CNF
Consiglio Nazionale
Forense

Bureau of Studies

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In the course of 2021, the Italian Parliament enacted important reforms in the area of civil and criminal justice, with the instrument of the Delegated Law that contains the general principles to which the Government will have to conform when issuing specific regulations (legislative decrees) implementing the general provisions. During the process for the adoption of the regulations, the Bar has punctually interacted with the Government and the Parliamentary Bodies, often listened to and at other times disregarded.

1. REFORMS IN THE AREA OF CIVIL PROCEDURE

The normative text of reference is Law No. 206 of 26 November 2021 ***"Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of alternative dispute resolution instruments and urgent measures for the rationalization of proceedings concerning personal and family rights as well as enforcement".***

Before analyzing the details of the text of the ***enabling act***, it should be specified that the CNF (Consiglio Nazionale Forense – Italian Bar Council) has repeatedly emphasized that - in order to pursue the goal of making trials faster and thereby guaranteeing the effectiveness of judicial protection - a serious investment in the recruitment of new magistrates and an equally serious reflection on the organization of justice were necessary. On the contrary, action is taken almost exclusively and massively on procedural rules.

The delegated law of very broad application aims to affect the four books of the Code of Civil Procedure and the discipline of ADRs and provides for principles aimed at:

- incentivizing the resort to mediation and assisted negotiation; making the discipline of arbitration more efficient;
- revising the structure of the first instance trial;
- modifying the discipline of appeals;
- simplifying and facilitating access to executive protection;
- favoring recourse to the telematic notification of judicial acts; incorporating, under certain conditions, some of the emergency solutions (remote hearing or so-called "by paper") introduced to cope with the Covid-19 pandemic;
- reforming proceedings in matters of personal and family rights and establish the new court for persons, minors and the family.

The law also contains provisions of immediate application (paragraphs 27/37) intended to take effect on the 22 June 2022 for proceedings introduced as from that date in matters of family and children disputes, also for enforcement, and citizenship disputes provided by paragraphs 27 to 36.

The legislative text must be judged **positively regarding the establishment of the Court for Persons, Juveniles and Families (Article 1(24)).** A clearer and more qualifying specialization of the judge, the reunification under common rules of matters similar in terms of protected interests fully meet the objective of guaranteeing a faster and fairer trial.

Equally positive is the verdict on other provisions, such as:

a) the delegation aimed at **"the reorganization and implementation of the provisions on the Electronic civil Procedure"** limited only to civil process and not - as would have been preferable - to administrative and tax proceedings as well (**Article 1, paragraph 17(h)**).

b) the delegation of power to completely revise the **voluntary jurisdiction proceedings** attributed to the jurisdiction of the ordinary and juvenile courts, providing that those "unconnected" with the exercise of judicial activity may be transferred to the administrations concerned, to notaries and "to other professionals with specific skills" (**Article 1, paragraph 13(b)**). In the current situation of civil

justice, in fact, it seems necessary to preserve the resolution of disputes exclusively to the courts, assigning the matters of pure voluntary jurisdiction to others.

c) the elimination of the enforcement order - and, therefore, the possibility of taking executory action on the basis of a certified copy conforming to the original writ of execution – makes it possible to eliminate unnecessary formalities for the administrative staff of the judicial offices, for notaries (or for registrars of notary archives) and also for lawyers (avoiding the burden of having to request the affixing of the order for enforcement and the issue of the enforceable copy, since they can extract copies of the judicial orders from the PCT- *Processo Civile Telematico*, i.e. Electornic Civil Procedure - also certifying compliance with the respective originals). This is in line with the requests made by the CNF (**Article 1, paragraph 12(a)**).

d) the interventions on the proceedings before the Italian Supreme Court (*Corte di Cassazione*) with the unification of the rites and the elimination of the "special filter section" (**Article 1, paragraph 9(b)**)

On the contrary, positive judgment cannot be expressed as to the further criteria of delegation, neither in terms of the individual solutions adopted nor and especially with reference to the objective of simplifying the judgment and reducing the time of judicial assessment.

As for the first court instance, at least 3 different rites will have to coexist - monocratic cognition; collegial cognition; simplified cognition - in addition to the special rites of labor and persons, children and families. The model rite will be the one dictated for ordinary cognition before the Court in monocratic composition, which - **as for the introductory phase** - is articulated on the basis of a legislative precedent (later repealed in its entirety), namely on the special trial for commercial and corporate disputes (Legislative Decree No. 5/2023). In a nutshell, the exchange of the pleadings currently envisaged as a written appendix to the proceedings before the court is anticipated at a time preceding the first hearing (**Article 1, paragraph 5(d/f)**). Such system delays the first contact between the parties and the judge without eliminating the latter's necessary powers of control, so that -in case of irregularity of the acts- the time for the actual handling of the case will eventually lengthen even further. It is also too complex a mechanism for simple cases while it presents a high risk of irregularities for complex cases (e.g. for multiple parties).

The overall delay is aggravated by changes in the **decisional phase**:

- the simple model of judgment, which is the one following oral hearing (Article 281-sexies c.p.c - the Italian Code of Civil Procedure) is burdened by the provision of the possibility - currently not contemplated - of the judge reserving the filing of the judgment by postponing it to a moment after the hearing (**Article 1, paragraph 5 (l no. 1)**).

-the more complex model consists of one hearing («remittance of the case for decision ») and three statements of case/pleadings prior to judgment (**Article 1, paragraph 5 (l. no. 2)**). On the contrary, the current rules provide for one hearing (for closing arguments) and a maximum of two pleadings.

In the course of the trial, **interim summary measures of acceptance or rejection** may be taken which are difficult to exegete and which - by providing for a complaint mechanism – risk to further complicating and dilating the process (**Article 1, paragraph 5 (o and p)**).

In the course of the trial, it is possible, by means of a **«reference for a preliminary ruling»** (interlocutory referral) to refer to the Supreme Court (*Corte di Cassazione*) questions of interpretation involving the necessary suspension of the trial (**Article 1, paragraph 9(g)**). The institution will lead to an increase in the load of the Supreme Court, an inevitable lengthening of the time of the assessment and a deresponsibilization of the judges of merit.

As for the appeal process, the proposed solutions essentially reproduce past and subsequently outdated disciplines (strengthening of the figure of the examining magistrate).

Apart from what has already been pointed out, in other respects, the delegation provisions bring to fruition solutions that have already been tried and tested in the emergency period (alternative methods

of handling disputes; electronic notifications and filings) or intervene on terrain that is already too heavily regulated (forced execution) without proposing models of particular impact.

In conclusion, it seems that the Legislator has retraced for the umpteenth time roads already crossed in the past 15 years without any obvious benefits. Despite the fact that the persistent problem of the time length of civil assessment suggested the adoption of different strategies and measures, the reform of the civil process functional for accessing the Next generation EU funds is based on the extension of contingent jurisdictional hypotheses to the ADR procedure experiment, the tightening of the discipline of financial penalties and on the prediction of massive changes of rites, almost always aimed at a summary of the assessment.

2. REFORMS IN THE AREAS OF CRIMINAL PROCEDURE

In the context of criminal procedure reform, the *Consiglio Nazionale Forense* (CNF - National Bar Council), has played a decisive role having put forward proposals and requests for corrective measures in the relevant parliamentary and ministerial forums.

In general, **the assessment of the reform of the criminal procedure is positive** (as referred by the delegated law of September 27, 2021, n. 134), even without the implementing decrees, which are still being drafted[1].

In particular, the interventions evaluated positively are:

- relating to **the digitalization of the criminal procedure** that will allow the telematic filing of acts and documents as well as being able to provide, where possible, communications and notifications in the same manner;

- concerning the **regime of notifications to the defendant and the trial in absence of the latter** it is provided that only the first notification to the defendant, in which he takes note of the proceedings against him, and those relating to the summons at first instance and on appeal, will be made personally to the defendant; all others may be made to the trusted lawyer, to whom the defendant will have the responsibility of communicating his contact information;

- relating to **preliminary investigations and preliminary hearing** with the aim of overcoming the criterion of the abstract usefulness of the examination and legitimizing the establishment (or continuation) of the trial only in cases where it is reasonable to expect a conviction. It also provides for the remodeling of the duration of preliminary investigations (6 months for contraventions, one year for the offences, one and a half years for the most serious offences, without prejudice to the possibility of extension for a period not exceeding six months in the event of complexity of the investigation);

-relating to the **extension of applicability of special procedures** (plea bargaining, shortened judgment, decree procedure);

- relating to the **exclusion of punishable offences on account of the particular tenuousness of the offence** with the aim of avoiding trials for petty (not serious) offences;

- concerning the **extension of the suspension of proceedings with probation of the defendant** for crimes punishable by a custodial sentence not exceeding a maximum of six years, in which the perpetrator takes part in resocializing or restorative paths.

The **National Forensic Council had evaluated, and <u>still evaluates negatively</u>** the provision whereby in the **appeal proceedings**:

[1] The Minister of Justice has established 5 working groups: 3 groups on trial reform, one related to the penalty system and one related to restorative justice. It should also be noted that a sixth group was established on April 14 on digitalization.

a) it is established that with the statement of appeal, under penalty of inadmissibility, a declaration or election of domicile must be filed for the purpose of notification of the appeal. The said provision makes it impossible, in fact, to file an appeal in cases where the defense counsel is unable to find the defendant convicted at first instance with the effect that, once the time limit for lodging an appeal has expired to no avail, the latter will no longer be able to file it;

b) the legislator is mandated to eliminate the provisions that allow the appeal to be lodged in the registry of a judicial office other than the one that issued the act to be challenged and to proceed by telegram or registered letter. This provision, in fact, prevents the so-called 'external appeal', i.e. the possibility for the defendant to file the appeal in a judicial office other than the one that issued the judgment.

Further concerns were raised by the CNF (Italian National Bar Council) with regards to the **inadmissibility of appeals due to exceeding the time limit**.

This provision, which is immediately prescriptive, provides that the failure to finalise the appeal proceedings within the two-year time limit, and the Supreme Court (Corte di Cassazione) proceedings within the one-year time limit, constitute grounds for declining to prosecute: this means that the Court of Appeal, or the Supreme Court, having determined that these time limits have been exceeded, will have to, in reform or after annulment of the contested judgment, declare that there is no need to proceed.

These are the remarks:

a) As for the declaration of inadmissibility, there is neither conviction nor acquittal; previous decisions of both conviction and acquittal are absorbed; personal precautionary measures (including those for the protection of the victim) and real measures are forfeited; the defendant loses the right to compensation for unjust imprisonment; provisionally enforceable civil measures as well as confiscation decisions are forfeited; there is no decision on the plaintiff; the judgement has no res judicata authority in civil or disciplinary proceedings; questions arise as to the probative value of the material in other proceedings; in the event of annulment with reference for the determination of the penalty, the res judicata on liability is lost; perhaps the defendant can avail himself of the Pinto Law;

b) the unreasonableness of the chronological timing of the possible procedural courses of action (e.g.: eight years at first instance; two years on appeal and one in Supreme Court: perfectly legitimate, and one year at first instance, three years on appeal with a declaration of improbability) which is offset by the unreasonableness of the judge's power to determine, on his own initiative (albeit appealable), the duration of the trial even with unlimited extensions.

Lastly, the National Bar Council would like, and has proposed, that further and different measures be taken with the aim of:

(a) make the no-fault principle effective in order to exclude no-fault and abnormal liability hypotheses.

(b) enhancing the so-called principle of code reservation in order to rationalise the offence hypotheses contained in complementary laws, avoiding useless and harmful overlaps or difficult and complex systematic reconstructions due to the Legislator's increasingly frequent use of the technique of recetical references.

(c) intervene on the hypotheses of administrative and corporate liability arising from offences in order to describe in a precise, clear and peremptory manner the hypotheses of "'aggression' against the assets of companies by reducing the hypotheses of application of preventive measures and assessing the applicability of sanctioning measures of an administrative and/or pecuniary nature;

(d) increase the staffing of the judiciary, chancellery staff, regarding an appropriate allocation of resources and a proper "restructuring of judicial buildings";

(e) reduce the recourse to organisational measures of the heads of offices or to the identification of priority criteria in the handling of criminal matters delegated to persons outside the legislative framework of the primary source.