FIVERS

Case-law update

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BANKING AND FINANCIAL LAW

Italian Supreme Court, May 29, 2024, no. 15130 – French-style amortization: the lack of indication in the bank loan contract, with a fixed rate, of the so-called 'French' amortization mode and the 'compound' capitalization regime does not entail invalidity of the loan contract for breach of the requirements of determinateness and/or determinability of the object of the contract nor violation of the transparency's law of contractual conditions and relationship between credit institutions and customers.

Italian Supreme Court, May 7, 2024, no. 12295 – Administrative sanctions of the Bank of Italy: on the subject of administrative sanctions imposed by the Bank of Italy, although the Engel criteria, in the light of which the possible criminal nature of the sanction must be ascertained, are alternative and not cumulative, for the purposes of applying the criterion of the severity of the sanction, regard must be had to the extent of the sanction for which the person concerned is a priori liable and not to the severity of the sanction ultimately imposed. However, the assessment of the economic afflictiveness of a sanction cannot be carried out in totally abstract terms but must necessarily be related to the normative context in which the sanctioning provision fits.

COMPANY LAW

Italian Supreme Court, 24 May 2024, no. 14575 – Contributions of money made by shareholders of companies: the payment of money made to a capital company by its shareholder "on capital contribution" does not give rise to the shareholder's right to reimbursement, it is recorded among the liabilities of the balance sheet among the reserves and is definitively acquired by the company's assets, since it is assimilated to risk capital to which it is assimilated for substantive purposes; the reserve thus formed, like the ordinary or optional reserves for the portion exceeding the legal reserve, is therefore generally available, but the distribution does not constitute a subjective right of the shareholder because the right to restitution only exists at the end of the company's liquidation if there is a residue to be distributed among the shareholders, upon fulfilment of all the company's obligations, with a subordination of restitution to the satisfaction of all the company's creditors, exactly as is the case for contributions.

Italian Supreme Court, 16 May 2024, no. 13561 – Shareholders' agreements: there may be shareholders' agreements that do not conform to the model typified by Article 2341-*bis* of the Italian Civil Code. However, in order to be considered shareholders' agreements and therefore worthy of legal protection, the content of those agreements must in any event be aimed at regulating the conduct that the shareholders intend to adopt within the company in the exercise of the organic function that they perform by virtue of the capacity they hold: it follows that a private contract whose subject-matter is the condition for the effectiveness of the exit from the company of one of the stipulating partners cannot be deemed to be a shareholders' agreement, since said agreement has nothing to do with the organisation of the entity, nor with the exercise of the future rights due to the shareholders within the company.

BANKRUPTCY LAW

Italian Supreme Court, 23 May 2024, no. 14414 – incorporated company subject to bankruptcy: on the subject of a merger by incorporation, the incorporated company, if insolvent, is subject to bankruptcy proceedings, pursuant to Article 10 of the Italian Bankruptcy Law (hereinafter, "l.f."), within one year of its cancellation from the Italian Register of Companies.

Italian Supreme Court, 6 May 2024, no. 12137 – amendment of the proposal of a composition with creditors: when an amendment to the proposal of a composition with creditors takes place, the creditors, who have voted in favour of the proposal before such modification, have to receive appropriate and updated information with regards to *(1)* the ineffectiveness of their votes expressed before the amendment and *(2)* the need for a renewal of their expression of consent. In the event of failure to provide such information and in the absence of a further expression of consent by the creditors (who already voted), the votes previously cast in favour of the composition cannot be cancelled but it is necessary to proceed to the renewal of voting.

PUBLIC LAW

TAR Campania, Naples, Sez. IV, 8 May 2024 no. 3001 – **Automatic** exclusion of anomalous bids in sub-threshold contracts. Legitimacy. Exclusion of the private party: only if the automatic exclusion mechanism was expressly indicated in the tender documents.

TAR Sardegna - Cagliari, 11 March 2024, no. 204 – **New** principle of trustworthiness of the Public contracts code and causes of exclusion under articles 95 and 98 of Legislative Decree no. 33/2023. Exclusion from the tender due to ascertained unreliability of the competitors (due to previous contractual terminations). Legitimacy. Decision-making autonomy of the individual contracting station.

TAR Veneto, 3 April 2024, no. 623 – Equal remuneration (Law 49/2023). Professional workers registered with professional orders. Right to remuneration commensurate with the actual quality and quantity of the work performed. Contracts with the public administration and public tender procedures. Applicability. Exclusion of tenders in breach of fair compensation. Legitimacy.

BANKING AND FINANCIAL LAW

Italian Supreme Court, May 29, 2024, no. 15130 – French-style amortization: the lack of indication in the bank loan contract, with a fixed rate, of the so-called 'French' amortization mode and the 'compound' capitalization regime does not entail invalidity of the loan contract for breach of the requirements of determinateness and/or determinability of the object of the contract nor violation of the transparency's law of contractual conditions and relationship between credit institutions and customers.

The Italian Supreme Court, United Civil Sections, in ruling No. 15130, published following a preliminary ruling pursuant to Article 363-bis of the Italian Civil Procedure Code, ruled on the issue of the lack of indicatation in the fixed-rate bank loan contract the so-called 'French' amortization method and the 'compounding' capitalization regime.

The Supreme Court first stated that the question of law, which is the subject of a reference for a preliminary ruling under Article 363-bis of the Code of Civil Procedure, concerns «*the interpretation of the legal consequences arising from the failure to indicate, within a bank loan contract, the 'compound' capitalization regime of debit interest, even in the face of the provision in writing of the Annual Nominal Rate (TAN), as well as the so-called 'French' amortization mode, i.e. whether such lack of express negotiated provision may result in the indeterminateness and/or indeterminability of the relevant object, resulting in structural inavalidity under the combined provisions of Articles 1346 and 1418, paragraph 2, Civil Code, as well as ... violation of the rules on transparency and, in particular, of Article 117, paragraph 4, T.u.b., which requires, under penalty of invalidity, that contracts indicate the interest rate and any other price and conditions practiced, including, for credit contracts, any higher charges in case of default, with consequent redetermination of the amortization plan by applying the substitute rate B.O.T.' (Article 117, paragraph 7, T.u.b.)*».

That said, as for the profile of the indeterminateness and/or indeterminability of the object of the contract, the Supreme Court first of all remembered that «*the inquiry into the determinacy of the object of the contract pertains to the structural construction of the negotiated transaction , that is, it is aimed at verifying that it has well-defined boundaries with regard to the an and quantum of the (non-legal) interest, which must be agreed on the basis of objective criteria that are insusceptible of giving rise to margins of*

uncertainty, not on the basis of indefinite elements or left to the discretion of one of the contracting parties (ex plurimis, on the subject of the determination of the interest rate by reference to usages or uncertain parameters, Cass. Nos. 28824 and 36026/2023, No. 17110/2019, No. 8028/2018, No. 25205/2014)».

The Supreme Court then states that «***the aforementioned question is easy to answer in the negative when the loan contract contains the indications proper to the legal type (art. 1813 ff. Civil Code), that is, the clear and unequivocal indication of the amount disbursed, the duration of the loan, the periodicity of repayment and the predetermined interest rate.*** *The amortization schedule attached to the contract in the case that gave rise to the preliminary reference also indicated the number and composition of the constant repayment instalments with the division of the portions for capital and interest; thus, the borrower's ability to easily derive the total amount of repayment by a simple summation was satisfied*».

The court then stated that, in any case, «*the grievance concerning the failure to make explicit in the contract the higher cost of the loan as an effect of the 'compound' system of capitalization of interest does not point to a problem of determinacy or indeterminateness of the subject matter of the contract but, in hypothesis, to the possible lack of a typifying element of the contract, provided for by Art. 117, paragraph 4, T.u.b. ('Contracts indicate the interest rate and any other price and conditions charged'), which would give rise, if anything, to textual nullity for the failure to indicate a 'price' or additional cost of the loan and the application of the replacement rate (paragraph 7)* ».

In this regard, according to the Supreme Court, «***the increased interest burden of the loan does not depend - and in any case was not established by the trial court in the case and is not a characteristic feature peculiar to standardized 'French' amortization plans - on a phenomenon of producing 'interest on interest,' i.e., of calculating interest on the principal increased by interest nor on 'past due' interest (properly anatocistic), but from the fact that in the plan agreed between the parties, the repayment of the principal is delayed due to the need to ensure the constant installment (controlled in the first few years) in financial equilibrium, which results in the borrower owing more interest consideration in favor of the lender for the deferment of the deadline for repayment of the equivalent of the principal received***».

Therefore, the Supreme Court continues, «***in the absence of a phenomenon of interest-on-interest production, the type of amortization adopted does not in itself affect the annual rate (TAN) that must be (and has been) made explicit in the contract nor the annual percentage rate of charge (APR) also made explicit. Moreover, jurisprudence (see Cass. nos. 4597, 17187 and 34889/2023, no. 39169/2021) holds that the APR is only a synthetic indicator of the overall cost of financing and does not fall within the group of rates, prices and other conditions referred to in Article 117,***

paragraph 4, T.U.B. always derivable from the sum of charges and individual cost items listed in the contract».

Therefore, according to the Supreme Court, «**it must be ruled out that the lack of indication in a fixed-rate bank loan contract the so-called 'French' amortization mode and the 'compound' capitalization regime of interest negatively affects the requirements of determinacy and determinability of the object of the contract causing its partial nullity**».

The Court then focused on the profile relating to the possible violation of transparency rules, stating that «***Article 117 T.u.b. did not require and still does not require (a fortiori under penalty of nullity) the explication of the amortization regime in the contract and similarly, at the systematic level, the most recent legislation does not require it****: on the subject of 'real estate credit to consumers' (art. 120-quinquies ss. and, in particular, 120-novies T.u.b., implementing, by Legislative Decree No. 72 of 2016, Directive 2014/17/EU) and 'consumer credit' (Art. 121 ff. T.u.b., implementing, by Legislative Decree No. 141 of 2010, Directive 2008/48/EC), the latter of which provides (along the lines of Art. 117, para. 4) for the indication in the contract, under penalty of nullity, of 'interest and (all) other costs, including commissions, taxes and other charges, with the exception of notarial fees...' (Art. 125-bis, para. 6, in relation to Art. 121, para. 1, lett. e, T.u.b.), items among which could not be made to include the amortization scheme (along the same lines is Directive 2023/2225/EU on 'consumer credit' that 'the creditor shall make available to the consumer, without charge and at any time during the entire term of the credit agreement, an extract in the form of an amortization table (which) indicates the amounts due as well as the periods and conditions of payment of these amounts (and) also contains the breakdown of each periodic repayment specifying the amortization of the principal, the interest calculated on the basis of the borrowing rate and, where applicable, any additional costs')*».

In the present case, the Supreme Court noted that «*repayment plan such as the one at issue in the judgment on the merits contains, as mentioned above, in detail, the clear and unambiguous indication of the amount disbursed, the term of the loan, the nominal (TAN) and effective interest rate (APR), the periodicity (number and composition) of the repayment installments with their breakdown by portions of principal and interest. This is in accordance with the aforementioned Bank of Italy provisions of July 29, 2009, which require lending institutions to provide pre-contractual information to customers by means of a timely summary of the amounts due at the various due dates through a clearly and comprehensibly drafted plan indicating the periodicity and composition of the installments, specifying whether periodic repayment of principal only, interest only or both is envisaged, rather than through recourse to lexical formulas or mathematical expressions that would like to explain the way interest is calculated but whose need for precision clashes with a level of technicality that escapes most people's understanding (Annex 4E of the aforementioned 'provisions' contains the 'European Standardized Information Sheet' with an*

amortization table indicating, precisely, the installments to be paid, their frequency and composition by interest and principal repaid, and expenses)».

The Court thus pointed out how, in this way, it is «***satisfied that the possibility for the borrower to easily know the total amount of the repayment by means of a simple summation, knowledge that he could hardly have by independently developing a complex mathematical formula through which the repayment plan is developed, once the sustainable installment has been chosen and the interest rate determined***».

Indeed, according to the Supreme Court, the «***chance of comparison between different products is ultimately the purpose of transparency*** *(an indication to this effect, at the systematic level, comes from Article 124, paragraph 1, T.u.b. which, on the subject of 'consumer credit,' provides among the pre-contractual obligations incumbent on the lender or intermediary that of giving the consumer 'the information necessary to allow the comparison of the different credit offers on the market'; see also art. 120-novies, paragraph 2, T.u.b. on the subject of 'consumer real estate credit').* ***Otherwise arguing, that is, assuming in the abstract that among the behavioral obligations of the credit institution there is also that of making explicit in the contract the amortization regime or the mode of capitalization of interest, it could derive, if anything, in case of violation, possible consequences at the level of the responsibility of the credit institution and not of the validity of the contract (see Cass. SU no. 26724/2007)***».

In particular, the Supreme Court continues, «***the sector regulations are intended to balance the obligations of conduct of credit institutions with the need to leave customers free to choose the institution that offers them a repayment plan that best suits their needs and conditions, but does not go so far as to require institutions to substitute themselves for him in the assessment, in the final analysis, of the adequacy and convenience of the transaction, unlike what happens, only in part, in other sectors in which information obligations are configured in more stringent terms, also in view of the risk profiles that arise there***».

In light of the above, the Supreme Court therefore concluded by stating that it must be «***excluded that the failure to indicate in the fixed-rate bank loan contract the so-called 'French-style' amortization method and the 'compound' capitalization regime of interest is cause for the nullity of the loan contract for violation of the regulations on the transparency of contractual conditions and relations between credit institutions and customers***».

Italian Supreme Court, May 7, 2024, no. 12295 – Administrative sanctions of the Bank of Italy: on the subject of administrative sanctions imposed by the Bank of Italy, although the Engel criteria,

in the light of which the possible criminal nature of the sanction must be ascertained, are alternative and not cumulative, for the purposes of applying the criterion of the severity of the sanction, regard must be had to the extent of the sanction for which the person concerned is a priori liable and not to the severity of the sanction ultimately imposed. However, the assessment of the economic afflictiveness of a sanction cannot be carried out in totally abstract terms, but must necessarily be related to the normative context in which the sanctioning provision fits.
The Italian Supreme Coury, in Order no. 12295, published on May 7, 2024, ruled on the issue of administrative sanctions imposed by the Bank of Italy».

First of all, the Supreme Court reminded that «*this court has, in recent times, albeit with regard to the legitimacy of a sanctioning measure adopted by CONSOB under Article 195 of the TUF (but the 'ratio' is assimilable to the case that is relevant here), affirmed-as the defense of the Bank of Italy has adequately pointed out-that although the Engel criteria, in the light of which the possible criminal nature of the sanction must be ascertained, are alternative and not cumulative (Grande Stevens, Par. 94) and that, for the purpose of applying the criterion of the gravity of the sanction, regard must be had to the extent of the sanction of which the person concerned is a priori liable and not to the gravity of the sanction ultimately imposed (Great Stevens, Par. 98)-**it must nevertheless be considered that the assessment on the economic afflictiveness of a sanction cannot be carried out in totally abstract terms, but must necessarily be related to the regulatory context in which the sanctioning provision is inserted***.

Therefore, the Supreme Court stated that «*from this perspective, especially on the terrain of violations consummated within the banking and financial sector (which contemplates criminal sanctions even imprisonment, as well as administrative fines that, like those for market abuse, can rise to many millions of euros) a fine between the minimum edictal amount of 2. 500 and the maximum sentence of 250,000 euros, not accompanied by accessory sanctions nor by confiscation, **cannot be considered characterized by such afflictiveness as to move from the administrative to the criminal sphere (cf. Cass. no. 1740/2022). From this it was inferred that the non-criminal nature of the sanction imposed precludes the procedural discipline from being contrary to the guarantees set forth in Article 6 ECHR***».

The Supreme Court then pointed out «*the inverosimilarity*» of the chance that the «*new sanction regime against the individual introduced by Legislative Decree No. 72/2015 may, in practice, be more favorable than the previous one*» since «*under the force of the aforementioned Legislative Decree. of 2015, for the same violations that come to the fore in the present case against natural persons performing administrative, management and control functions (when the failure to comply is a consequence of their own duties or those of the body to which they belong, identifying, among other conditions that the conduct could have significantly affected the overall organization and corporate risk profiles) the penalty from a*

minimum of euro 5. 000.00 to a maximum of 5,000,000.00 euros, whereas, with reference to the regulatory framework in force at the time of the commission of the conduct by the appellant, a minimum penalty of 2,580.00 euros and a maximum penalty of 129,110.00 euros were provided for (and, in concrete terms, the appellant appears to have been applied a total penalty of 225,000.00 euros for several violations attributable to the administrative offenses provided for in Article 53 of the TUB)».

In this regard, the Court concludes, since also according to Constitutional Court ruling No. 63/2019, «*the provision on non-retroactivity is inherent in the right of the offender to be judged and, where appropriate, punished, according to the current appreciation of the legal system relating to the disvalue defaced by him, rather than according to the appreciation underlying the law in force at the time of its commission*» it follows that «***the consideration 'to the contrary' that, with the amendment introduced by D. Legislative Decree No. 72/2015, it cannot be said that the current appreciation of the legal system regarding the disvalue of the violation consummated by the natural person in relation to the conduct previously indicated was inspired by a tempering criterion, having resulted, rather, from this amendment, a general pejorative sanction regime***».

COMPANY LAW

Italian Supreme Court, 24 May 2024, no. 14575 – Contributions of money made by shareholders of companies: the payment of money made to a capital company by its shareholder "on capital contribution" does not give rise to the shareholder's right to reimbursement, it is recorded among the liabilities of the balance sheet among the reserves and is definitively acquired by the company's assets, since it is assimilated to risk capital to which it is assimilated for substantive purposes; the reserve thus formed, like the ordinary or optional reserves for the portion exceeding the legal reserve, is therefore generally available, but the distribution does not constitute a subjective right of the shareholder because the right to restitution only exists at the end of the company's liquidation if there is a residue to be distributed among the shareholders, upon fulfilment of all the company's obligations, with a subordination of restitution to the satisfaction of all the company's creditors, exactly as is the case for contributions.

The Italian Supreme Court, in its decision no. 14575, published on 14 May 2024, ruled on the subject of contribution of money made by shareholders of companies.

First of all, the Supreme Court addressed the issue of the shareholder's liability pursuant to Article 2495, paragraph 2, of the Italian Civil Code.
In particular, the Court stated that: «*after the reform of company law implemented by Legislative Decree No. 6 of 2003, when the extinction of the company, following its cancellation from the companies register*

does not correspond to the disappearance of all legal relations, a succession-type phenomenon is determined; consequently, the company's obligation is not extinguished, which would unjustly sacrifice the right of the company's creditor, but is transferred to the shareholders who are liable for it within the limits of the amount collected following the liquidation».

The Court went on to state that: «*the liability of the shareholders is justified by the "instrumental character of the subject company": once this has ceased to exist, the shareholders are the actual holders of the company's debts within the limits of the liability that they had according to the type of company relationship chosen; in this sense, limiting the liability of shareholders of companies to the value of the assets distributed to them in the liquidation does not imply any prejudice to the creditors' reasons, because if the company was cancelled without distribution of assets, this obviously means that there would in any event have been a shortfall in the company's assets compared to the claims to be satisfied*».

In any case the Court noted that: «*it is necessary to ensure, pursuant to Article 2740 of the Italian Civil Code, the guarantee of the company's receivables - and, consequently, the limit of the shareholders' liability - any assets distributed, beyond the formal limit of the entry in the balance sheet*».

Therefore, the reason for the allocation of assets in the company is relevant for the purpose of identifying the limits of the shareholders' liability.
Thus, the Court stated that: «***the contribution of money by the shareholders in favour of the company may be made for very different purposes, to which a diversity of rules (contributions, financing, non-repayable or capital contributions, payments on account of future capital increase) responds. Consequently, the qualification depends on an examination of the parties' negotiating intentions, the manner in which the relationship was put into effect in practice, the practical purposes to which it appears to be directed and the interests underlying it, and, in the absence of a clear manifestation of intention, the classification that the donations have received in the balance sheet***».

With reference to the capital contribution made by the shareholder, the Supreme Court stated that it: «***it does not entail the shareholder's right to repayment, it is entered on the liabilities side of the balance sheet among the reserves and definitively acquired by the company's assets,*** *inasmuch as it is assimilated to risk capital to which it is assimilated for substantive purposes;* ***the reserve thus formed****, like the ordinary or optional reserves for the portion exceeding the legal reserve,* ***is therefore generally available, but the distribution does not constitute a subjective right of the shareholder because the right to restitution exists at the end of the company liquidation only if there is a residue to be distributed among the shareholders, upon fulfilment of all the company's***

obligations, with a postponement of restitution to the satisfaction of all the company's creditors, exactly as occurs for contributions».

On the other hand, the discipline of loans made by shareholders is different: «*as loan contracts (Article 1813 of the Italian Civil Code), free form, between a shareholder and the* ***company they must be reported among the liabilities of the balance sheet among the debts owed to the shareholders and must actually be returned to the shareholder; pursuant to Article 2467 of the Italian Civil Code****, in the wording applicable ratione temporis****, the repayment of shareholders' loans to the company is subordinated with respect to the satisfaction of other creditors, precisely in order to counter the phenomena of nominal undercapitalisation in "closed" companies*** [...] ***determined by the convenience of reducing exposure to business risk***».

In conclusion, the Supreme Court also ruled on the issue of the subordination of loans made by the shareholder pursuant to Article 2467 of the Italian Civil Code, stating that: «***it could happen that capital is made available to the collective entity in the form of a loan instead of a contribution so that it can be artificially classified as "freely repayable" loans, for the sole purpose of being able to make preferential distributions of the company's assets, to the detriment of creditors.***
In order to avert this danger, then, in Article 2467 of the Italian Civil Code, ***the shareholders' loans in favour of the company to be subordinated are those, in whatever form they are made, that have been granted at a time when, also in consideration of the type of activity carried out by the company, there is an excessive imbalance of indebtedness with respect to the company's equity or in a financial situation of the company in which a contribution would have been reasonable.***
In particular, this Court has specified that ***this is a hypothesis of legal subordination that, although it does not operate a 'requalification' of the loan, from financing to contribution with the exclusion of the right to repayment, nevertheless affects the order of satisfaction of claims and operates in this sense already during the life of the company and not only when a formal competition with the other company creditors is opened, because it integrates a condition of legal and temporary non-recoverability of the shareholder's right to repayment***».

Italian Supreme Court, 16 May 2024, no. 13561 – Shareholders' agreements: there may be shareholders' agreements that do not conform to the model typified by Article 2341-*bis* of the Italian Civil Code. However, in order to be considered shareholders' agreements and therefore worthy of legal protection, the content of those agreements must in any event be aimed at regulating the conduct that the shareholders intend to adopt within the company in the exercise of the organic function that they perform by virtue of the capacity they hold: it follows that a private contract whose subject-matter is the condition for the effectiveness of the exit from the company of one of the stipulating partners cannot be deemed to be a shareholders' agreement, since said

agreement has nothing to do with the organisation of the entity, nor with the exercise of the future rights due to the shareholders within the company.

The Court of Cassation, in its decision no. 13561, published on 16 May 2024, ruled on the subject of shareholders' agreements.

The Court preliminarily framed shareholders' agreements as: «***a contractual agreement between a number of persons (usually two or more shareholders, but also between shareholders and third parties), aimed at regulating the future conduct to be observed during the life of the company or, in any case, on the occasion of the exercise of certain rights deriving from the shareholdings held***».

The Supreme Court went on to state that: «[**t**]***he shareholders' agreement finds, therefore, its qualifying element in its distinction from the deed of incorporation and its bylaws, inasmuch as it entails a convention by which the shareholders implement a regulation complementary to that laid down in the company's deed of incorporation and bylaws, in order to protect their interests more profitably***».

Regarding the validity of shareholders' agreements, the Court stated that: «[t]*he validity of such agreements can be said to be established in principle and emerges, in a now direct manner, from the regulatory provision of Article 2341-bis of the Italian Civil Code, introduced by the 2003 Reform of Company Law, which provides that agreements cannot have a duration of more than five years - unless renewed - that "in order to stabilise the ownership structure or governance of the company:*
(a) have as their object the exercise of voting rights in joint stock companies or in companies controlling them;
(b) limits the transfer of the relevant shares or holdings in companies controlling them;
c) have as their object or effect the exercise, even jointly, of a dominant influence over such companies". This provision implies the recognition by the legislature of the merits and protectability of shareholders' agreements, which must therefore always be considered valid, provided that they do not conflict with the fundamental principles of the legal system in corporate matters».

However, the Court noted that: «*there may be shareholders' agreements that do not conform to the model typified by Article 2341-bis of the Italian Civil Code*».
In this case, the Court ruled that*:* «*in order to be considered shareholders' agreements, and thus deserving of legal protection similar to that expressly recognised for the agreements indicated in Article 2341-bis of the Italian Civil Code,* ***it is necessary that their content is in any event aimed at regulating the***

conduct that the shareholders intend to adopt within the company in the exercise of the organic function that they perform by virtue of the capacity they hold.
*In other words****, the obligations contained in the shareholders' agreement, to which the company in question is by definition extraneous, must nevertheless be aimed at regulating the conduct that the shareholders intend to undertake to adopt when exercising the administrative powers vested in them within the entity as a result of the exercise of the relevant capacity***».

In conclusion, the Court stated that: «[t]***his condition is absolutely necessary in order to qualify the agreement as a shareholders' agreement: necessary, it may be added for the sake of completeness, but not sufficient, since the content of the obligation regulated by the agreement, in order to be a shareholders' agreement, must in any event be traceable to the pursuit of those effects of stabilising corporate governance to which Article 2341-bis of the Italian Civil Code expressly refers, which has typified the "cause" of the agreements themselves, setting forth their purposes and, consequently, also defining the scope of the relative merits of the interest pursued pursuant to Article 1322 of the Italian Civil Code***».

Applying these principles in the present case, the Supreme Court concluded by stating that: «[a] *provision, such as that contained in the private contract at issue in this case, by which the outgoing shareholder agrees with the remaining shareholder that the transfer of the share to a third party is conditional on the assumption of the guarantee by the transferor of the pro-rata payment of a loan previously contracted in the interest of the company, has nothing to do with the structure of the entity, nor with the exercise of the future rights due to the shareholders within the company.*
It is sufficient to consider that the subject matter of the agreement is the condition of effectiveness of the exit from the company of one of the stipulating partners: which logically excludes the possibility that it was intended to regulate the manner of joint exercise by the subscribing partners of their powers within the company; which absolutely precludes that such an agreement may constitute a shareholders' agreement».

BANKRUPTCY LAW

Italian Supreme Court, 23 May 2024, no. 14414 – incorporated company subject to bankruptcy: on the subject of a merger by incorporation, the incorporated company, if insolvent, is subject to bankruptcy proceedings, pursuant to Article 10 l.f., within one year of its cancellation from the Italian Register of Companies.

The Supreme Court, in its decision no. 14414, published on 23 May 2024, stated that an incorporated company (following a merger by incorporation) is subject to bankruptcy pursuant to Article 10 l.f.

Firstly, the Supreme Court referred to the evolution of case law on the nature and effects of the companies' merger by incorporation, recalling the statement that «*merger by incorporation extinguishes the incorporated company, in a perspective, however, capable of combining "reorganisation and concentration, on the one hand, and extinction and succession, on the other", since "the merger creates a universal succession corresponding to the succession mortis causa and produces the effects, which are interdependent, of the extinction of the incorporated company and the simultaneous substitution of the latter, in the ownership of the active and passive legal relationships, including procedural ones, by the incorporating company, which represents the new centre of imputation and legitimation of the legal relationships already concerning the incorporated subjects"*» (cf. Cass. SS.UU, no. 21970/2021).

Therefore, «***after the merger*** […]***, the bankruptcy of the company, even if deleted from the commercial register****, "does not* ***depend*** *so much on its survival after cancellation, but rather* ***on the presence in the legal system of a special rule such as Article 10 of the bankruptcy law****"*».

In light of the above, the Court proceeded stating that «*notwithstanding the case law fluctuations on the nature of the merger, "****the possibility of subjecting the merged company to bankruptcy proceedings has never been denied, even within a year of its cancellation from the commercial register****", since "a phenomenon of corporate reorganisation (....) as well as, more generally, a modification of the debtor's structure, cannot, as a matter of principle, create a cause for exempting the company from being subject to bankruptcy proceedings"; therefore, subjecting the merged* […] *company to bankruptcy proceedings does not concern "the level of the company's corporate organisation", but rather "the level of the company's operations and its relations with third parties, contracting parties and creditors" (cf. Cass. 4737/2020* […]*)*».

Consequently, the Supreme Court agreed with the abovementioned interpretation, which enhances the importance of «***Article 10 of the bankruptcy law*** […] ***that*** […] ***states the bankruptcy of collective entrepreneurs, and in particular of companies - even if they are "extinguished" as a result of merger*** […] ***(Cass. 11984/2020) - within the term of one year from their cancellation from the commercial register, provided that the insolvency has manifested itself before or within the said term***».

Supporting the aforementioned, the Court recalled that «*it has recently been reiterated that a merger by incorporation extinguishes the incorporated company, making it possible to file for bankruptcy only within the year provided for in Article 10 of the bankruptcy law, (Cass. 6324/2023); but also, and more directly, that "in the hypothesis of cancellation of the company generated by the merger (...) the provisions of Article*

10 of the bankruptcy law apply", which entails the "bankruptcy of the company absorbed within one year of its cancellation from the register of companies" (Cass. 36526/2023)».

In conclusion, the Supreme Court stated the following principle of law: «***since the extinction of the merged company must be considered a fixed point, and that such extinction entails the cessation of its own business activity - not excluded by the continuation of only the relationships connected to it in the hands of the merging company, which as a separate entity carries out its own and distinct business activity - the application of the special regime set forth in Article 10 of the bankruptcy law is inevitable, having regard to a state of insolvency manifested prior to the cancellation from the commercial register, or within the following year***».

Italian Supreme Court, 6 May 2024, no. 12137 – amendment of the proposal of a composition with creditors: when an amendment to the proposal of a composition with creditors takes place, the creditors, who have voted in favour of the proposal before such modification, have to receive appropriate and updated information with regards to *(1)* the ineffectiveness of their votes expressed before the amendment and *(2)* the need for a renewal of their expression of consent. In the event of failure to provide such information and in the absence of a further expression of consent by the creditors (who already voted), the votes previously cast in favour of the composition cannot be cancelled but it is necessary to proceed to the renewal of voting.

The Supreme Court, in its decision no. 12137, published on 6 May 2024, ruled on the modification of the proposal of composition with creditors and the related need to appropriately inform the creditors and to renew the manifestation of their consent to the new proposal pursuant to the combined provisions of Articles 160, 161 and 177 l.f.

Firstly, the Supreme Court stated that «[w]*hen we refer to a "modification of the proposal for composition with creditors", we are referring both to its negotiating content, that is* […] *the economic treatment that the debtor offers to its creditors, indicating the possible classes into which it considers it should divide them and the respective percentages of satisfaction, and to the composition plan, that is* […] *the manner and the timeframe in which the debtor envisages obtaining the resources necessary to be able to fulfil what it has promised its creditors*».

Moreover, the Court affirmed that «*the amendments* [to a proposal for composition with creditors] *constitute a new proposal when: (i) they change the nature of the agreement proposed to the creditors* […]*, so as to require a new admissibility control by the court, a renewal of the attesting office's assessment activity, a new vote by the creditors, who, in light of the changes introduced, can no longer rely on the original composition, because the fundamental characteristics of the proposal have changed (ii) in addition*

to or as an alternative to the foregoing […]*, where elements of the proposal that affect the "satisfactory" structure of the creditors change, such as, inter alia the number and composition of the classes, the percentage granted to unsecured creditors, the provision of new financing." (cf. Cass. nr 22988/2022)*». Consequently, «*even a modification of the elements of the proposal in the strict sense (composition of the classes, new distribution of the assets) is capable of having repercussions on the formation of the creditors' consent and the consequent expression of their vote* [...]».

In this regard, the Supreme Court recalled its case law stating that «"*the* ***solely condition necessary for the validity of the expression of vote is that it corresponds to any amendments to the proposal of composition that have taken place in the meantime****, in order to ensure an exact overlapping of the parties' negotiating will at the time of the proposal and the acceptance or dissent, so that* ***the validity of the vote cast before the amendments*** [...] ***to the content of the proposal*** *appreciated by the same voting creditor* ***must be excluded*** […]" *(see Cass.3860/2019)*».

However, the Court proceeded stating that «[t]*he composition with creditors, in addition to its purely negotiating profile,* [...] *also has* [...] the *character of insolvency* [...]. *The fact that the composition agreement is an insolvency-negotiation procedure makes it possible to consider that the contractual categories of fairness, good faith, transparency and reliance, the breach of which is capable of altering the formation of the will of the creditors*, *are also applicable to the rules governing voting operations, which constitute one of the steps within the procedure leading to the resolution of the proposal*».

In light of the abovementioned considerations, the Supreme Court stated the following principle of law: «**[w]*hen an amendment to the proposal of composition with creditors takes place, creditors who, in accordance with precise instructions given by the Judicial Administrators, have voted in favour of the proposal prior to the amendment, have to receive appropriate and updated information about the ineffectiveness of the vote expressed and about the need for a renewal of the expression of their consent to the new proposal. In the event of failure to give such notice and in the absence of a further manifestation of consent by the creditors, their votes previously cast in favour of the composition cannot be cancelled but it is necessary to proceed to the renewal of voting by providing the creditors with precise information on the ineffectiveness of their suffrage***».

PUBLIC LAW

TAR Campania, Naples, Sez. IV, 8 May 2024 no. 3001 – Automatic exclusion of anomalous bids in sub-threshold contracts. Legitimacy. Exclusion of the private party: only if the automatic exclusion mechanism was expressly indicated in the tender documents.

The judgment expressed the principle that in tendering procedures concerning sub-threshold contracts awarded on the basis of the lowest price criterion, the automatic exclusion of anomalous bids is permitted: «*in accordance with the provisions of Art. 54, para, legislative decree 36/2023, in the case of awarding, with the criterion of the lowest price, of contracts for works or services below the European thresholds which are not of certain cross-border interest, the contracting authorities, by way of derogation from the provisions of Article 110, shall provide in the tender documents for the automatic exclusion of tenders which are anomalous, if the number of admitted tenders is equal to or greater than five (...)*».

However, it is necessary for the tender documents to explicitly indicate this automatism, specifying the method for calculating the anomaly threshold (among those listed in Annex II.2 of the Public Contracts Code): «Art. 54, para. 2, first alinea, of the same decree, provides that 'in the cases referred to in paragraph 1, first sentence, the contracting stations shall indicate in the tender documents the method for identifying anomalous tenders, chosen from among those described in Annex II.2, or they shall select it during the evaluation of the tenders by drawing lots from among the compatible methods of Annex II.2».

Failing that, the automatic exclusion of tenders declared anomalous pursuant to Art. 54 of the Code, because such exclusion would be contrary to the legitimate expectations of the private party, which had relied on the same tender documents in formulating its tender: «*the failure to provide in the tender documents for the automatic exclusion of anomalous tenders, together with the failure to indicate the method for identifying them, could not be remedied, or remedied ex post facto by the contracting authority with the communication sent to the applicant following the application for annulment in self-defence of its exclusion*».

TAR Sardegna - Cagliari, 11 March 2024, no. 204 - New principle of trustworthiness of the public contracts code and causes of exclusion under articles 95 and 98 of Legislative Decree no. 33/2023. Exclusion from the tender due to ascertained unreliability of the competitors (due to previous contractual terminations). Legitimacy. Decision-making autonomy of the individual contracting station.

According to Article 2 of the Procurement Code currently in force, «*the principle of trust favours and enhances the initiative and decision-making autonomy of public officials, with particular reference to evaluations and choices for the acquisition and execution of services according to the principle of result*».
Applying this principle, the contracting authority had excluded two operators on the basis of Articles 95 and 98 of the Contracts Code, on the grounds of their established unreliability for having previously engaged in conduct leading to the termination of contractual relations with the same administration.
The judgement rejected the appeal of the operators, who had contested the exclusion, holding that the concept of «*reliability of the economic operator, which consists in the deserving of trust by the contracting*

station» allows the public administration to assess the exclusion of the operator in the light of the principle of trust, and therefore to interpret each individual situation «with decisional autonomy in relation to the exercise of the power to exclude the economic operator for unreliability».

TAR Veneto, 3 April 2024, no. 623 – Equal remuneration (Law 49/2023). Professional workers registered with professional orders. Right to remuneration commensurate with the actual quality and quantity of the work performed. Contracts with the public administration and public tender procedures. Applicability. Exclusion of tenders in breach of fair compensation. Legitimacy.

With Law No. 49 of 2023, the Italian legislature regulated the so-called fair remuneration for professional service providers (lawyers, engineers and, in general, members of a professional association) by enshrining the principle that they are entitled to fair remuneration, i.e. commensurate with the actual quality and quantity of work performed.

The judgement of the Veneto Regional Administrative Court (TAR) no. 632 of 3 April 2024 affirms the non-derogation of the discipline also in the case of public tenders, recognising the Public Administration's obligation to regulate the tender in compliance with the provisions on fair compensation, as regards the economic component of the offer. Correspondingly, there is the obligation of the public administration to exclude participants who have submitted economic offers that are lower than the fair compensation.

The judgement notes that there are no reasons to derogate from fair compensation because of the public nature of the tender and the contract, and that, on the contrary, «*Article 8, legislative decree no. 36/2023, (editor's note: the new Public Contracts Code) today provides that public administrations, except in exceptional cases of services rendered free of charge, must in any case guarantee the application of the principle of fair compensation to intellectual workers*».

The Veneto Regional Administrative Court explicitly departed from ANAC Opinion No. 101 of 28 February 2024, where the Authority had ruled out a «*heterointegration of the call for tenders*» by the rules on fair compensation, with the consequent legitimacy of a tender formulated in violation of the minimum threshold indicated by Law 49/2023.

Shortly afterwards, the Regional Administrative Court of Veneto also ruled in the same sense as the Regional Administrative Court of Lazio, in Judgment No. 8580 of 30 April 2024.