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Italian Supreme Court, 19th July 2024, no. 19900 – effects of the manipulation of the Euribor index on the interest determination clauses agreed upon in loan contracts: request for assignment of the First President to the United Sections.

The Italian Supreme Court, First Civil Section, in Interlocutory Order No. 19900, published on 19 July 2024, requested the First President to refer to the United Sections the issues related to the effects of the manipulation of the Euribor index on loan contracts containing interest determination clauses parameterized on this index.

On the basis of the interlocutory order, the Court preliminarily noted that «*on the issue regarding the validity* of *loan contracts that in determining the interest rate to be paid by the financed party make reference to the index represented by Euribor, a guideline of the Third Civil Section of this Court***,** *expressed in Order* ***No. 34889 of December 13, 2023*** *and clarified by the subsequent ruling* ***No. 12007 of May 3, 2024***, *has been formed*».

The Supreme Court then analyzed these decisions, stating that «*in the first decision it held that the competition manipulative agreement put in place by some banks and having as its object the fixing of Euribor constituted* 'privileged evidence ... in support of the application for the declaration of nullity of the 'manipulated' rates and the redetermination of interest in the period affected by the manipulation', *regardless of whether or not the lender had participated in the unlawful agreement*, 'as reached [sic] by the prohibition in art. 2 of l. No. 287/1990 is any downstream contract or transaction that constitutes the implementation of the unlawful agreements made upstream'».

Otherwise, continued the First Civil Section of the Supreme Court, «*with judgment No. 12007 of May 3, 2024, the Third Section clarified that, for the purpose of ascertaining the validity of contractual clauses that expressly refer to the parameter constituted by Euribor for the determination of the interest rate relating to the obligations undertaken by the parties, it is necessary to establish*:
a) whether the relevant loan contracts can be considered "downstream" contracts with respect to the agreements (or, more precisely, practices) restrictive of competition aimed at altering Euribor put in place by the banks sanctioned by the European Commission's decisions of 2013 and 2016 and, as such, swept away by the nullity of such agreements;
b) whether it may, in any event, affect the validity of the negotiated transaction that the benchmark for determining the interest rate agreed upon by the parties may have been altered as a result of the unlawful conduct of third parties».

The Court then noted how Judgment No. 12007 of 3 May 2024 answered the above questions by stating that:

i) with reference to question a), that «*the declaration of nullity of a contract concluded 'downstream' of an agreement (or non-negotiated practice) restrictive of competition presupposes that the same constitutes an 'application' of the same unlawful agreement and, therefore, that at least one of the contracting parties is aware of the existence of that particular agreement having a certain object and purpose and intends to avail itself of the objective result thereof*. *Otherwise, it added, the market-distorting effects resulting from the unlawful agreements or practices aimed at altering Euribor can be eliminated through ordinary bargaining remedies*»;

ii) in relation to question b), that if Euribor «*is altered by an unlawful activity put in place by a third party, the same is no longer* 'capable of expressing the actual negotiating will of the parties themselves, at least with regard to the specific clause providing for the reference to the parameter in question , for as long as the alteration of the external mechanism for determining the consideration of the transaction has produced its effects' *with the consequence that this parameter must be replaced with another value, on the basis of the general principles of the legal system and, failing that, the contractual clause must be considered no longer effective, due to the partial nullity that has resulted, because of the impossibility of determining its object*».

With this in mind, the First Civil Section of the Supreme Court, «*tabularly competent for disputes both on competition and enterprise in general and on banking contracts*», held that the jurisprudential orientation outlined by the previous decisions of the Third Civil Section «*gives rise to perplexity and deserves to be reconsidered*».

In this regard, the Court noted that «*the European Commission, in its Dec. 4, 2013 and Dec. 7, 2016 decisions - binding on the national court under Article 16(1) of Regulation (EC) No. 1/2003, and not already privileged evidence - found that, between September 29, 2005 and May 30, 2008, certain banks participated in a single and continuous infringement of Article 101 TFEU having as its object the restriction and/or distortion of competition in the field of euro interest rate derivatives linked to Euribor (Euro Interbank Offered Rate) and/or EONIA (Euro Over-Night Index Average) (hereinafter 'EIRD'). In particular, the European Commission (...) found that the cartel restricted competition through the creation of an information asymmetry between market participants, in that the participants in the infringement, on the one hand, were in the best position to know in advance, with a certain degree of precision, the level at which Euribor would be set or would be set by their competitors acting in collusion and, on the other hand, knew whether or not Euribor on a specific date would be set at an artificial level*».

The Supreme Court went on to specify that «***the restrictive understanding established was geared***

toward reducing the cash flows that the participants would have to pay under the 'EIRDs' or from the increase in those they would have to receive under that security and, therefore, concerned a market, that of the 'EIRDs,' different from that of adjustable-rate mortgages, in which both the contract sued over and those affected by the Third Section's recalled pronouncements participate». It follows that, according to the Supreme Court, «***such contracts cannot be considered 'downstream' of the unlawful agreement, even less so in the case where the lender is extraneous to the anticompetitive agreement, not constituting its outlet, nor being essential to realize and implement its effects***. ***They, therefore, do not constitute the means of violation of antitrust law, since, as noted, the unlawful agreement covered the market for 'EIRDs' and this is irrespective of any consideration as to the knowledge of the existence of the unlawful agreement and/or the intention to avail oneself of its objective result***». In addition, the Court noted that «*[t]heThird Sections's guidance*» that «*a finding of restrictive agreement always determines the nullity of the 'downstream' contracts that constitute its implementation (...) with regard to the specific phenomenon relating to the reproduction in surety contracts of clauses responding to the scheme prepared by the ABI that were declared to be the result of a restrictive agreement by the Bank of Italy and the effect of which was to make the discipline more burdensome for the contractor, imposing more obligations on him and without granting him any corresponding rights, was not controversial*».

Therefore, the Supreme Court continues, «***an indiscriminate extension of the principle to all contracts 'downstream' of restrictive agreements on competition - even in the hypothesis that they are contracts 'downstream' of the agreement, which, as mentioned above, seems instead to be excluded - could lead to inappropriate or, in any case, ineffective conclusions in cases where such contracts are beneficial - at least in the short term - for the downstream competitor in the market, exposing the latter to the action of nullity of the competitor damaged by the illegal agreement. For these reasons, therefore, a restrictive reading of United Sections ruling No. 41994 of Dec. 30, 2021, is deemed preferable***».

The Supreme Court then addressed «*the issue of the deemed nullity of contracts that refer to a parameter, such as Euribor, altered due to the wrongful act of a third party in the determination of the interest due*» stating that «***the wrongful act of the third party, in addition to not determining nullity in the context of antitrust law ,*** *once it is excluded that contracts* ***such as the one in question can be considered as "downstream" contracts, produces*** […] ***limited repercussions, in terms of validity, on the contract to which the third party is extraneous and, in any case, not in terms of nullity, but, if anything, of annullability, just as the provision of the second paragraph of Art.*** **1439** *Civil Code, to which, moreover, the aforementioned judgment of the Third Section would seem to allude* (Ed. Cass., May 3, 2024, No. 12007)*, where it speaks of* '**proof of knowledge of such understandings and/or practices on the part of at least one of the contracting parties**'*;* ***which makes, however, it difficult to***

reconstruct what is the normative basis of the '**possible possibility of substitution of the parameter referred to by the contractual clause with another value**'».

The Court also added that «*the nullity of the clause that determines the interest of the loan contract by means of Euribor* ***does not seem to be achievable, in the case of banks that are extraneous to the contract, not even through the consumer discipline****, if one considers that Article 33 of the Consumer Code places outside the presumption of vexatiousness contracts having as their object* 'products or services whose price is linked to fluctuations ... of a financial market rate not controlled by the professional'». Nor, according to the Court, can it be considered that «*the wrongful act of the third party can invalidate the existence of the consent of the parties on the contractual affair, capable of manifesting their negotiating will, not only in the hypothesis that the contract was concluded before September 29, 2005 (unless one imagines a void contract that is born valid and then becomes void, for a certain period of time, in dependence of the wrongful act of the third party)*, *but also for those concluded in the time span of the three-year period covered by the decision of the Court of Justice*, *given that* ***Euribor is not the interest rate applied in the contract, but a mere market index employed as a factor in calculating the measure of the interest rate, it should be stressed that the contractual agreement is formed - and, in this sense, objectified - on the application of the Euribor index, as officially established and thus understood in its formal datum, regardless of the correctness of the procedure followed for its detection***'».

In this sense, the Supreme Court continues, «***the alteration of Euribor may, if anything, result in a misrepresentation of reality on the part of the parties apt to vitiate their process of forming the will, which may permit, where the relevant prerequisites are met, recourse to the ordinary remedies provided for defects of consent, to which reference has already been made, that is, for violation of the general principle of neminem ledere, a violation to be enforced obviously against the person who committed the wrongdoing****." All this without considering that the "ascribability" of the situation under consideration within the scope of the remedy of nullity could, in hypothesis, have the effect, if it is found that Euribor was altered, albeit for some periods, in the sense of artificially reducing it, of exposing the borrower, an obligated party, to the repayment of the residual capital borrowed or, in any case, to the payment of greater interest***».

In light of the above, the First Civil Section of the Supreme Court ruled that «*since this is a question of interpretation of rules of law for which the need for a uniform orientation looms*» the case should be «*referred to the First President for possible assignment to the United Sections, dealing with the following questions*:

- ***whether the loan agreement containing the clause determining interest benchmarked to the Euribor index constitutes a 'downstream' transaction with respect to the restrictive agreement on***

competition established, for the period from September 29, 2005 to May 30, 2008, by the Commission of the European Union in its decisions of December 4, 2013 and December 7, 2016, or whether, instead, ***irrespective of the lender's participation in such a cartel or its knowledge of the existence of such a cartel and its intention to avail itself of its result, this is not the case, lacking the functional link between the two acts, which is necessary to be able to consider that the loan agreement constitutes the outlet of the prohibited cartel, which is indispensable for realizing and implementing its effects***;

- ***whether the alteration of Euribor due to unlawful acts carried out by third parties constitutes a cause for the nullity of the clause determining the interest of a loan contract parameterized on this index due to indeterminability of the object, or constitutes an element abstractly capable of assuming relevance only within the process of forming the will of the parties, where suitable to determine in the contracting parties a false representation of reality, or as a fact productive of a damage***».

Italian Supreme Court, 10th July 2024, no. 18903 – legal qualification and executive effectiveness of the solutorio loan agreement: request for assignment of the First President to the United Sections.

The Italian Supreme Court, in Interlocutory Order No. 18903, published on 10 July 2024, requested the First President to refer to the United Sections the issue related to the legal qualification and executive effectiveness of the so-called solutorio loan contract.

The Supreme Court preliminarily noted that on the issue relating to «*the qualification of the so-called 'solutorio mortgage' (...) there have been non-uniform solutions in the jurisprudence of this Court and which have undoubted conceptual and practical relevance, such as to constitute even questions of principle of particular importance, thus making the nomofilactic intervention of the United Sections appropriate*». In particular, the Supreme Court recalled the jurisprudential orientation expressed by «*Cass. Sec. 3, Judgment No. 23149 of 25-7-2022 (Rv. 665427-01)*» according to which «*the so-called 'solutorio loan' entered into to settle the borrower's past debt exposure to the lender, is not null - as it is not contrary to either the law or public policy- and cannot be qualified as a mere deferment of the payment term of the pre-existing debt or as a* pactum de non petendo by *reason of the alleged lack of an actual movement of money*, ***since the crediting to the current account of the sums disbursed is sufficient to integrate the legal* datio rei *proper to the loan, and their use for the extinction of the pre-existing debt purges the borrower's assets of a negative post***. *This ruling, an expression of the majority line, which specifically recalls in the grounds, even refuting the minority line, is in continuity already to Cass. Sec. 1, Ruling No. 5193 of 9-5-1991 (Rv. 472085-01) and Cass. Sec. 1, Ruling No. 1945 of 8-3-1999 (Rv. 523924-01),* ***according to which the perfection of the loan contract, with the consequent emergence of the***

obligation of repayment on the part of the borrower, occurs at the moment in which the borrowed sum, even if not materially delivered, is placed in the availability of the borrower himself, it not mattering, for that purpose, that there is an obligation to use that sum to extinguish another debt position towards the lender».

In a different sense, the Supreme Court continues, are «*the precedents of Cass. Sec. 1, Judgment No. 1517 of 25-1-2021 (Rv. 660370-01) and Cass. Sec. 1, Order No. 20896 of 5-8-2019 (Rv. 655022-01), according to which the use of sums by a credit institution to settle the past exposure of the current account holder, with simultaneous establishment in favour of the bank of a collateral,* ***constitutes a merely accounting transaction in debit and credit on the current account, which cannot be framed in the mortgage loan****, which always presupposes the delivery of money from the lender to the borrower*; *such a transaction generally determines the effects of the* pactum de non petendo ad tempus***, only the term for performance remaining modified, without any novation of the original obligation of the account holder***».

In support of the latter precedents, the Supreme Court noted that it has been stated in doctrine that «*the obligatory relationship, although modified, retains its previous identity even after the conclusion of the solutorio loan; this is because the* animus novandi is *also lacking, in order to qualify the solutorio loan in terms of novation*, *given that in solutorio loan contracts no express and unequivocal intention to extinguish the previous obligation is generally traced*». Moreover, the Court notes, «*not even the minority view denies that for the perfection of the loan the legal giving of the sums is sufficient, with the consequence that even the crediting of the current account is sufficient for this purpose; however, this view is based on the consideration that the traditio must realize the transfer of the sums from the lender to the borrower, that is, involve the acquisition of their availability by the borrower,* ***which it does not see in the case where the bank already a creditor with these sums realizes the repayment of the previous debt***».

With this in mind, the Supreme Court wonders whether «***it is correct to consider that the repayment of the previous liabilities performed by the Bank autonomously and immediately by means of a giro account transaction, as complained of by the plaintiffs, fulfils the requirement of the legal availability of the sum in favour of the borrower, whereby the repayment of the liabilities constituted a mode of use of the borrowed amount that entered the borrower's availability; if the answer is in the affirmative, the question arises whether in such a case the loan agreement can also constitute an enforceable title***».

In light of the above, the Supreme Court therefore found it appropriate «*to transmit the acts to the First President, so that he may consider whether to assign the case to the United Sections*».

COMPANY LAW

Italian Supreme Court, 18th July 2024, no. 19833 – transfer of shares or quotas of companies and lack of the essential qualities of the thing: the shares (and quotas) of capital companies constitute "second degree" assets, in that they are not entirely distinct and separate from those included in the company's assets, and are representative of the legal positions pertaining to the shareholders with regard to the management and use of such assets, functionally intended for the exercise of the company's business, it being however to be considered that the actions that may be brought to protect the actual value of the shareholding derive from an application of the general canon of good faith, and are limited to those cases in which the difference between the actual quantitative value of the company's assets and that indicated in the contract affects the economic soundness and productivity of the company, and therefore the value of the shares or quotas, which are the immediate object of the assignment, being thus capable of constituting a lack of the essential qualities of the thing, or of being an indication of the fact that the assets transferred to the assets are absolutely devoid of the functional capacity to satisfy the purchaser's needs, and therefore "radically different" from those agreed upon.

The Italian Supreme Court, in its Order No. 19833, published on 18th July 2024, ruled on the issue of lack of the essential qualities of the object of sale with regard to shares and quotas of capital companies.

First of all, the Supreme Court the Supreme Court recalled its prevailing opinion according to which «*the transfer of shares, or quotas, of a capital company has as its immediate object the shareholding in the company, and only as a mediated object, the portion of the company's assets that that shareholding represents. Therefore, deficiencies or defects relating to the characteristics and value of the assets included in the corporate assets and, consequently, to the economic consistency of the shareholding may justify its termination or the reduction of the agreed price only if the transferor has provided, in this regard, specific contractual guarantees*». The Court went on to state that «[t]*his interpretation is based on the identification of the object of the shareholding change transaction. An asset, the shareholding, which confers on the holder administrative rights and patrimonial rights to be exercised in the company as a result of the acquisition of the status of shareholder. An asset, the shareholding, which is not limited, therefore, to attributing to the shareholder patrimonial rights that are proportionate to the value of the company's assets, but which, in relation to each type of company chosen, also attributes administrative rights, which allow the shareholder to participate in the life of the company, exercising all the faculties granted by law and the bylaws, with respect to which the expectation of profitability connected to the exercise of patrimonial rights constitutes no more than an aspect of the overall status of shareholder. The asset value of the shareholding, in so far as it corresponds to the exercise of the patrimonial rights due to the shareholder, is only a part of the utility which the purchaser of the shareholding receives as a result*

of its acquisition». The Supreme Court therefore clarified that: «[**t**]***he status of shareholder confers*** *[...]* ***rights broader and more extensive than those linked to the participation in the distribution of profits****, a hypothesis in which there could be an interest in always and in any event attributing relevance to the actual value of the assets constituting the company's assets, in dependence on defects that diminish their value, with the consequent admissibility of contractual actions in defense of the actual value of the mediated asset, in the absence of specific guarantees*».

The Supreme Court then referred to a minority position according to which «[t]*he shares (and quotas) of capital companies constitute "second-degree" assets, inasmuch as they are not wholly distinct and separate from those included in the company's assets, and are representative of the legal positions pertaining to the shareholders with regard to the management and use of those assets, functionally intended for the exercise of the company's business*». According to the Court, this position «*is not at odds with the prevailing one*» and therefore «***the actions that may be brought to protect the actual value of the shareholding derive from an application of the general canon of good faith, and are limited to the hypotheses in which the difference between the actual quantitative consistency of the company's assets and those indicated in the contract, affects the economic soundness and productivity of the company, and therefore the value of the shares or quotas, which are the immediate object of the assignment, being thus capable of constituting a lack of the essential qualities of the thing, or of being an indication of the fact that the assets transferred into the assets are absolutely devoid of the functional capacity to satisfy the purchaser's needs, and therefore "radically different" from those agreed upon***».

In light of the above, the Supreme Court in the present case held that: «[t]*he challenged decision, in line with the latter case law, did not merely derive the lack of quality pursuant to Article 1497 of the Italian Civil Code from the existence on the property* [...], *the only one included in the assets of the company to be sold, of the undeclared restrictions on its use* [...] *connected with the financial contributions and facilities granted to* [the sold company ed.] *by the Region* [...] *in so far as* [...] *correctly considered the specific repercussions deriving from this, according to the CTU carried out, on the value of the same company quota to be sold (decrease in value of 25%), that is of the immediate object of the sale, pointed out that in the preliminary quota purchase agreement* [...] *a specific reference was made to the determination of the price* [...] *in consideration of the accounting situation of the only property* [...] *having primary importance for the parties, and considered that therefore the* [purchaser ed.] *had legitimately relied, according to the canons of good faith, on such evaluation, which was frustrated by the omitted declaration of the quota holders of the* [the sold company ed.], *in the pre-contractual phase, about the restriction on its use and about the subjective limits of transferability of the same quota, which derived from the concealed use of the contributions and the regional subsidized financing*».

BANKRUPTCY LAW

Italian Supreme Court, 5th July 2024, no. 18370 – creditor's knowability of the debtor's bankruptcy: in case of debtor's bankruptcy in the course of a real estate expropriation procedure, the inclusion by the clerk's office of the bankruptcy judgment in the file of the enforcement procedure, without a direct communication to the parties, is not suitable to transfer the actual knowability of the bankruptcy to the creditor. The curatorship of the bankruptcy, who has failed to send the notice pursuant to art. 92 of the Bankruptcy Law (hereinafter, "l.f."), cannot resort to presumptive evidence aimed at proving the creditor's knowledge of the bankruptcy; on the contrary, he has to demonstrate that the creditor had actual knowledge of the opening of the bankruptcy procedure, on a given date, by means of an act or fact equivalent to the notice, which ensure him the same legal knowledge that would have been ensured by compliance with the provisions of art. 92 l.f.

The Italian Supreme Court, in its Order No. 18370, published on 5th July 2024, ruled on the subject matter of the debtor's bankruptcy in the course of a real estate expropriation procedure with particular reference to the case of curatorship's failure to send the notice pursuant to art. 92 l.f.

On this point, the Supreme Court reiterated that «***the curatorship who has failed to send the notice pursuant to art. 92 L. Fall, may not resort to presumptive evidence, aimed essentially at proving the creditor's knowledge of the "bankruptcy" event, but he must prove that the creditor had actual knowledge of the opening of the proceedings, on a given date*** […]***, by means of an act or fact equivalent to the notice, which ensures him the same legal knowledge that would have been ensured by compliance with the provisions of art. 92 cited above***».

Based on these premises, the Court affirmed that «***equivalent act cannot*** **[be]** ***discerned either in the mere inclusion, within the file of the enforcement procedure, at the initiative of the clerk's office, of an excerpt or copy of the judgment declaring bankruptcy (an act that cannot be counted among those of a procedural nature), not followed by any communication to the parties, or in the mere reference to the special legislation on land loans, specifically art. 41 TUB, contained in an application filed months before the bankruptcy was declared, and therefore ontologically unsuitable to infer actual knowledge of it***».

Moreover, the Supreme Court pointed out that «*this conclusion appears consistent with the most recent approaches of this Court on the subject of imputability of delay under art. 101 L. Fall*».

In conclusion, the Supreme Court reiterated the well-established principle of law according to which «***on the subject of assessing the imputability of the delay in the submission of a so-called "super-late***

application" of a creditor who has not received the notice referred to in art. 92 L. Fall. "the judge's ascertainment must have as its object actual knowledge (and not merely factual knowledge, nor, much less, abstract knowability) on the part of that creditor of the issuance of the judgment declaring bankruptcy, as well as of the date of its attainment, that is, a knowledge assimilable to that, legal, which would have been guaranteed by compliance with the form provided for in art. 92 cit.; with the consequence that the application for admission cannot be considered precluded as a result of the expiration of the period referred to in art. 101, par. 1, L. Fall, if it does not result in the existence of a document, or a procedural fact equivalent to the notice, that proves with certainty that the creditor has had timely notice of the opening of the procedure and that therefore the purpose (the practical result) to which said notice was aimed ex lege has equally been achieved" (Cass. judgment no. 35963 of 2023; cf. Cass. 21760/2022, with regard to "notorious"; Cass. 3195/2023, in case of declaration on record and filing of the bankruptcy judgment by the debtor's defence counsel in the criminal trial; Cass. 13635/2023, in case of knowledge of the bankruptcy learned through the defence counsel in the executive proceedings in which the bankruptcy trustee had intervened; Cass. 30846/2023, with regard to service of the writ)».

Italian Supreme Court, 3rd July 2024, no. 18261 – merger and bankruptcy of the entrepreneur who has ceased business activity: in the event of a merger pursuant to art. 2504 *et seq*. of the Civil Code, which extinguishes the merged company and causes the universal succession of the incorporating company in all active and passive legal relations, including procedural ones, in which the former was a party, for the case of insolvency of the latter the special discipline of art. 10 l.f. is applicable. Consequently, for the purposes of the proper establishment of the cross-examination under art. 15 l.f., the debtor subject to the notification of the appeal and the notice of convocation must be identified in the incorporated company, which, although extinct, for the sole purposes of the possible declaration of bankruptcy, retains its identity, since the incorporating company is not precluded from intervening in the pre-bankruptcy proceedings and in any case from lodging a complaint, in the capacity of interested party, against the possible bankruptcy ruling of the incorporated company itself.

The Italian Supreme Court, in its Judgment No. 18261, published on 3rd July 2024, ruled on the issue of the application of the rules set forth in artt. 11 and 15 l.f. in the case of a merger by incorporation under artt. 2504 *et seq.* of the Civil Code.

Firstly, the Supreme Court premised that «*the controversy submitted its scrutiny consist of a threefold order of closely related substantive and procedural issues: a) the legal framework of the phenomenon of company transformation by merger; b) the impact of the company's merger with the special discipline under art. 10 l.f.* [...]*; c) the identification of the subject involved in the operation of transformation of the*

company by merger (incorporating or incorporated company) against which the cross-examination for the declaration of bankruptcy should be integrated».

Regarding the first issue, the Court reiterated a consolidated case law on the nature and effects of the merger by incorporation (Cass. SS.UU. 21970/2021), according to which «***the merger extinguishes the incorporated company and causes the universal succession of the incorporating company in the entire assets of the incorporated company, with the result that the incorporating company succeeds in all active and passive legal relationships, including procedural ones, to which the incorporated company was a party***». Consequently, «*the prosecution of the legal relations in the unified entity grounds the active legitimacy of the incorporating company to act and continue in the protection of rights and its passive legitimacy to suffer and defend itself against the claims of others, with regard to the relations originally belonging to the incorporated company; conversely, the latter, not maintaining its subjectivity after the merger and cancellation from the commercial register, does not even boast its own autonomous active or passive procedural legitimacy*». According to the Supreme Court, **the aforementioned principles «*have to be coordinated with the special discipline contained in art. 10, par. 1, l.f.*, *according to which "individual and collective entrepreneurs may be declared bankrupt within one year from the cancellation from the business register if the insolvency has manifested itself prior to the same or within the following year"*»**. Indeed, the Supreme Court has consistently considered «*consistent with the reconstruction of the phenomenon in extinction/successive terms the bankruptcy of the incorporated company in the manner and terms provided by artt. 10 and 11 l.f.* ». Having confirmed the bankruptcy of the incorporated company within the time limits provided for in art. 10 l.f., the Court moved to the discussion of the issue constituted by the identification of the "debtor" to be notified of the bankruptcy petition and the decree of summons to the pre-bankruptcy hearing pursuant to art. 15 l.f. On this issue, the Supreme Court held that «**[t]*he pre-bankruptcy proceedings and any subsequent appeal stages* […] *continue to be held* [...] *against the extinguished company, since the latter does not lose, in the insolvency context, its procedural capacity***».

In conclusion, the Supreme Court affirmed the following principle of law: «***in case of a merger pursuant to artt. 2504 et seq. of the Civil Code, which extinguishes the incorporated company and causes the universal succession of the incorporating company in all active and passive legal relations, including procedural ones, in which the former was a party, for the case of insolvency of the latter, the special discipline set forth in art. 10 l.f. is applicable, which allows the bankruptcy of the incorporated company within the time limits provided therein; it follows that, for the purposes of the proper establishment of the cross-examination ex art.15 l.f., the debtor addressee of the notification of the appeal and of the summons must be identified in the incorporated company, that, although extinguished, only for the purposes of the eventual declaration of bankruptcy, retains its identity***».

PUBLIC LAW

Constitutional Court, 22nd July 2024, no. 139 and no. 140 – Payback. Medical devices. Reservation of the law. Irretroactivity. Proportionality. Constitutional legitimacy.

The Constitutional Court, has, unfortunately, found the exceptions of unconstitutionality of the Payback legislation to be unfounded, except for the provision relating to the 48% reduction of the amount due by companies that market medical devices with the Public Administration, which the Legislature had made conditional on the waiver of the litigation initiated.

The Court, in fact, first dealt with the provisions of 2023, introduced to defuse the litigation initiated by numerous companies, at the appeal of the Campania Region, and, with sentence no. 139, declared them unconstitutional in the part in which they conditioned the reduction of the burden borne by the companies on their waiver of litigation, stating that all supplier companies must now be recognised the reduction of their respective payments to 48 per cent.

With the subsequent sentence no. 140, the Court, on the referral of the Lazio Regional Administrative Court, declared as unfounded the questions of the constitutionality of Article 9-*ter* of Decree-Law No. 78 of 2015 referring to the time span from 2015 to 2018. The Court found «*that the payback in itself presents various critical issues, but it is not unreasonable with reference to Article 41 of the Constitution, as far as the period 2015-2018 is concerned»* and this is because «*it places a solidarity contribution at the expense of the companies for that period of time, which can be correlated to reasons of social utility, in order to ensure the supply of medical devices necessary for the protection of health in a seriously difficult economic and financial situation*». It also states that the payback «*is not even disproportionate, in light of the significant reduction to 48 per cent of the amount originally charged to the companies, a reduction now unconditionally recognised for all companies by virtue of the aforementioned judgment No. 139*».

Lastly, the Constitutional Court rejected the objections relating to the conflict with the reservation of the law provided for by Article 23 of the Constitution for the imposition of patrimonial benefits, as well as on the retroactive nature of the measure because, the Court stated, paragraph 9-*bis* of Article 9-*ter*, introduced in 2022, merely made the obligation to repay the supplier companies operative, without affecting, in a constitutionally untenable manner, the trust that private parties placed in the maintenance of the sale price of medical devices.

Council of State, 22nd July 2024, no. 6587 – Construction and town planning - Building permit - Urbanisation charges - Distinction from construction costs.

The appellate court reiterated that: «*While the urbanisation charges perform the function of compensating the community for the new additional urban load that is poured on the area due to the allowed building activity, the construction cost is configured as a municipal co-participation to the increase in the value of the real estate property of the builder*» (Cons. Stato, Sec. IV, 31 July 2020, no. 4877; Sec. VI, 29 August 2019, no. 5964; Sec. IV, 28 June 2016, no. 2915; Sec. V, 30 November 2011, no. 6333).

With specific reference to urbanisation charges, the Council of State then added that: «...the *only criterion for determining whether or not the charges are due consists in the urban load deriving from the building activity, with the specification that an increase in the urban load must be understood as both the need to equip the area with new urbanisation works and the need to make more intensive use of the existing ones*» (Cons. Stato, Sec. VI, 25 July 2023, no. 7261; Sec. IV, 17 August 2022, no. 7191).

According to the appellate court, a final principle to be acknowledged is that: «...it *has been considered sufficient, for the purpose of the configuration of an increased urban load, the circumstance that, as an effect of the building intervention, the structural reality and the urban usability has changed, with charges referred to the objective revaluation of the property and functional to bear the additional socio-economic load that the building activity entails*» (Cons. Stato, sez. II, 21 July 2021, no. 5494).

Regional Administrative Court, Lombardy, 18th July 2024, no. 869 – Distances between constructions - Distance of 10 metres between windowed walls - *Ex* Art. 9 of Ministerial Decree no. 1444 of 1968 - Constructions in a non-parallel position.

The judgement ruled that «[i]*n answering the question whether, for the purposes of the application of the absolute minimum distance of ten metres referred to in Article 9 of Ministerial Decree. 1444/1968, the notion of fronting buildings always includes the case in which the windowed wall of one does not face the wall of the other, but rather faces a free space (since the latter remains at a lower height), and therefore the obligation to respect this distance also exists when the walls adhere to each other along the entire common front (i.e, without residual gaps) and one stops below the lower threshold of the window(s) in height (with the consequent and corresponding obligation to set back the front of the upper windowed wall), the Supreme Court has clarified that "The obligation to respect a minimum distance of 10 metres between windowed walls and walls of buildings in front, provided for by Ministerial Decree no. 1444 of 1968, art. 9, also applies when the window of one wall does not face the other wall (due to the latter being lower in height than the other), unless the two walls adhere to each other at the bottom along the entire front and for the entire corresponding height, without any remaining gaps or interstices"*».

This is because «*the purpose of Article 9 of Ministerial Decree no. 1444 of 1968 is to safeguard the public health interest (cf. Court of Cassation 20574/1997) in the healthiness of living beings overlooking the*

spaces between buildings facing each other, when at least one of the two has a windowed wall (cf. Court of Cassation SU 1486/1997), regardless of whether the latter is built before or after the other wall (cf. Court of Cassation 13547/2011). An instrument of this is the observance of a minimum distance, such as to guarantee the circulation of air and the irradiation of light suitable for maintaining the healthiness of overlooking. The notion of "antistance" or "frontality" (if one could say so) is to be referred to and circumscribed to (portions of) walls that face each other and therefore present, if not adequately spaced, a problem of insufficient air circulation and/or light irradiation, with a real danger of creating a harmful gap. If the walls face each other only for a stretch - because they are of different horizontal or vertical extension or not perfectly parallel, the respect of the distance D.M. no. 1444 of 1968, pursuant to art. 9, must be ensured within (and only within) the portions of the walls facing each other, in the aforementioned meaning (cf. Cass. 4639/1997). In other words, the distance of 10 metres - which is measured in a linear manner (and not radial, as is the case with respect to views: see Court of Cassation 9649/2016) - must be respected within the segment of the walls such that the (ideal, merely conceived) advancement of one leads it to meet the other, albeit in that segment (see Court of Cassation 4175/2001)».

Administrative jurisprudence has also pointed out for some time that the distance between buildings pursuant to Article 9 of Ministerial Decree 1444/1968 must be calculated in a linear manner and not radially and that this distance must concern windowed walls, even those of different heights (see recently Cons. Stato, section IV, 17/11/2023, no. 9872). IV, 17/11/2023, no. 9872); on the contrary, the obligation to comply with the aforementioned distance between walls that do not face each other (i.e., assuming an ideal continuation of the opposite walls) cannot be deemed to exist (see Council of State, Sec. IV, 3 July 2023 no. 6438; Sec. II, 10 July 2020 no. 4465).

Declining the aforesaid principles to the case at hand, according to the Lombardy Regional Administrative Court, it must be held that the circumstance that the building owned by the applicant and the building at issue are placed on different levels is not suitable to exclude the situation of "frontistance" referred to in Article 9 of Ministerial Decree 1444/1968.