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Consiglio di Stato, Sez. V, 18 October 2024, no. 8352 – in matters of tendering procedures, the *dies a quo* for challenging tender acts coincides with the date on which the person concerned acquires, or is put in a position to acquire, full knowledge of the acts adversely affecting him.

BANKING AND FINANCIAL LAW

Italian Supreme Court, 16 October 2024, no. 26897 – prescription of the action for repayment of undue payments against the Bank: the account holder suing for repayment against the Bank, in order to postpone the beginning of prescription to the time of the account closing, has the burden of proving the existence of a credit opening agreement suitable to qualify the payments made as reparative.

The Italian Supreme Court, in its judgment no. 26897, published on 16th october 2024, ruled on the issue of prescription for an action for the recovery of undue payments brought by the account holder against the bank.

The Supreme Court preliminarily recalled that «*constitute payment in the technical sense (determining a shift of wealth in favor of the bank) the so-called solutory remittances, i.e., payments made by the account holder to a current account for which there has been an overdraft with respect to the overdraft granted (with a current account credit opening agreement) or to a current account ab origine non entrusted*»; conversely, in the face *of* «*so-called restorative remittances, which flow to an account that is not "overdrawn" but only "passive" - there having been no overrun with respect to the overdraft limit - one cannot technically speak of a payment, given that, with those payments, the current account holder merely restores the provision, so that no asset shift in favor of the bank is determined, since the current account holder can reuse at any time the sum paid into the current account that the bank is contractually obliged to keep at the customer's disposal until the possible revocation of the overdraft*».

Therefore, the Court goes on by stating that «*where, in the course of the current account relationship, the deposits of money made on it by the account holder have the simple purpose of restoring the overdraft granted by the bank to the customer (...), it can only be called 'payment' after, having concluded the current account credit opening relationship, the bank has exacted from the account holder the repayment of the final balance (...) where, on the other hand, the deposits are made on an "overdraft" account, it will be possible to speak of "payment" in the technical sense, even if this took place during the continuance of the relationship, with the consequent possibility for the account holder to exercise an action for repayment where a sum has been unlawfully debited, followed by its payment having a "solutory" nature in the said terms*».

Having clarified this, the Supreme Court stated that «*it is the burden of the account holder acting for the repayment of undue payments under Article 2033 of the Civil Code to 'allege' the constituent facts of the claim that specifically pertain to the existence of a 'payment' and the 'undue' nature of the same, and said allegation is considered fulfilled with the indication of the existence of undue payments and with the request for restitution with reference to a given account and a given time*».

Otherwise, according to the Supreme Court, «***the credit institution that, as a defendant in court, wishes to raise the objection of prescription against the account holder who has brought an action for the repayment of sums unduly paid - has the burden of 'alleging' only the inaction of the holder of the right coupled with the declaration of his intention to take advantage of it, without the need to indicate the specific solutory remittances deemed to be time-barred*** *(...) since the solutary or restorative nature of the individual remittances does not affect the content of the exception, which remains the same regardless of the nature of the individual payments*».

On this basis, the Court the court goes on by stating that «***in the face of the objection of prescription raised by the bank against the demand for the recovery of undue payments proposed by the account holder, the latter bears the 'burden of proof' of the restorative and non-solvent nature of the remittances indicated***»; it follows that «***the existence of credit opening, on which depends the restorative value of the payments made to settle the exposures that do not exceed the limit of the agreement, can only be borne by the account holder himself***».

Under this last profile, the Supreme Court finally pointed out that «*a* de facto *situation characterized by the performance of a passive account with repeated fulfillments by the bank of payment orders from the account holder, even in the absence of funding and within the risk limits assessed in advance by the bank itself,* ***does not prove, in itself, the stipulation, by conclusive facts, of a contract of credit opening on current account, with the bank's obligation to perform passive credit operations, since the said de facto situation can find its basis in a position of mere tolerance on the part of the bank itself***».

Italian Supreme Court, 28 October 2024, no. 27817 – *ex officio* detectability of partial nullity of surety bonds covered by Bank of Italy Order No. 55/2005: the court must not declare ex officio the partial nullity of surety bonds to which Bank of Italy Order No. 55/2005 is applicable, if the party interested in obtaining such declaratory fails to timely allege the facts on which the alleged nullity is based.

The Supreme Court, in its decision no. 27817, published on 28 th october 2024, ruled on the matter of the *ex officio* detectability of the partial nullity of surety bonds drawn up according to the scheme prepared by the ABI and censured by the Bank of Italy in Order No. 55/2005.

In this regard, the Court first of all premised that «*the United Sections of this Court (with the judgment of December 30, 2021, no. 41994) affirmed that the surety contracts 'downstream' of agreements declared partially null and void by the Guarantor Authority, in relation only to the clauses that conflict with Art. 2(2)(a) of Law No. 287 of 1990 and 101 of the TFEU, are partially null and void, pursuant to Art. 2(3) of the aforementioned law and Art. 1419 of the Civil Code, in relation only to the clauses that reproduce those of the unilateral scheme constituting the prohibited agreement (because they are restrictive, in concrete terms, of free competition), unless a different intention of the parties can be inferred from the contract, or is otherwise proven*».

That being said, in the case at hand, the Supreme Court had to determine «*whether or not the contested decision was correct insofar as, in holding that the exception relating to the alleged nullity of the guarantee for violation of antitrust regulations had been ritually raised on appeal, it held that the documentary production attached in support of the exception was admissible and timely*».

In this regard, the Supreme Court recalled the principle that «*in appellate and cassation judgments the judge, in the event of failure to detect a contractual nullity officio in the first instance, is always entitled to make such a finding*».

However, the Court pointed out that this principle «*must be applied bearing in mind the general rules of civil proceedings and the relevant time frame, this in order to avoid that the exercise of an officio power may allow the parties to get back into the game - so to speak - when the constituent facts of the complained of breach of contract to be examined ex officio could and should have been promptly attached, in order to allow the judge the necessary assessment in law*».

As a result, according to the Court, «***(w)hen the constituent facts of the alleged nullity of the contract are not already attached in their entirety by the party subsequently invoking it (...) the court is not allowed, at any stage and level of the proceedings, to make such findings of its own motion***» given

that «***the officio detectability of the nullity***» is «***limited only to the in iureassessment of the facts already attached***».

In the light of the aforementioned principles, the Supreme Court noted how «***it does not, therefore, appears to be in accordance with law the decision contested today in the part in which it proceeds to examine the merits of the exception, relying on Bank of Italy Order No. 55/2005 and the opinion of the Guarantor Authority, filed only on appeal***».

Moreover, the Supreme Court observes that such measures «***do not fall among the sources of law listed in Article 1 of the Prelegislations and therefore remain excluded from the scope of application of the principle iura novit curia in Article 113 of the Code of Civil Procedure***».

In addition, according to the Supreme Court, **it cannot** «*share the plaintiffs' defensive assumption that the Bank of Italy's measure could fall within the category of "notorio"*» since «*specific acquisitions of a technical nature, evaluative elements that imply particular knowledge or require the prior ascertainment of particular data, as well as those notions that fall within the judge's private science, since this, insofar as it is not universal, does not fall within the category of notorio,remain* ***outside the scope*** *of this notion*».

On this basis, the Court concluded by stating that «***(t)he territorial court should, therefore, have noted the tardiness of the documentary production, as not usable for the purposes of the decision, and, consequently, rejected, in the absence of proof of the constituent facts, the request for nullity of the surety bond contract for conflict with antitrust regulations***».

COMPANY LAW

Italian Supreme Court, 22 October 2024, no. 27283 – a shareholders' agreement that, through a put option, allows shareholders to be guaranteed remuneration for the value of the shareholding at a predetermined price is valid and deserving of protection, having to rule out a violation of Article 2265 of the Italian Civil Code because the exclusion from losses is not total and constant.

The Italian Supreme Court, with its Order no. 27283, published on 22 th October 2024, ruled on the issue of shareholders' agreements and violation of Article 2265 of the Italian Civil Code in the case of a *put* option, whereby remuneration of the value of the shareholding is guaranteed at a predetermined price.

The Supreme Court first reaffirmed the principle that «*the shareholders' agreement finds, therefore, its qualifying element in the distinction from the company contract and its bylaws, in that it realizes a convention by which the shareholders implement a complementary regulation to the one enshrined in the deed of incorporation and then in the company's bylaws, in order to more profitably protect their interests*».

The Court then goes on to state that "*the characterizing element of the shareholders' agreement, as typified by the legislature in the enucleation of the regulation of interests that through it the stipulating parties intend to achieve, is that the mandatory structure agreed upon therein has as its objective one of the two characterizing elements indicated in Article 2341-bis of the Civil Code: stabilization of the ownership structure or governance of the company. These aims can also be pursued, therefore, by means of agreements which, in any way provided for, have as their effect a regulation of the patrimonial rights falling to a shareholder, of which the other stipulator (whether shareholder or third party) is in any way a guarantor*».

The Supreme Court, recalling an earlier ruling, thus clarified that «*a shareholders' agreement that, through a put option, allows shareholders to be guaranteed remuneration for the value of the shareholding at a fixed price is valid and deserving of protection. A covenant, moreover, that (…) is not limited to a mere "absolute and constant" guarantee of profitability of the shareholding of the beneficiary of the option, but constitutes a contingent guarantee*».

With reference to the violation of Article 2265 of the Italian Civil Code, the Supreme Court stated that «*those clauses that establish a participation in profits or losses that is not proportional to the value of one's share do not fall under the prohibition in question*».

Therefore, «*it is lawful and deserving of protection the negotiated agreement concluded between the shareholders of a shareholding company, by which one, on the occasion of the participatory financing thus made, is obliged to indemnify the other from the possible negative consequences of the contribution made in the company, by means of the assignment of the right of sale (so called "put") within a given time limit and the corresponding obligation to purchase the shareholding in the company at a predetermined price, equal to that of the purchase, albeit with the addition of interest on the amount due and the repayment of the payments made during the delays in favour of the company*».

BANKRUPTCY LAW

Italian Supreme Court, 2 October 2024, no. 25919 – arrangement with creditors ("*concordato preventivo*"): the "specific utility" under art. 161, para. 2, lett. (e) l.f., to be allocated to creditors, must be understood in the sense of a concrete correspondence of the arrangement proposal, without the relevance of the provision of art. 84, para. 3, CCII.

The Italian Supreme Court, in its decision no. 25919, issued on 2th October 2024, ruled on the application for the admission to the arrangement procedure under art. 161 l.f.

Firstly, the Supreme Court made a «*preliminary clarification*» on the basis of which «*the questio iuris that is relevant in this case exclusively concerns the exegesis of the phrase '**in any case, the proposal must indicate the specifically identified and economically assessable utility that the proponent undertakes to ensure to each creditor'**, **i.e.** relating to the phrase included in the text of **subparagraph (e) of the 2nd paragraph of Article 161 of the bankruptcy law.** (…) In this perspective, **it is necessary to completely disregard - even for the purposes of the interpretation of the phrase in subparagraph (e) cited above. - from the provision set forth in the second part of the 3rd co. of art. 84, 3rd co. of the I.C.C.I.*** [...], *since this is a provision that has arisen with respect to the time in which the res litigation originated*».

On the basis of the foregoing premise, the Court stated that «***it is therefore necessary that the arrangement proposal concretely reflects the abstract function - 'the restructuring of debts and the satisfaction of claims through any form' - even of the arrangement with continuity, through the indication of the specific utility, economically assessable, ensured to each creditor**, so that, in any case, the asset attribution even in the forms of the remission - possibly - in full of the debt for which the creditor is responsible* (…), *is inescapably correlated with the patrimonial attribution of which the debtor - the entrepreneur in crisis - in turn takes charge*».

Therefore, the Supreme Court held that «(o)***ccurs therefore that the arrangement proposal must be connoted in terms of 'concrete onerousness.'*** *(…) And so much in the sign of this Court's elaboration that the 'concrete cause' of the concordat proposal consists - in addition to overcoming the state of crisis - in ensuring that the creditors realize their respective reasons for an albeit minimal consistency, within a reasonably contained time frame*».

Consequently, the Court of Cassation concluded by stating that «*the failure to foreshadow, for a given class of unsecured creditors, apportionment or **the foreshadowing of the mere 'possibility of continuing existing contractual/commercial relations, results in the failure to indicate the economically assessable utility referred to in subparagraph (e) of the 2nd paragraph of Art. 161 of the bankruptcy law and therefore in the lack of the 'concrete onerous cause***» with the clarification that «***there is no margin whatsoever to identify the mere result of the contractual continuity with the economically assessable utility, since the 'concrete cause' of the arrangement would be resolved in the execution of the arrangement itself, making the functional requirement - 'the restructuring of debts and the satisfaction of credits' - postulated by the legislative construction evidently evanescent***».

Italian Supreme Court, 7 October 2024, no. 26159 – "consecution" ("*consecuzione*"): in "consecution" between minor bankruptcy proceedings and bankruptcy under art. 69-*bis* l.f., the course of time between the closure of a minor proceeding and the declaration of bankruptcy is not decisive, as long as it is an interval of not unreasonable extent.

The Italian Supreme Court, in its decision no. 26159, issued on 7th October 2024, ruled on the "consecution" ("*consecuzione*") between minor bankruptcy proceedings and a final bankruptcy under art. 69-*bis* l.f.

Firstly, the Supreme Court affirmed the validity of the second ground of appeal, with which the appellant «*denounces violation and false application of Articles 111(2) and 69 of the bankruptcy law, for having the court erroneously excluded the predeductible nature of the credit on the assumption that there was no consecution between composition with creditors procedures*»; merits arising from «*the inadequacy of the reasoning by which the court excluded the predeductible nature of the claim in question*».

Indeed, the Court found that «[t]*he court of first instance has in fact limited itself to excluding prededuction, on the one hand, on the erroneous finding that there cannot be consecution between two "minor" procedures - contrary to the conspicuous case law of this Court (…) - and, on the other hand, on the equally erroneous assertion that consecution would remain per se excluded by the existence of a temporal caesura between the procedures, when instead, according to the well-known and well-established orientation of this Court, it should have investigated whether, regardless of the length of the temporal interval, the bankruptcy resulted from the same state of crisis or insolvency that had given rise to the application for an arrangement with creditors*».

On the basis of the abovementioned, the Supreme Court recalled the «*nomofilactic direction, recently summarized by the United Sections of this Court (Cass. Sec. U, 42093/2021, in reasons, paras. 25 et seq.)*», on the basis of which it ruled the following principle of law: «*(i)* ***the prededuction, by its nature granted to a credit in the procedural context in which the relevant title originates*** *(including the preparatory area),* ***survives in a different insolvency procedure that follows the previous one if there is a consecution between them****; (…) (ii)* ***consecution between insolvency procedures is "a phenomenon of connection between procedures of any kind, aimed at regulating a coinciding situation of insolvency of the enterprise, which finds in art. 69 bis l.f. its special discipline in the case in which it takes the form of a consecution between one or more minor proceedings and a final bankruptcy"*** *(Cass. 15724/2019); iii)* ***it is not "decisive the temporal interval in itself between the closure of a proceeding and the declaration of bankruptcy", provided that it is an interval of unreasonable extension****, that is, such that it does not itself constitute a demonstrative element of the intervening variation in the prerequisites of the two proceedings (Cass.6290/2018, 33402/2021)*».

ADMINISTRATIVE LAW

Consiglio di Stato, Sez. III, 4 October 2024, no. 7971 – reference to the Court of Justice of the European Union for a preliminary ruling on a national rule concerning extraordinary measures for the management, support and monitoring of companies in the context of preventing corruption

In the order under review, the Council of State referred the following question to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU: «*Do Article 16 and Article 52 of the Charter of Fundamental Rights of the European Union and the European Union principles on freedom of establishment and freedom to conduct a business (Article 49 TFEU) preclude an interpretation of the national provision, in this case Article 32(8) of Decree-Law No 90/2014, as amended by Article 12(1), Chapter 12-ter, of Decree-Law No 121/2021, which allows the adoption of a measure of support and monitoring for "the establishment and freedom to conduct a business"? Decree-Law No. 90/2014 as amended by Article 12, Paragraph 1, Section 12-ter, of Decree-Law No. 121/2021, which allows the adoption of the measure of support and monitoring against "an undertaking awarded a contract for the performance of public works, services or supplies" even in the hypothesis that the contract subject of the contract - which gave cause for the adoption of the measure - has been concluded and fully performed and the undertaking has no other ongoing contractual relationships with public administrations*».

The need for the referral to the Court of Justice arises from the contrast between the decision of the Regional Administrative Court (which had disapplied the national rule by finding a conflict with the European Union one under the profile of the unjustified interference of the Prefect on fully concluded contracts) and the different orientation of the referring Council of State, according to which «*it can reasonably be considered that the application of the new measure provided for by art.32, paragraph 8 of Decree-Law no. 90/2014, due to its minimal invasiveness, although constituting the expression of a power of compliance limiting the freedom of economic initiative, does not collide with the EU principles governing the matter, since the support and monitoring measure complies with the canons of gradualness and proportionality, and is justified by the purpose of safeguarding public interests of a higher rank, in respect of which the freedom to conduct business does not represent an absolute right, remaining a right that is in any case subject to a constraint of compliance with the regulatory framework of the Union and of the State to which it belongs*».

Council of State, Sez. IV, 21 October 2024, no. 8412 – the administration may modify its planning choices on the area subject to the approval of a subdivision plan and decide to no longer enter into the town-planning agreement.

The appellate court clarified that «*legitimately the Administration, even after having approved a subdivision plan and before entering into the relevant town-planning agreement, may review its planning decisions on the same area (and therefore decide not to enter into the same agreement)*» and this because «*only after entering into the town-planning agreement does the town-planning instrument become effective and, correlatively, the area concerned receives a town-planning regulation that allows building to proceed*», because «*the signing of the agreement and the subsequent registration by the private party are conditions of effectiveness of the resolution approving the subdivision*» because «*the conclusion of the agreement and the subsequent registration by the private party are conditions for the effectiveness of the resolution approving the subdivision*».

For these reasons, the Council of State concludes, «*the agreed allotment plan takes effect not with the approval of the relevant project by the municipal council, but with the subsequent conclusion and transcription of the agreement*».

Consiglio di Stato, Sez. V, 18 October 2024, no. 8352 – in matters of tendering procedures, the *dies a quo* for challenging tender acts coincides with the date on which the person concerned acquires, or is put in a position to acquire, full knowledge of the acts adversely affecting him.

The Council of State, in the ruling under comment, refers to the regulations on access to tender documents contained in the new Tender Code (Legislative Decree no. 36/23), which now provides for the immediate availability of all tender documents, to affirm that «*According to the regulations, the dies a quo of the time limit for challenging the tender documents coincides, therefore, with the date on which the interested party acquires, or is put in a position to acquire, full knowledge of the documents that are damaging to him*» so that only in the event of failure by the Contracting Authority to make the tender documents available there is an extension of the time limit for the challenge.

The legislation, states the appeal court, pursues «*the objective of avoiding so-called blind' reviews and is in line with the view expressed by the European Court of First Instance that 'Directive 89/665, in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that reviews of measures taken by contracting authorities concerning admission to or exclusion from participation in public procurement procedures must be brought on pain of forfeiture, within a period of 30 days from the date of their communication to the persons concerned, provided that the measures so communicated are accompanied by a statement of the relevant reasons, so as to ensure that those persons have had or could have had knowledge of the infringement of European Union law alleged by them (see Court of Justice EU, Sec. IV, ord. 14 February 2019, in C- 54/18; Cons. Stato, Sec. V, 6 December 2022, no. 10696)*».