INTESA ANTICONCORRENZIALE E INVALIDITÀ DEL CONTRATTO "A VALLE": IL CASO DELLE FIDEIUSSIONI *OMNIBUS*

SOMMARIO: 1. Abstract. – 2. State of the art. – 3. Definition of the project purpose and awaited outcomes. – 5. Bibliography.

1. Abstract.

The project starts with the legal analysis of omnibus guarantees conforming to the ABI model and their invalidity profiles. Recently, the issue has been the focus of extensive litigation, which culminated in the very recent, but well-known, the decision of the United Sections of Supreme Court no. 41994/2021 in favour of their partial nullity. Even though it acknowledges the merit of having resolved the jurisprudential contrast (total and arbitral) that had been created, this decision was not shared by part of the doctrine, especially for the argumentative path followed.

This analysis aims to make an original and topical contribution to the doctrinal discussion on the effects of the finding of the anticompetitive nature of 'upstream' cartel in terms of the lawfulness or invalidity of 'downstream' contracts[1].

Therefore, the crucial point will be the identification of the best remedy to protect the guarantor. This objective will be achieved by investigating the reasons why jurisprudence and doctrine are divided between so-called "real" protection and compensation protection.

2. State of the art.

2.1. Premises.

In 2003, the Italian Banking Association (ABI) developed a negotiation model for sureties placed as a guarantee for banking transactions as an exception to the codified model. These general contractual conditions are characterised mainly by the so-called "revival clause" (Art. 2), the so-called "clause of waiver of terms according to art. 1957 of the Civil Code" (Art. 6) and the so-called "survival clause" (Art. 8), with which banking institutions can better defend themselves against the risk of the debtor's insolvency as well as any paralysing procedural objections[2].

[1] CAMILLERI E., *Contratti a valle, rimedi civilistici e disciplina della concorrenza*, Napoli, 2008; LONGOBUCCO F., *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione a valle*, Napoli, 2009; FEDERICO R., *Operazione economica e nullità dei contratti derivati da intesa anticoncorrenziale*, in *Corr. Giur.*, 2018, 1063-1074; D'ORSI S., *Nullità dell'intesa e contratto "a valle" nel diritto antitrust*, in *Giur. comm.*, 2019, 575-585.

[2] SICCHIERO G., *Sulla nullità della deroga all'art. 1957 c.c. (e di altre clausole delle fideiussioni omnibus) per violazione della disciplina antitrust (art. 2 l. n. 287/1990)*, in *Foro Pad.*, 2017, I, 200-207; MASSARELLI R., *Il vaglio di essenzialità delle clausole ABI, contenute nei modelli di fideiussione omnibus censurati dalla Banca d'Italia*, in *Contratti*, 2021, 286-294.

Before it became widely spread among the ABI banks, this negotiation model has been notified to the Bank of Italy, which was the competition authority among credit institutions[3].

Nevertheless, with Provision no. 55 of 2 May 2005, the Bank of Italy held that precisely the three beforementioned clauses, insofar as they determine an excessive contractual imbalance in favour of the creditor, "*nella misura in cui vengano applicate in modo uniforme, sono in contrasto con l'articolo 2, comma 2, lettera a), della Legge. n. 287/90*"[4], i.e., with antitrust law. Guarantees that conform to the model drawn up by the ABI are qualified as cartel restricting competition because they are considered excessively burdensome for the guarantor and potentially able to distort the market if applied across the board.

One of the peculiarities of the event can be seen in the circumstance that the credit institutions, despite the Bank of Italy's measure, continued to include such clauses in loan contracts. Therefore, for many years, conditions have been applied in 'downstream' contracts that refer to an 'upstream' cartel in breach of antitrust rules.

The validity or invalidity issue of omnibus guarantees has started to raise a great deal of interest, with numerous decisions of the toggle judges and the Banking and Financial Arbitration (ABF), following the order of Cass. no. 28910/2017[5]. This occasion took the nullity of the guarantee contract, i.e. of that "downstream" contract that constitutes the application of the illicit cartel concluded "upstream", considering that "*rientrano sotto quella disciplina anticoncorrenziale tutte le vicende successive del rapporto che costituiscano la realizzazione di profili di distorsione della concorrenza*".

The wide range of disputes that have arisen to obtain a declaration of nullity of guarantees (whose content conforms to the ABI model and the opposing jurisprudential orientations on the protection of the guarantor) drove the First Civil Section of the Supreme Court to refer to the matter to the United Sections[6].

2.2. Effects of the anticompetitive cartel on "downstream" contracts.

Art. 2, law no. 287/1990 forbids and provides the invalidity for all purposes of "*intese tra imprese che abbiano per oggetto o per effetto di impedire, restringere o falsare in maniera consistente il gioco della concorrenza all'interno del mercato nazionale o in una sua parte rilevante*"[7]. Moreover, to protect the proper

[3] La Banca d'Italia ha esercitato le funzioni di tutela della concorrenza nel settore creditizio fino al gennaio 2006, secondo quanto previsto dalla L. n. 287/1990.

[4] Banca d'Italia, provvedimento del 2 maggio 2005, n. 55 "*ABI - Condizioni generali di contratto per la Fideiussione a garanzia delle operazioni bancarie*". Reperibile sub *https://www.bancaditalia.it/compiti/vigilanza/avvisi-pub/tutela-concorrenza/provvedimenti/prov_55.pdf*.

[5] LIBERTINI M., *Gli effetti delle intese restrittive della concorrenza sui cd. contratti "a valle". Un commento sullo stato della giurisprudenza in Italia*, in *Nuova giur. civ. comm.*, 2020, 378-396; VISMARA F., *Intesa anticoncorrenziale ed effetti sui contratti "a valle": riflessioni alla luce dei più recenti orientamenti giurisprudenziali*, in *Contratti*, 2021, 323-328.

[6] Ordinanza di rimessione della Cass. n. 11486/2021.

[7] Queste intese possono consistere nel "*a) fissare direttamente o indirettamente i prezzi d'acquisto o di vendita ovvero altre condizioni contrattuali; b) impedire o limitare la produzione, gli sbocchi o gli accessi al mercato, gli investimenti, lo sviluppo tecnico o il progresso tecnologico; c) ripartire i mercati o le fonti di approvvigionamento; d) applicare, nei rapporti commerciali con altri contraenti, condizioni oggettivamente diverse per prestazioni equivalenti, così da determinare per essi ingiustificati svantaggi nella concorrenza; e) subordinare la conclusione di contratti all'accettazione da parte degli altri contraenti di prestazioni supplementari che, per loro natura o secondo gli usi commerciali, non abbiano alcun rapporto con l'oggetto dei contratti stessi*".

working of the markets, art. 33 of the same law provides for the possibility of acting to enforce such nullity and/or to obtain compensation for the damage inflicted.

The literal datum of art. 2, however, seems to exclude that nullity "to all effects" also extends to contracts entered into "downstream" in compliance with anti-competitive cartel "upstream".

Since the entry into force of law no. 287/1990, the doctrine has therefore questioned the effects that the finding of the restrictive character of a cartel (for this reason unlawful) has on the 'downstream' contract, mainly in terms of its lawfulness or invalidity.

The issue focal point is that these contracts, even if they are not covered by specific antitrust prohibitions, are still the acts through which the proper functioning of markets is affected. They can be defined as the executive moment of the anti-competitive cartel.

Therefore, three possible solutions have been envisaged: an exclusively compensatory protection or a so-called "real" protection, in other words, a declaration of total nullity or partial nullity (limited to clauses conforming to the ABI model) of the surety bond contract[8]. The United Sections no. 41994/2021 addressed the issue and ruled in favour of partial nullity[9].

2.3. Invalidity of the "downstream" contracts and exclusion of damages.

On several occasions, part of the doctrine has attempted to justify the nullity of contracts entered into 'downstream' of the cartels, arguing that such invalidity would allow the ratio of the antitrust discipline to be respected.

According to a first reconstruction, guarantees conforming to the ABI model would be affected by a so-called "derivative nullity" due to their negotiated connection with the "upstream" cartel, of which they represent the moment of execution. According to another reconstruction, these sureties would be null and void under Article 1418 of the Civil Code due to violation of a mandatory provision, in this case, art. 2, law no. 287/1990.

However, both are open to criticism. As mentioned earlier, the United Sections have nevertheless ruled in favour of the invalidity of contracts, rejecting protection in terms of compensation only.

Among the several reasons for excluding the remedy of damages is the so-called 'principle of effectiveness'. According to this principle, it is necessary to remove any possible advantage that enterprises (in our case, the credit institutions) may derive from the transactions carried out in the execution of the unlawful cartel[10]. From the United Sections' point of view, only a declaration of nullity of the 'downstream' contracts has the necessary deterrent effect on the banks and allows the ratio of the antitrust legislation to be fully

[8] GENTILI A., *La nullità dei contratti a valle come pratica concordata anticoncorrenziale. (Il caso delle fideiussioni ABI)*, in *Giust. civ*., 2019, 675-705; PILETTA MASSARO A., *Pratiche concordate contrarie al diritto antitrust: il caso delle fideiussioni omnibus redatte secondo lo schema ABI*, in *Riv. dir. banc*., 2020, 257-278; RENNA M., *La fideiussione omnibus oltre l'intesa antitrust*, in *Riv. dir. civ.*, 2021, 572-602.

[9] VOTANO G., *Gli effetti delle intese restrittive della concorrenza sulle fideiussioni "a valle": la pronuncia delle Sezioni Unite*, in *Contratti*, 2022, 152-161.

[10] DENOZZA F., *I principi di effettività, proporzionalità ed efficacia persuasiva della disciplina dei contratti a valle di intese e abusi*, in *Riv. dir. ind.*, 2019, 354-375.

realised[11]. On the other hand, the compensatory remedy does not provide the same guarantees since realistically not all guarantors would take legal action and it is not certain that all of them would see their claims granted.

The main reason for this argument, however, is teleological. The United Sections state that the underlying ratio of antitrust law is the protection of the general interest in the proper functioning of the market, respecting the principle of free competition. Such regulation aims at pursuing a higher interest than the interest - still protected - of the contracting party (extraneous to the unlawful agreement) not to be prejudiced. That said, the United Sections conclude that the so-called 'real' protection, i.e. the declaration of nullity of contracts 'downstream', is the only one that allows the proper functioning of the market to be guaranteed.

Guarantees are affected by a nullity that is expressly defined as 'special', in so far as it is governed not by the civil law provisions of art. 1418 et seq. of the Civil Code, but directly by the antitrust law.

2.4. Partial nullity and the "principle of preservation of the contract".

After opting for the invalidity of 'downstream' guarantees, the United Sections had to choose between partial nullity - which would have affected only the anti-competitive clauses conforming to the ABI model - and total nullity.

The acceptance of this last thesis would have had significant negative repercussions on the banking systems' stability. Moreover, there would have been a risk of opportunistic behaviour from the guarantors. In case of economic difficulties on the part of the principal debtor, the guarantors could have taken legal action to have the surety declared null and void, even though at the time the contract was concluded, they had had every interest in finalising the economic transaction even with the clauses following the ABI model. Possibly influenced by these risks, United Sections chose the solution of partial nullity of guarantees.

The first argument in support of this decision came from what is called 'european living law' drawn from numerous decisions of the Court of Justice. Extending the analysis of the nullity of 'upstream' cartels to entire Europe, it is observable that Court of Justice declare such stipulations only partially null and void, preserving those parties that do not affect the proper functioning of the markets. The United Sections logically observe that 'downstream' contracts cannot be declared void if the 'upstream' cartel is partially null only.

However, the crucial element which supports the partial nullity of sureties derives from the general principle of preservation of legal transactions. In the case under consideration, art. 1419 of the Civil Code assumes particular importance. From this article it emerges that the partial nullity (or total nullity) of the contract extends to the entire legal transaction only exceptionally, i.e. when it turns out that the contracting parties would not have concluded the contract without the clauses complying with the ABI.

This circumstance, however, is considered "very difficult to prove". On the one hand, the guarantor would have certainly provided the guarantee even in the absence of such clauses - unless proven otherwise - as they are more burdensome for his position. On the other hand, the United Sections consider "quite evident"

[11] DENOZZA F., *Incongruenze, paradossi e molti vizi della tesi del "solo risarcimento" per le vittime di intese ed abusi*, in *Nuova giur. civ. comm.*, 2020, 406-414; DOLMETTA A.A., *Fideiussioni bancarie e normativa antitrust: l'urgenza della tutela reale; la qualità della tutela reale*, in *Riv. dir. ban.*, 2022, 1-24.

the interest of banking institutions in maintaining the sureties even in the absence of such clauses, given the lesser guarantee they would have in the case of their total lack.

2.5. Contractual imbalance and criticism of "real protection".

Although everyone recognises that 'downstream' contracts constitute the enforcement moment of 'upstream' cartels, i.e. the acts through which the distortion of markets materialises, the choice to admit their invalidity lends itself to incisive criticism[12].

First of all, it should be emphasised that the 'downstream' contracts, individually considered, do not conflict with any antitrust or mandatory rules tout court and are therefore lawful. It is only due to the uniform application by the banking institutions participating in the illegal arrangement that the conflict with antitrust law materialises. The violation relates to the behaviour of companies, thus to a 'rule of conduct' and not to a 'rule of validity' of individual acts.

Precisely because it is a 'rule of conduct' that is violated, the choice of the caducatory remedy seems to be open to criticism. Indeed, the declaration of nullity of 'downstream' contracts seems to depend - the contractual content being equal - on the presence or absence of an agreement restricting the competitors, i.e. on a factual and not a legal circumstance such as the structure of the market.

According to part of the doctrine, the appearance of an anti-competitive cartel 'upstream' does not affect the validity of contracts 'downstream' but brings about a problem of 'contractual imbalance'. The cartel prevents different contractual conditions from being offered on the market. This lack of competition, therefore, has two effects, one consequential on the other:

1. companies increase their bargaining power and may impose unbalanced contractual conditions on customers;
2. customers cannot defend themselves against such a bargaining system, as the lack of competition deprives them of the alternative of relying on competitors who might offer the same services at better conditions.

However, the solution could not lie in a declaration of nullity of the contract 'downstream'. On the contrary, it is necessary to re-establish the contractual equilibrium that only the correct functioning of the market can ensure, thinking from a perspective of 'correction' of the contract and not its nullity. Part of the doctrine, therefore, considers a compensatory protection preferable: compensation for damages (even in a specific form) would make it possible to preserve the contract and, at the same time, re-establish the contractual equilibrium and eliminate the prejudice suffered by the customers.

3. Definition of the project purpose and awaited outcomes.

[12] CAMILLERI E., *Validità della fideiussione omnibus conforme a schema tipo dell'ABI e invocabilità della sola tutela riparatoria in chiave correttiva*, in *Nuova giur. civ. comm.*, 2020, 397-405; GUIZZI G., *I contratti a valle delle intese restrittive della concorrenza: qualche riflessione vingt ans après, aspettando le Sezioni Unite*, in *Corr. giur.*, 2021, 1173-1180.

One of the project's main aim is to give an original and modern contribution to the doctrinal discussion on the effects of the assessment of the anti-competitive nature of the 'upstream' cartel in terms of the lawfulness or invalidity of the 'downstream' contracts. This purpose will be possible to realize thanks to the analysis of the case of omnibus guarantees conforming to the ABI model.

The prime aim of the project is to investigate and understand the legal relationship between the anti-competitive cartel and the 'downstream' contracts, to be able then to debate on the possible invalidity of the latter.

Therefore, particular attention will be paid to the identification of the best remedy for the protection of the guarantor - or, more generally, of customers who adre extraneous to the cartel - through the examination of the reasons why case law and doctrine are divided between a so-called "real" protection and compensatory protection.

The first expected outcome from the project is presumably an organic reconstruction and critical analysis of the main doctrinal and jurisprudential theories on anti-competitive cartel and the invalidity of 'downstream' contracts.

The second expected result is the identification, after highlighting the benefits and criticalities accompanying the so-called "real" protection and the indemnity protection, of the best remedy to protect the guarantor or, more generally, the customers who are not involved in the cartel.

It is intended to make an original and innovative contribution that is not limited to the issue of omnibus guarantees but can help the doctrinal discussion on actions for damages and contract invalidity in European private antitrust law.

4. Innovative elements and research outline.

The main innovative element is the methodological approach at the project's root. An extremely current topic such as the omnibus surety affair will make it possible to investigate and give an original contribution to a classic theme such as the effects of ascertaining the anti-competitive nature of 'upstream' agreements in terms of the lawfulness or invalidity of 'downstream' contracts.

Moreover, the project's innovativeness is linked precisely to the timing of the case under examination. Although already in 2005 the Bank of Italy had declared the illegality of the three clauses of the ABI model, the subject of the validity or invalidity of omnibus surety bonds began to awaken interest only after the order of Cass. no. 28910/2017, and then arrived at the very recent decision of the United Sections of 30 December 2021.

A further innovative element of the project consists in its interdisciplinarity. Along the three-year period, there will be investigations on classic private law topics, such as the nullity of contracts and the regulation of surety bonds. There will also be investigated the national and European competition.

At first year, it will be analysed the main case-law and ABF decisions on omnibus guarantees in recent years. The focus will be on the argumentative path followed by the United Sections in their 2021 decision. This analysis is most likely to occupy the first year of the doctoral course.

The second year will based on the examination of competition law. The focus will be the concept of anti-competitive agreements and the relationship between the latter and 'downstream' contracts.

The aim is to combine the second year with the study period abroad to have the opportunity to study more profitably European 'antitrust' private law with the help of foreign texts.

The third-year will test which legal reasoning followed in the case of omnibus guarantees can find general application in the relationship between 'upstream' and 'downstream' contracts.

5. Bibliography.

CAMILLERI E., *Contratti a valle, rimedi civilistici e disciplina della concorrenza*, Napoli, 2008.

CAMILLERI E., *Validità della fideiussione omnibus conforme a schema tipo dell'ABI e invocabilità della sola tutela riparatoria in chiave correttiva*, in *Nuova giur. civ. comm.*, 2020, 397-405.

DENOZZA F., *Incongruenze, paradossi e molti vizi della tesi del "solo risarcimento" per le vittime di intese ed abusi*, in *Nuova giur. civ. comm.*, 2020, 406-414.

DENOZZA F., *I principi di effettività, proporzionalità ed efficacia persuasiva della disciplina dei contratti a valle di intese e abusi*, in *Riv. dir. ind.*, 2019, 354-375.

DOLMETTA A.A., *Fideiussioni bancarie e normativa antitrust: l'urgenza della tutela reale; la qualità della tutela reale*, in *Riv. dir. ban.*, 2022, 1-24.

D'ORSI S., *Nullità dell'intesa e contratto "a valle" nel diritto antitrust*, in *Giur. comm.*, 2019, 575-585.

FEDERICO R., *Operazione economica e nullità dei contratti derivati da intesa anticoncorrenziale*, in *Corr. Giur.*, 2018, 1063-1074.

GENTILI A., *La nullità dei contratti a valle come pratica concordata anticoncorrenziale. (Il caso delle fideiussioni ABI)*, in *Giust. civ.*, 2019, 675-705.

GUIZZI G., *I contratti a valle delle intese restrittive della concorrenza: qualche riflessione vingt ans après, aspettando le Sezioni Unite*, in *Corr. giur.*, 2021, 1173-1180.

LIBERTINI M., *Gli effetti delle intese restrittive della concorrenza sui cd. contratti "a valle". Un commento sullo stato della giurisprudenza in Italia*, in *Nuova giur. civ. comm.*, 2020, 378-396.

LONGOBUCCO F., *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione a valle*, Napoli, 2009.

MASSARELLI R., *Il vaglio di essenzialità delle clausole ABI, contenute nei modelli di fideiussione omnibus censurati dalla Banca d'Italia*, in *Contratti*, 2021, 286-294.

PILETTA MASSARO A., *Pratiche concordate contrarie al diritto antitrust: il caso delle fideiussioni omnibus redatte secondo lo schema ABI*, in *Riv. dir. banc.*, 2020, 257-278.

RENNA M., *La fideiussione omnibus oltre l'intesa antitrust*, in *Riv. dir. civ.*, 2021, 572-602.

SICCHIERO G., *Sulla nullità della deroga all'art. 1957 c.c. (e di altre clausole delle fideiussioni omnibus) per violazione della disciplina antitrust (art. 2 l. n. 287/1990)*, in *Foro Pad.*, 2017, I, 200-207.

VISMARA F., *Intesa anticoncorrenziale ed effetti sui contratti "a valle": riflessioni alla luce dei più recenti orientamenti giurisprudenziali*, in *Contratti*, 2021, 323-328.

VOTANO G., *Gli effetti delle intese restrittive della concorrenza sulle fideiussioni "a valle": la pronuncia delle Sezioni Unite*, in *Contratti*, 2022, 152-161.