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TAR Puglia – Bari, Sec. II – 13 Jenuary 2025, n. 30 – in the matter of tenders and, in particular, of service contracts according to the criterion of awarding the economically most advantageous offer under Article 108, of Legislative Decree No. 36/2023, it must be held that, when the contracting station has expressed an assessment of non-anomaly of the offer and this has been challenged by the economic operator who was not awarded the contract, it is up to the plaintiff to prove the manifest error or contradictory nature of the administration's assessment.

BANKING AND FINANCIAL LAW

Court of Appeal of Cagliari, 25 January 2025 – manipulation of the Euribor index: referral to the Court of Justice of the European Union pursuant to Article 267 TFEU.

The Court of Appeal of Cagliari, with order dated 25 January 2025, referred to the Court of Justice of the European Union the question relating to the manipulation of the Euribor index ascertained by the Decisions of the European Commission of 4 December 2013 and 7 December 2016.

The Court of Appeal preliminarily recalled that «*with the Decisions 4-12-2013 and 7-12-2016, the European Antitrust Commission had established a single and continuous infringement in the conduct of certain banks belonging to the panel for having participated in a cartel set up for the purpose of altering the procedure for setting the price of certain components of derivatives and thus the average Euribor yield published in the period from 29-09-2005 to 30-05-2008, conduct consisting in having communicated and/or received preferences for a constant-value setting depending on their own commercial positions or exposures, in*

having exchanged non-public information on their intentions for sending future Euribor data, in having aligned the data to be communicated with the confidential information received, in having aligned themselves to a specific level in the communication of the data, in having communicated to the other banks the quotation as soon as it was sent to the EBF or even before it was sent».

The Court also recalled the judgment of 12 January 2023 issued in Case C-883/19 by the Court of Justice of the European Union, which, in confirming the European Commission's Decision of 7 December 2016, had ruled that «*a concerted practice may have an anti-competitive object even though it has no direct connection with retail prices. Indeed, the wording of Article 101(1) TFEU does not allow for the assumption that only concerted practices having a direct effect on the price paid by end consumers are prohibited. On the other hand, it follows from Article 101(1)(a) TFEU that a concerted practice may have an anti-competitive object if it consists in the direct or indirect fixing of purchase or selling prices or other trading conditions'* (par. 121). *'In any event, Article 101 TFEU, like the other competition rules set out in the Treaty, is not intended to protect only the immediate interests of competitors or consumers, but rather the structure of the market and, thus, competition as such*».

The Court of Appeal then recalled the recent rulings of the Supreme Court on the subject, focusing first of all on Court of Cassation decision n. 12007/2024, which observed that where «*it is ascertained that the parameter referred to has been altered by an unlawful activity carried out by a third party, the result, at least partially foreseeable, of the mechanism constituting the prerequisite of the reference to the external parameter desired by the parties is no longer valid: it is inevitable, then, to conclude that it could no longer be considered capable of expressing the actual negotiating will of the parties themselves, at least with regard to the specific clause providing for the reference in question, for as long as the alteration of the external mechanism for determining the consideration for the transaction produced its effects*».

The territorial court then pointed out how in a different sense was expressed the «*ruling n. 19900/2024 where it affirmed that the restriction of competition assessed by the Antitrust Commission had concerned only the derivatives market and could not produce effects in the market for variable-rate mortgages that applied the Euribor parameter resulting from the unlawful agreement, with the consequence that such contracts could not constitute the outlet of the prohibited agreement*»; furthermore, continues the Appeal's judge, such order also affirmed that «*the decisions of the Antitrust Commission are binding, but do not constitute privileged evidence*».

In light of the foregoing, the Cagliari Court of Appeal observed how «***the interpretation of the prohibition contained in Art. 101 TFEU, where it states* 'Agreements or decisions prohibited pursuant to this article shall be automatically void'*, is a matter of general interest, as it is decisive for the decision of numerous pending disputes concerning the nullity of the contractual clause referring to Euribor,***

published in the period 29-09-2005/30-0S-2008, for the determination of the variable interest rate, even if included in contracts with a duration schedule entered into on a date prior to the ascertained anti-competitive practice».

Therefore, continues the Appeal's Judge, pursuant to Article 267 TFEU it is appropriate to refer the matter to the Court of Justice of the European Union as «*the question of the interpretation of Art. 101 TUFE is of general interest for the uniform application of European Union law and is relevant to the decision of the case pending before this Court*' which concerns a case brought "*to obtain the redetermination of the amount due by way of interest due on the variable-rate mortgage loan stipulated between the parties on 15-12-2005, and renegotiated on 20-02-2015*».

In light of the foregoing, the Court of Appeal of Cagliari referred the proceedings before it to the Court of Justice of the European Union to «***clarify whether, in light of the provisions of Article 16(1) EC Reg. no.1 /2003, the evidence of the manipulation of Euribor, as established in the aforementioned Commission decisions and in the judgment of the Court of Justice in Case C-883/19 HSBC Holdings and Others v Commission, must be considered to have been definitively established also for the national courts and whether the restriction of competition referred to in the judgments of the Commission and the CJEU constitutes an agreement prohibited by Article 101 only in the derivatives market or in any market in which the manipulated Euribor parameter was used***».

Italian Supreme Court, 28 Jenuary 2025, n. 1942 – floor clause: in a variable-rate loan agreement, the stipulation of a floor clause is valid where it includes a precise specification of the interest rate based on parameters set on a national scale, in accordance with interbank agreements. Moreover, such a clause is not considered unfair under article 34, para. 2, of the consumer code, as it relates to the determination of the contract's subject matter and/or the adequacy of the consideration.

The Supreme Court, in its judgment n. 1942, published on 28 Jenuary 2025, ruled on the subject of validity of the floor Clause in a loan agreement.

Preliminarily, the Court noted that «*the theory that the provision of a minimum interest rate owed by the client, included in an indexed loan agreement, would constitute an unconscious sale by the client to the lender of a floor option, and therefore a derivative contract, is a mere artifice.* ***In fact, the provision that, even in the event of fluctuations in the reference index for determining the interest rate, the debtor is still required to pay a minimum interest rate, is simply a conditional clause, in which the conditioning event is the fluctuation of the reference index below a certain threshold, and the conditional event the amount of the rate: thus, a legitimate agreement permitted by article 1353 of the civil code***».

Furthermore, the Court of Cassation also stated that «*in loan agreements, the provision concerning interest must have a completely clear content regarding the precise specification of the interest rate; if the agreed rate is variable, a reference to parameters set on a national scale in accordance with interbank agreements is suitable for its precise identification, while generic references are not sufficient if it is not clear which provision the parties intended to invoke with their agreement*».

With specific reference to the validity of the floor clause, the Supreme Court highlighted that «*in the case in question, it can be said that the functioning of the clause was clearly explained in the loan agreement, with the explicit specification that the initial interest rate would indeed be 3.25%, so that the borrower, when signing the contract, was fully aware of the amount of the consideration, which excluded from the outset the possibility that it was a clause with the object or effect of imposing terms on the consumer that they had, in fact, no opportunity to understand before concluding the contract*».

Finally, the Court emphasized that «***the floor clause contained in the contract entered into by the parties pertains to the determination of the subject matter of the contract and/or the adequacy of the consideration and, therefore, is also excluded from the assessment of unfairness under article 34, par. 2, of the consumer code, as it is formulated in a clear and understandable manner***».

COMPANY LAW

Italian Supreme Court, 23 January 2025, n. 1635 – nature of the representative of savings shareholders: the representative of savings shareholders is not a corporate body but a representative of savings shareholders, in a tendentially opposing position vis-à-vis the company in light of the protection requirements of «savings» shareholders versus «business» shareholders. Therefore, the legal standing of the savings shareholders of the merged company remains even after the effectiveness of the merger.

The Supreme Court, in decision n. 1635, published on 23 January 2025, ruled on the issue of the nature of the common representative figure of savings shareholders and the processual consequences of this qualification.

The Supreme Court first clarified what the terms of the debate are and their consequences with respect to the case brought to its attention of adhering to one thesis or the other*:* «(r)*egarding the common representative,* ***there is a debate*** *in doctrine* ***as to whether he should be considered as an organ of the company or whether, instead, he participates only in the organization of the special category****, identified by the legislator, of savings shareholders, and the debate is not without relevance to the solution of the case, since,* ***if it were an organ of the company, this could contribute to making preferable*** *– albeit, in the opinion of the Court, not entirely obligatory –* ***the thesis according to which, the issuing***

company having ceased to exist as a result of the merger by incorporation, its organs, including the common representative of the savings shareholders" organization, would cease».

The Supreme Court thus affirmed that «***the common representative is in a potentially antagonistic position vis-à-vis the issuing company****, depending on the protection of interests that the savings shareholders hold, and in dependence on the hybrid nature of the shares in question*».

In fact, the Court continued, it is necessary «*to recall the long-standing and elementary distinction, which first emerged in economic thought, between two heterogeneous groups of shareholders, on the one hand the "business shareholders", for whom the shares are an instrument of control of the company, and on the other hand the "saver shareholders" that is those who purchase the shares by way of investment, without being interested (and perhaps not even willing) to be involved in the life of the company*».

Therefore, «(w)*hile shareholders are in their capacity as shareholders of the company, while bondholders are not, but are creditors of the company, clear then appears the rationale that moved the legislator to design the figure of the common representative of savings shareholders along the lines of that of bondholders, through the double reference contained in Article 147* [TUF], *since the former are included in the structure of the company, in the broadest sense, as said*, *"with the spirit" of the latter i.e., the legislature intended here to treat the savings shareholders, who have no administrative rights but only property rights, from the aspect of the conformation of the figure of the common representative, as if they were, rather than shareholders, creditors of the company, assimilating them, in short, to creditors of the company*».

That being considered, «*the appointment of the common representative by the Court at the request also of the company's directors does not demonstrate so much its nature as an organ of the company itself, nor is it worth neutralizing the highlighted profile of alterity, of potential antagonism (…) between the company and the group of savings shareholders, with which they directors may well have an interest in interacting through the common representative, taking into account, in general, that the regulatory provision of savings shares, in addition to responding to the aforementioned need to ensure that savings shareholders are adequately protected from their income expectations, also allows entrepreneurial shareholders to strengthen the financial structure of the company without compromising its power structures*».

Therefore, regarding the nature of the common representative of the savings shareholders, the Supreme Court concluded by stating that «***it seems much easier to consider that the interests of the group are considered by the legislator in their objectivity, as protected interests, albeit ownerless, whose***

care is entrusted to an office, that of the common representative *(…)* ***aimed at the protection of the interests common to the savings shareholders***».

Premised on this qualification, the Supreme Court, in dealing with the case brought to its attention, then affirmed that «***the common representative of the shareholders, established by the legislator in order to protect the interests of the group, under a regime of exception to the general principle established by Article 81 of the Italian Code of Civil Procedure, according to which "no one may assert in his own name in the trial a right of others" shall remain in existence as long as those interests which he is obliged to protect survive***».

Accordingly, **the company may** «***become extinct by merger by incorporation****, so that the same savings shares of that now defunct company come to an end,* ***but this does not extinguish the prior interests, deserving of protection, ergo of the rights, that the group of savings shareholders of the company then incorporated, through the common representative, was entitled to assert against that company****, in a dialectical relationship that now sees the incorporating company as the counterparty*».

So, «***following a merger by incorporation, the savings shareholders of the merged company retain, until the final ruling of the court, the legitimacy to institute a claim for damages for the wrongness and inadequacy of the exchange ratio****, an action exercised in the person of their common representative, by virtue of the legitimacy attributed to him or her by the combined provisions of Articles 147 t.u.f. and 2418 civil code, challenging the resolution of the merger of their company into the merging company. And to this end it is consequently necessary to provide the instrumental means for the functioning of the separate organization of savings shareholders, and of their common representation under Article 147 t.u.f., a functioning that extends even beyond the temporal limits of its permanence since it is a safeguard provided by law precisely for the purpose of conferring effective protection on the category*».

This implies, according to the Supreme Court, that «*where their common representative, in execution of an explicit mandate from the shareholders' meeting, exercises the powers vested in him by the combined provisions of Articles 147 t.u.f. and 2418 c.c., by summoning the company to court, and subsequently, for whatever reason and in particular for the implementation of a decision of the ordinary shareholders' meeting, the special shareholder category of savings shareholders ceases to exist, this does not affect the action already brought, in dependence on a non-hypothesizable supervening lack of legitimacy of the common representative because otherwise it would attribute to the subject by definition counter interested (the majority meeting of ordinary shareholders) a paradoxical power to cancel the protection that the law instead expressly recognizes for savings shareholders*».

The Supreme Court thus held that: «(n)*o obstructive impact to the reconstruction carried out, in other words, possesses the provision of Article 2504-bis of the Civil Code, according to which "The company resulting from the merger or the incorporating company assumes the rights and obligations of the companies participating in the merger, continuing in all their relationships, including procedural ones, prior to the merger". On the contrary,* ***precisely because the incorporating company succeeds the merged company, which was the counterpart of the common representative, the intervening merger does not affect the permanence of the legitimacy (active and passive, in the terms indicated) of the latter, the entity appointed ex lege to protect the interests of the savings shareholders, a legitimacy that survives upon the extinction of the merged company, that is, within the limits of a device of prorogatio until the judicial attainment (or disavowal) of the right in dispute***».

Finally, the Supreme Court for the sake of completeness also clarified that «***the idea that the procedural legitimacy of the common representative of the savings shareholders of the absorbed company could be transferred to the common representative of the same category of the incorporating company****, to whom, in this way, it would end up conferring a right with respect to which the special organization represented and protected by him* ***is entirely extraneous*** *(…) and indeed potentially counter-interested, since the acquiring company's savings shareholders may well have an interest in ensuring that any action proposed by the acquiring company's savings shareholders (either in terms of a more favorable exchange, or of the outflow from the acquiring company's assets of a sum of money intended to compensate for the damage suffered as a result of the merger) is rejected in its entirety*».

BANKRUPTCY LAW

Italian Supreme Court, 27 January 2025, n. 1865 – subordination/postponement ("postergazione") and bankruptcy offsetting: shareholders' subordinated claims under art. 2467 c.c. cannot be offset against debts owed to the bankrupt company under art. 56 l.f.

The Italian Supreme Court, in its decision no. 1865, issued on 27th January 2025, ruled on the compatibility between the institution of subordination of claims from the repayment of shareholders' loans, governed by art. 2467 c.c., and the institution of offsetting in bankruptcy under art. 56 l.f.

Firstly, the Supreme Court referred to «*the content of the two allegedly conflicting rules, namely the provisions of Article 56 of the Bankruptcy Law and those of Article 2467 of the Civil Code, in order to understand in apicibus what is (and if there is) a legal paradigm applicable to overcome the antinomy between the two institutions, and, that is to say, whether said paradigm should be declined in terms of the "incompatibility" between two conflicting regulae iuris, or in terms of a necessary "prevalence" of one rule over another*».

With regard to abovementioned legal issue, the Court held that «*the solution (...) must be found on the ground of the already announced ontological "incompatibility" between different legal rules, which are in a relationship of applicative interference with each other*». Indeed, the Supreme Court held that «*Article 2467 of the Civil Code expresses a "strong" normative rule. That is to say, it is not a principle of law to be correlated and "compared" in a comparative, value-based context. (...) Otherwise, it is necessary to examine whether there is a substantial incompatibility between the two regulatory rules dictated respectively by Article 2467 of the Civil Code, on the subject of subordination, and by Article 56 of the Bankruptcy Law, on the subject of bankruptcy set-off*».

In light of these considerations, the Court of Cassation held that «*such incompatibility exists because* ***the subordinated claim must be "treated", in the satisfaction forum, only after all other insolvency claims have been satisfied; such claim is therefore not "comparable", for the purposes of the application of the set-off under Article 56 of the Bankruptcy Law, with another counterclaim***».

Indeed, «*differently reasoning, a substantial neutralisation of the normative precept contained in Article 2467 of the Civil Code should be admitted precisely in the temporal context of the manifestation of the effects of the business crisis, which constitutes, on the contrary, its prevailing ground of election and application*».

Therefore, the Court continued stating that «*while it is true that bankruptcy set-off, by mutually extinguishing the obligations incumbent on the parties to the relationship, allows the creditor in bonis to avoid* (...) *the harm that would result from having to regularly fulfil the performance against the bankrupt, against the latter's counter-performance in bankruptcy money, it is equally true that* ***admitting the set-off of the subordinated claim would mean nullifying the effective protection of the company's creditors that Article 2467 of the Civil Code aims to safeguard. 2467 of the Civil Code is intended to safeguard***. ***The set-off of a subordinated claim under Article 2467 of the Civil Code against a debtor declared bankrupt, or who has filed for composition, with a counterclaim claimed by the latter, would in fact result in a clear reduction of the assets intended for the satisfaction of the other creditors, which is precisely the effect that the subordination rules are intended to prevent***. *(...) Indeed, subordination protects the interests of the company's creditors which transcend the interests of the shareholders and which are not available to them*».

In conclusion, the Supreme Court of Cassation ruled that «***it is the satisfactory function of set-off****, as well as the effect that it achieves in bankruptcy (of "anterrogation" of the creditor in the proceedings), that is, in essence, the subtraction of resources to be allocated to the satisfaction of the bankruptcy creditors****,*** ***to be placed in a relationship of irremediable and ontological incompatibility - logical and legal - with the ratio of subordination under Article 2467 of the Civil Code****, a mandatory and systemic rule,*

***placed to protect the soundness of the corporate structure**, also on account of the trust that the company's creditors place in the possibility of satisfaction of their credit interests. Hence the conclusion that **set-off, in favour of the subordinated creditor, is not possible**».*

INSURANCE LAW

Italian Supreme Court, 27 January 2025, n. 1909 – characteristics of the Subsequent Decennial Liability Policy pursuant to Article 4 of Legislative Decree No. 122/2005: the subsequent decennial liability policy is considered an agreement for the benefit of any involved party, meaning that the insured, as a third party to the contract, has the right to enforce the rights arising from the insurance agreement made by the policyholder.

The Supreme Court has clarified the characteristics of the subsequent decennial liability policy as outlined in Art. 4 of Legislative Decree No. 122/2005. Indeed, Article 4 of Legislative Decree No. 122/2005 states: «(**t**)***he contractor is obliged to take out and deliver a subsequent decennial liability policy to the purchaser**, under penalty of nullity for the contract. This policy can only be enforced by the purchaser and it is intended for his benefit. **It must begin from the date the work is completed and is designed to cover damages to property**, including damages to third parties for which the contractor is liable according to Article 1669 of the Civil Code. This coverage pertains to damages resulting from total or partial ruin or serious construction defects, whether due to soil or construction faults, and must manifest after the final sale or assignment contract has been concluded».*

The Supreme Court has clarified that the purpose of the subsequent decennial liability policy is to ensure adequate protection of property rights for purchasers.

This contract should be understood as a multi-risk Insurance, whose coverage — while limited to damages outlined in Article 1669 of the Civil Code, such as damages from total or partial ruin or serious construction defects — extends beyond just material and direct damage to the property. It also includes the owner's liability for damages to third parties.

The Court emphasized that the subsequent decennial liability policy should not be classified as a «mere» builder's liability insurance. If interpreted this way, «*it could imply that only the builder is entitled to exercise the rights from the policy. In such scenario, the builder could claim indemnity from the Insurer to cover compensation they might owe to the purchaser, while the purchaser would not be able to directly seek insurance payment for themselves*».

According to the Supreme Court's decision, the subsequent decennial liability policy should be regarded as a unique form of Insurance designed for the benefit of the entitled parties. Under this policy, the Insured third party has the right to enforce the rights arising from the contract. However, it cannot be entirely ruled

out — considering the specifics of each case — that the policyholder may also hold concurrent rights. This valid and effective attribution should be determined on a case-by-case basis by the judge, taking into account the broader interests that underlie the agreement and the specific contractual terms.

ADMINISTRATIVE LAW

TAR Sicilia - Palermo, Sec. II – 24 January 2025, n. 187 – in the approval of the general regulatory plan, it must be considered that a "reinforced" motivation of the urban planning choices made by the P.A. is required only when the following occurrences occur: i) qualified private reliance; ii) modification in an agricultural zone of the destination of a limited area; iii) oversizing of the areas intended for standards.

The Regional Administrative Court of Sicily - Palermo affirmed that «(i)*n the approval of the general regulatory plan, it must be considered that a "reinforced" motivation of the urban planning choices made by the P.A. is required only when the following eventualities occur: (i) qualified expectations of the private party, arising, on the one hand, from allotment conventions or from private law agreements between the municipality and the owners of the areas, and, on the other hand, from expectations arising from judgments annulling building permits or from the silence of refusal on an application for the issuance of a permit; (ii) alteration in agricultural zoning of the destination of a limited area, interclosed by built-up land in a non-abusive manner; (iii) oversizing of the areas allocated to standards for public equipment and public interest compared to the parameters established by the Ministerial Decree of April 2, 1968*».

The commentary pronouncement specifies that «*on this basis, in the present case it must be held that: (i) there are no prior building titles, unlike the case referred to by the appellant Institute concerning the observation proposed by third parties at no. 215 which was accepted; (ii) the Institute's area cannot be considered an interlocking lot, since such characteristics, as is well known, are found only "when the area of interest is the only one that has not yet been built on, is located in an area fully affected by construction , is endowed with all the urbanization works (primary and secondary) provided for by the urban planning instruments, is enhanced by a building project fully in accordance with the Prg, so that, ultimately, one is in a factual situation perfectly corresponding to that resulting from the implementation of the executive plan" (ex multis Cons. Stato, sec. II, Dec. 9, 2020 no. 7843; (iii) there is no oversizing of the areas designated for standards in the case at hand*».

Council of State, Sec. IV – 21 January 2025, n. 416 – In line with Article 12 of Directive 2014/24/EU and Article 5 of the Public Contracts Code, in order for the requirement of analogous control in the

case of a multi-shareholding *in-house* company to be met, it is necessary that the public administrations holding minority shareholdings can still exercise analogous control jointly.

According to the Council of State, «*Administrative case law (Council of State, Sec. V, April 30, 2018 no. 2599) has clarified that, in line with Art. 12 of Directive 2014/24/EU and 5 of the Public Contracts Code, in order for the requirement of analogous control in the case of a multi-partnership in-house company to be met, it is necessary that the public administrations holding minority shareholdings can still exercise analogous control jointly and that: (a) the decision-making bodies of the controlled body are composed of representatives of all participating public shareholders, i.e., are formed from among individuals who can represent several or all participating public shareholders; (b) the public shareholders are able to jointly exercise decisive influence over the strategic objectives and significant decisions of the controlled body, in accordance with the general rules developed with respect to traditional in-house providing since the Teckal Court of Justice ruling (Nov. 8, 1999, C-107/98); and (c) the controlled body does not pursue interests contrary to those of all participating public shareholders*».

The college has, moreover, specified that «*the necessary prerequisites for the legitimacy of direct entrusting are: the total public shareholding of the capital of the company entrusted with the management of the service; the realization by the said company of the preponderant part of its activity with the controlling entities; and the similar control over the investee company by the same entities (so-called fragmented or joint control). In the latter regard, "joint" analogous control is allowed, in which it is certainly not required that each of the participating public entities be able to exercise individual power over that entity, but rather that each of the authorities themselves participate in both the capital and the governing bodies of the said entity (Council of State, sec. V, July 18, 2017 No. 3554)*».

TAR Puglia - Bari, Sec. II – 13 January 2025, n. 30 – In the matter of tenders and, in particular, of service contracts according to the criterion of awarding the economically most advantageous offer under Article 108, of Legislative Decree No. 36/2023, it must be held that, when the contracting station has expressed an assessment of non-anomaly of the offer and this has been challenged by the economic operator who was not awarded the contract, it is up to the plaintiff to prove the manifest error or contradictory nature of the administration's assessment.

According to the Bari Regional Administrative Tribunal, «*when the contracting station has expressed an assessment of non-anomaly of the tender and this has been challenged by the non-winning economic operator, it is up to the plaintiff to demonstrate the manifest erroneousness or contradictory nature of the administration's assessment, being therefore burdened with the relative burden of proof, being able to doubt the congruity of the tender, even under the specific profile relating to the cost of labor, if the discrepancy is considerable and manifestly unjustified, in the light of a global and synthetic assessment*

that is the expression of a technical-discretionary appreciation unquestionable, unless the manifest and macroscopic erroneousness or unreasonableness makes the overall unreliability of the offer evident" (cf. Council of State, Sec. V, Nov. 4, 2022, no. 9691)».