the Circular dated 27 May 2004 issued by the Italian Ministry of Economy and Finance); …*"
Regional Law no. 22 of 3 July 1998 {F/8T}, which authorises the Region to enter into a wide range of derivatives.	Declaration 16(e) {A/3/25}: "*In resolving to enter into the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(e) The L.R. n. 22 of 3 July 1998 on the "Renegotiation of Mortgages"*	§§93–99, 303–310 {B/2/24–25} {B/2/119–121}	This point has not been considered in previous English cases because Emilia Romagna is an Italian Region with its own Regional laws.	This relief has not been sought in previous English cases.
Regional Law no. 40/01 {F/12T}, which authorises the Region to enter into a wide	Declaration 16(f) {A/3/25}: "*In resolving to enter into the Transaction Documents and the*	§§100–102, 303–310 {B/2/25–27} {B/2/119–121}	This point has not been considered in previous English cases because Emilia Romagna	This relief has not been sought in previous English cases.

Relevant Italian Law	Declaration sought by Dexia	References to Italian Law Report {B/2}	References to cases cited in CEA Notice {B/4}	Equivalent Declaration in *Busto / Pesaro / Catanzaro*
range of derivatives.	*Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(f) The L.R. n. 40/01 "Accounting Regulations of the Emilia-Romagna Region. Repeal of Regional Law n.31 of 6 July 1977 and Regional Law n.4 of 27 May 1972"*		is an Italian Region with its own Regional laws.	
Article 21 of TUF {F/7T/1} and **Article 26 of the Consob Regulations** {F/6T/1}, which set out the duties a financial intermediary shall comply with when providing financial services.	Declaration 16(g) {A/3/25}: "*In resolving to enter into the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(g) Articles 21 and 23 of TUF and Article 26 of CONSOB Regulation n. 11522/1998;"*	§§148–162, 188–215 {B/2/45–50} {B/2/60–82}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.
Article 23 of TUF {F/7T/1–2}, which requires that contracts relating to the provision of financial services (such as the Master Agreement) are in written form and provided to the customer	Declaration 16(g) {A/3/25}: "*In resolving to enter into the Transaction Documents and the Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(g) Articles 21 and 23 of TUF and Article 26 of CONSOB Regulation n. 11522/1998;"*	§§268–272, 277–290 {B/2/100–102} {B/2/105–111}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.
Article 1337 of the Italian Civil Code {F/2T/1}, which requires that negotiations for,	Declaration 16(i) {A/3/25}: "*In resolving to enter into the Transaction Documents and the*	§216–230 {B/2/82–86}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.

Relevant Italian Law	Declaration sought by Dexia	References to Italian Law Report {B/2}	References to cases cited in CEA Notice {B/4}	Equivalent Declaration in *Busto / Pesaro / Catanzaro*
and the preparation of, a contract shall be carried out in good faith	*Dexia Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:…* *(i) Article 1337 of the Civil Code;"*			
Article 31 of the Consob Regulations {F/6T/3}, which provides that certain Consob regulations will not apply to professional investors.	Declaration 14 {A/2/23–24}: "*When entering into the Transaction Documents and the Dexia Transaction:* *(a) the Defendant had specific expertise and experience in transactions having as an object financial investments and was thereby a professional investor pursuant to art. 31 of the Regulation n. 11522 of 1 July 1998, brought in by CONSOB ("Commissione Nazionale per le Societa e la Borsa") in Italy; and/or* *(b) Article 30 of TUF and Articles 27, 28, 29, 30 and 32 of CONSOB Regulation n. 11522/1998 did not apply to the Defendant;"*	§§174–175, 275–276, 294–295, 311–323 {B/2/55} {B/2/104} {B/2/113–114} {B/2/121–127}	Dexia does not rely on any findings of Italian law in previous English cases but notes that a declaration in respect of Article 31 of the Consob Regulations was made in *Busto (Consequentials)* [42]–[44] {AB/REF/9} and in *Catanzaro* {AB/REF}.	*Busto*: "*Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (operatore qualificato) pursuant to Article 31 of Regulation no.11522 of 1 July 1998 issued by Consob."* *Catanzaro*: "*Prior to and when entering into the Transaction, the Defendant had specific expertise and experience in transactions having as an object financial investments and therefore was at all material times a professional investor (operatore qualificato) pursuant to Article 31 of Italian Regulation number 11522 of 1 July 1998 issued by CONSOB by virtue of the specific declaration delivered to the Claimant… when entering into the Transaction*"

Annex 3: Declarations Made

(1) The Defendant
(a) has, and at all material times had, the power (a) to execute the Transaction Documents and any other documentation relating to the Transaction Documents (b) to deliver the Transaction Documents and any other documentation relating to the Transaction Documents that it was required by the Transaction Documents to deliver, and (c) to perform its obligations under the Transaction Documents;
(b) has taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance as referred to in sub-paragraph 1(a) above; and

(2) The execution and delivery of the Transaction Documents, and the performance by the Defendant of its obligations under the Transaction Documents does not, and did not at any material time, violate or conflict with any law applicable to the Defendant, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets; and

(3) All governmental and other consents that are, or were, required to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and are, or were at all material times, in full force and effect, and all conditions of any such consents are being, or have been, complied with; and

(4) The Defendant's obligations under the Transaction Documents–constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their respective terms; and

(6) All applicable information that was furnished in writing by or on behalf of the Defendant for the purposes of the Dexia Transaction or the Transaction Documents (and, in particular, the information identified as such in Part 3(b) of the Schedule to the ISDA Master Agreement) was at the date of that information true, accurate and complete in every material respect; and

(9) The Defendant entered into the Transaction Documents and the Dexia Transaction not for speculative purposes but solely for the purpose of hedging interest rate risk and managing its liabilities arising from a loan as permitted by law, and the Dexia Transaction was carried out on underlying amounts that were actually due from the Defendant at the date of the Dexia Transaction, and the Defendant undertook to maintain for the duration of the Dexia Transaction an underlying indebtedness that financially matches the Dexia Transaction with particular regard to the duration and type of interest rate; and

(10) In entering into the Transaction Documents and the Dexia Transaction, and on each date (if applicable) that the Dexia Transaction was amended, extended or otherwise modified, the Defendant:
(a) was acting for its own account and made its own independent decisions to enter into each of them and as to whether the Transaction Documents and the Dexia Transaction were appropriate or proper for the Defendant based on its own judgement and upon advice from such advisers as it deemed necessary;

(b) did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transaction Documents and the Dexia Transaction, it being understood that (i) information and explanations related to the terms and conditions of the Transaction Documents and the Dexia Transaction would not be considered to be investment advice or a recommendation to enter into the Transaction Documents and the Dexia Transaction, and (ii) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Dexia Transactions; and

(11) Prior to entering into the Transaction Documents and the Dexia Transaction:
(a) the Defendant received from the Claimant the Document on General Risks involved in the Investments in Financial Instruments ("*Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari*") as established by CONSOB decree n. 11522, attachment no. 3 (Regolamento CONSOB n. 11522 del 1 luglio 1998);
(b) the Claimant requested, and the Defendant provided, information regarding its experience in the investment in financial instruments, its financial data, investment objectives, and its risk propensity; and

(13) The Transaction Documents and the Dexia Transaction: (a) were entered into by the Defendant in conformity with the provisions of the Decree n. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette n. 28 of 4 February 2004 (the "Decree"); and (ii) in compliance with Article 3, paragraph 4 of the Decree, were entered into by the Defendant with the intention of gradually tending towards ensuring that the nominal amount of the Dexia Transaction would not exceed 25% of the totality of the derivative transactions entered into by the Defendant; and

(14) When entering into the Transaction Documents and the Dexia Transaction:
(a) the Defendant had specific expertise and experience in transactions having as an object financial investments and was thereby a professional investor pursuant to art. 31 of the Regulation n. 11522 of 1 July 1998, brought in by CONSOB ("*Commissione Nazionale per le Societa e la Borsa*") in Italy; and
(b) Article 30 of TUF and Articles 27, 28, 29, 30 and 32 of CONSOB Regulation n. 11522/1998 did not apply to the Defendant; and

(16) In resolving to enter into the Transaction Documents and the Transaction, and in entering into them, the Defendant complied with the following laws to the extent applicable:
(a) Article 119(6) of the Constitution of Italy, as the Dexia Transaction does not fall within the definition of 'indebtedness' as set out in Article 3 of Law n. 350/2003.
(b) Law n. 448 of 28 December 2001 (Finance Act 2002) and in particular, Article 41 thereof, as amended by Article 2(1-bis) of the Legislative Decree n. 13 February 2002, converted with amendments by the Law No 75 of 24 April 2002 (La Legge 28 Dicembre 2001, n.448 (Legge Finanziaria 2002) ed in particolare l'art.41 come
modificato dall'art.2 comma 1-bis del D.L. 22 Febbraio 2002 n.13 convertito con modificazioni dalla Legge 24 Aprile 2002, n.75);
(c) Decree 1 December 2003 n. 389 of the Ministry of Economy and Finance as published on the Official Gazette n. 28 of 4 February 2004 on the "*Regulation concerning access to the capital market for provinces, municipalities, metropolitan cities mountain communities and islands communities as well as consortia of territorial entities and Regions, pursuant to Article 41, paragraph 1 of Law n.448 of 28 December 2001*" and in particular Article 3

thereof (Il decreto 1 dicembre 2003, n. 389 del Ministero dell'Economia e delle Finanze pubblicato sulla G.U. n.145 del 4 febbraio 2004 avente ad oggetto "*Regolamento concernente l'accesso al mercato dei capitali da parte delle Province, dei Comuni, delle Città Metropolitane, delle Comunità Montane e delle Comunità Isolane, nonché dei Consorzi tra Enti Territoriali e delle Regioni, ai sensi dell'articolo 41, comma 1, della legge 28 dicembre 2001, n.448"* ed in particolare l'art.3);
(d) The Circular of the Ministry of Economy and Finance of 27 May 2004 published on the Official *Gazette* n. 128 of 3 June 2004 (la Circolare del Ministero dell'Economia e delle Finanze del 27 maggio 2004 pubblicata sulla Gazzetta Ufficiale n. 128 del 3 giugno 2004);
(e) The L.R. n. 22 of 3 July 1998 on *the "Renegotiation of Mortgages"* (La L.R. n. 22 del 3 luglio 1998 concernente la "Rinegoziazione Mutui");
(f) The L.R. n. 40/01 "Accounting Regulations of the Emilia-Romagna Region. Repeal of Regional Law n.31 of 6 July 1977 and Regional Law n.4 of 27 May 1972" (L.R. n.40/01 "*Ordinamento Contabile della Regione Emilia-Romagna. Abrogazione della L.R. 6 luglio 1977 n.31 e 27 maggio 1972 n.4*");
(g) Articles 21 and 23 of TUF and Article 26 of CONSOB Regulation n. 11522/1998; and
(i) Article 1337 of the Civil Code; and

(17) The Transaction Documents constitute the entire agreement and understanding of the Parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto; and

(18) When entering into the Dexia Transaction, the Defendant:
(a) was capable of assessing the merits of and evaluating and understanding (on its own behalf or through independent professional advice), and understood, assessed and accepted, the terms, conditions and risks associated with the Dexia Transaction; and/or
(b) was capable of assuming, and assumed, the financial and other risks of the Dexia Transaction; and/or
(c) acknowledged that the execution of the Dexia Transaction did not constitute an assurance or guarantee of financial performance; and

(19) The Claimant was not acting as a fiduciary for, or advisor to, the Defendant in respect of the Dexia Transaction; and

(20) When entering into the Dexia Transaction, the Defendant was able to make and did in fact make an informed assessment of the risk of the Dexia Transaction and had the information required (whether under English or Italian law) to enable it to carry out that assessment; and

(24) The Italian Litigation is within the definition of "Proceedings" in clause 13(b) of the ISDA Master Agreement, the Italian Claim was commenced by the Defendant against the Claimant in breach of the Transaction Documents and the Claimant is entitled to damages in respect of all loss and damage incurred by the Claimant arising out of or as a result of the commencement of the Italian Proceedings, including but not limited to legal fees incurred in respect of the Italian Proceedings and the present proceedings; and

(25) The Claimant is entitled to an indemnity from the Defendant, payable on demand, and/or damages in respect of all loss or damage incurred by the Claimant arising out of, or in respect of any claim by the Defendant brought in breach of the Transaction Documents (including,

but not limited to, the claims advanced in the Italian Claim) and in respect of all reasonable out of pocket expenses, including legal fees and Stamp Tax, incurred in the enforcement and protection of the Claimant's rights under the Transaction Documents, including but not limited to costs of collection.