CNF Consiglio Nazionale Forense

JUSTICE AND PROFESSION
MAIN DEVELOPMENTS IN 2019

I - COMPETITION AND PROFESSIONS

In its ruling no. 13 of 2019, the Constitutional Court ruled out the possibility that the Italian Antitrust Authority (AGCM) could be qualified as a judge *a quo* for the purpose of raising questions of constitutional legitimacy.

This decision is an unprecedented in the Italian legal system. Indeed, for the first time an independent administrative Authority, the AGCM, had raised a question of constitutional legitimacy before the Constitutional Court. In the framework of a sanction procedure initiated against the Milan Notary Council, the question referred to the new second paragraph of Article 93ter of the notarial Law, which expressly provides for the removal of notarial disciplinary proceedings from the competition rules and therefore from the sanctioning jurisdiction of the AGCM.

The decision, on the other hand, highlights the difference between jurisdictional and administrative functions and recalls that the Antitrust Authority lacks those requisites of third parties and impartiality that must be considered constitutionally indispensable in the jurisdiction.

The same ruling recognizes those requisites, on the other hand, that the Organ of the Lawyers, the Consiglio Nazionale Forense, has judicial function.

II - THE REFORM OF THE CRISIS AND INSOLVENCY CODE

With Legislative Decree no. 14 of 12 January 2019, published in the Italian Official Gazette on 14 February 2019, the new Code of Business Crisis and Insolvency was introduced, with the aim of reforming the rules of bankruptcy law and insolvency proceedings in a comprehensive manner, with two main aims: to allow an early diagnosis of the state of difficulty of enterprises and to safeguard the entrepreneurial capacity of those who are facing a business failure due to particular contingencies.

Some of the most important new rules are the following: the replacement of the term "bankruptcy" with the expression "judicial liquidation", similarly to what happens in other European countries, in order to socially rehabilitate the person subject to bankruptcy proceedings; the introduction of a system of crisis alert procedures in order to allow the rapid emergence of the crisis of a company and anticipate the system of safeguards based on the prospect of recovery, business continuity and overcoming the crisis; the simplification of the provisions on bankruptcy matters as well as the reduction of the time limits and costs of bankruptcy proceedings; the establishment at the Ministry of Justice of a single register of persons habilitated to carry out, on behalf of the Court, the functions of management, liquidation and control of the company subject to bankruptcy proceedings, endowed with the requirements of professionalism, competence, experience and independence; the introduction of reward measures for the entrepreneurs who promptly detect their status of crisis; specific causes of non-punishment in the event of a bankruptcy offence.

The Consiglio National Forense has followed the genesis of the Code very closely, interacting first with Parliament and then with the Government, and submitting observations and amendments to the delegated Law and the implementing decrees.

Among the most relevant claims brought by the Consiglio Nazionale Forense, the followings can be highlighted:

a) the enhancement of the so-called OCC - Organizations of crisis composition of legal nature, already established in the Italian districts (about 120) to carry out the activities of assistance in the procedures;
b) the need to assure technical defense in the presentation of the request for restructuring, to guarantee the protection of consumer rights;
(c) the elimination of the judge's discretionary power to exclude the right to obtain compensation for the activity carried out by the crisis settlement body;
(d) the enhancement of the training already acquired by lawyers pursuant to Ministerial Decree No 202/2014 for the purposes of filling the register of professionals eligible to receive management positions in bankruptcy proceedings;
e) the request for recognition of the pre-deductibility to professionals' fees for services rendered during the alert and assisted settlement procedures of the crisis.

III - THE PROSPECTED REFORM OF THE CIVIL PROCESS

The bill of "delegated law for the reform of the civil process" drafted on December 2019 by the Italian Council of Ministers, was sent to Parliament on 9 January 2020.

The Consiglio Nazionale Forense took part in the consultations and expressed a positive opinion for:
a) Attention to ADR instruments (art. 2).
A revision of the catalogue of issues subject to compulsory mediation is planned; the extension, strongly desired by the CNF, of assisted negotiation to labour disputes; the provision, during assisted negotiation, for lawyers to collect witnesses that can be used in the subsequent and possible trial. Simplifications are also envisaged in the drafting of the assisted negotiation agreement (also using a model drawn up by the CNF).
b) Simplification of the measures relating to inadmissibility and extinction on appeal. Repeal of the so-called filter (art. 348 bis s.), which is very rarely used in practice (art. 5).

Not equally satisfactory, on the contrary, the provision of a single procedural rite for disputes in which the Court decides in monocratic composition. The Consiglio Nazionale Forense believes that this modification does not ensure positive impact on the timing of the civil trials, when it certainly compresses the legal guarantees, and the possible reform of "proceedings in chambers" (art. 9) relating only to the composition of the Court. Best reform should reserve to the Court to manage cases where rights have to be protected, removing the Court from the management of administrative cases.

IV - THE "BRIBE DESTROYER " LAW

Law no. 3 of 9 January 2019 represents the latest in a series of regulatory interventions that have pursued the fight against corruption in the last two legislatures.

On 31 January 2019, the following accessory penalties in the event of conviction for crimes against the Public Administration have been implemented:
- the inability to negotiate with the public administration and disqualification from public office become perpetual in the event of a conviction of more than 2 years imprisonment;
- rehabilitation has no effect on accessory perpetual sentences;
- the inability to bargain with the Public Administration is also introduced as a disqualification measure, which applies to the defendants before their convictions.

Penalties for bribery offences for the exercise of the function pursuant to Article 318 of the Italian Criminal Code are increased (the band increases from 1-6 years to 3-8 years) and

embezzlement pursuant to Article 646 of the Italian Criminal Code (from imprisonment up to 3 years and a fine up to €1032 to imprisonment from 2 to 5 years and a fine from €1,000 to €3,000).

There is a case of non-punishability for those who cooperate with the justice system, provided that there is a spontaneous confession by the person concerned before having knowledge of the investigations against him/her and in any case within 4 months of the commission of the crime.

The offences of bribery between private individuals (art. 2635 civil code) and incitement to bribery between private individuals (art. 2635-bis) become punishable ex officio.

The duration of disqualification sanctions against companies and entities responsible for crimes against the Public Administration is increased.

With an amendment to articles 9 and 10 of the Penal Code, it is provided for the possibility of prosecuting Italian or foreign citizens who commit certain offences against the Public Administration abroad, without the need for a request from the Minister of Justice and in the absence of a complaint by a party.

Measures are introduced to strengthen the fight against corruption also on the front of criminal investigations through undercover agents and the use of Trojans.

Finally, changes to the penitentiary system are planned, so that those convicted of certain crimes against the Public Administration will not be able to access prison benefits and alternative measures to imprisonment.

The proliferation of corruptive phenomena - and the persistent difficulty of curbing their diffusion and their immediate and systemic scope - undoubtedly represents one of the factors which is the greatest hindrance to the competitiveness and growth of the country's system: in fact, it undermines, at the same time, the effectiveness and efficiency of administrative action but also, more generally, the position of economic operators who enter - or intend to enter - in relation to the public administration in the exercise of their activity (for example, by participating in tenders or the stipulation of public contracts). The latter, if virtuous, see in fact damaged - as a result of the corruptive system - their chances of participating in the allocation of public resources in conditions of legality and balanced competition.

For these reasons, Consiglio Nazionale Forense reiterates, in principle, its support for forms of analysis and initiatives aimed at fighting the corruptive phenomenon.

At the same time, the CNF is aware of the need to pursue this objective in an effective and, above all, systemic manner: in this regard, it must therefore be observed from the outset that an effective anti-corruption strategy should merge the penal repressive instrument with public policies against corruption, aimed at making administrative action more efficient and transparent.

The phenomenon of corruption is first and foremost the result of the exasperated bureaucracy that suffocates our country: the more formal obstacles the citizen has to overcome in order to obtain a concession or an assignment from the Public Administration, the greater will be the temptation to identify a shortcut, the more bureaucratic steps to follow, the more complex it will be to identify responsibilities within the P.A. itself, the more uncertain are the uncertainties dictated by regulations based on forms of formal prevention, the more judicial disputes will arise and the more the public administrator will be discouraged from assuming operational responsibilities.

V - PRESCRIPTION IN CRIMINAL PROCEEDINGS

The reform of the prescription was also introduced by law of 9 January 2019, no. 3, on "Measures to combat crimes against the public administration, as well as on the statute of

limitations and on the transparency of political parties and movements" (the so-called “bride destroyer or sweep-corruption law"). The new provisions entered into force on 1 January 2020.

The reform impacts on articles 158, 159 and 160 of the Criminal Code and concerns the prescription of the crimes, which is subject to changes both on the *dies a quo* side and, above all, on the *dies ad quem* side.

As far as the *dies a quo* is concerned, a limited intervention, but relevant for the practice, concerns the continued crime and makes the prescription start to run from the moment in which the continuation ceases, moving forward in time the moment in which the prescription operates. With regard to the *dies ad quem* of the expiry of the prescription of the crime, it is anticipated for the first time with respect to the final sentence and is expressly identified as the one in which the sentence of first instance becomes enforceable or the decree of conviction becomes irrevocable.

The impact on the duration of the trial is evident. Without the prospect of the prescription of the crime, the running terms of which will be suspended after the first degree judgement (or the conviction decree), the appeal process could last much longer than it already does today, and the process in the Supreme Court could slow down, reversing a positive trend in the time it has been defined in recent years. Longer trials (even endless, it has been said) could affect not only those convicted at first instance, but also those who have been acquitted, and would also end up frustrating the victims' demand for justice, which the reform would instead like to satisfy, reducing the number of crimes that are statute-barred.

In view of this, the Consiglio Nazionale Forense has sent a request to the Minister of Justice to postpone the entry into force of the prescription for the period necessary to carry out appropriate monitoring of the effective reduction of the trial time, as soon as the criminal reform is approved, while maintaining the procedural guarantees for the accused persons. Once this monitoring period is over, the legislator will be able to consider whether or not a new prescription regime should be applied.

VI - SELF-DEFENCE

The new law no. 36 of 26 April 2019 introduced the new figure of home self-defence into the Italian penal system.

This new law states, *inter alia*, that *"those who perform an act to reject the intrusion carried out*" in their own home, "*always act in a state of self-defense*", since "always" there is a relationship of proportionality between the defense and the offense.

Article 2 modifies Article 55 of the Criminal Code by excluding, in the various cases of legitimate home defense, the punishability of those who, "*finding themselves in a state of impaired defense or in a state of serious disturbance, resulting from the situation of danger, commit the act in order to safeguard their own or others' safety*".

Article 3 provides that in cases of conviction for apartment theft, the conditional suspension of the sentence is subject to full payment of the amount due for compensation for damages to the injured party.

Therefore, when natural persons are attacked in their own home, self-defence is considered always proportionate to the offence. It is possible to reject violent or threatening intrusion, without being punishable for having acted in a situation of impaired defense, or in a state of serious danger. Those who are acquitted criminally have no obligation to pay damages and the thief's relatives cannot claim compensation.