FIVERS

Case Law Update

Civil Law and Administrative Law

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Italian Supreme Court, Order, 28 October 2026, No. 27944 – Business contributions and outstanding consortium contributions: contributing a business that includes an interest in a consortium company does not release the contributor from liabilities for consortium contributions accrued before the transfer, which remain subject to Article 2560 of the Italian Civil Code. Succession to consortium membership is governed by Article 2610, which also applies to consortium companies, subject to statutory and constitutional restrictions on transfers of equity interests. The associative nature of the relationship and the absence of

reciprocal consideration for contributions preclude the transfer of the contractual position from releasing the original debtor.

Italian Supreme Court, Order, 28 October 2026, No. 27997 – Withdrawal from a partnership and valuation of the outgoing partner's interest: settlement under Article 2289 of the Italian Civil Code must reflect the actual value of the partnership's net assets when the partner's membership ends, including goodwill and prudent forecasts of future profitability, rather than book values alone. In the case considered, the accounts, whose approval had not been established, were open to challenge and judicial assessment without a prior action to set them aside. Liabilities for the use of property were excluded because the relevant debt had not been proved, not because of a presumption of gratuitous use.

BANKRUPTCY LAW

Italian Supreme Court, 1 October 2026, no. 26021 – closure of bankruptcy proceedings following the approval of the composition with creditors: the closure of bankruptcy proceedings following the approval of the composition with creditors constitutes grounds for the suspension of the proceedings; however, where the insolvency practitioner has been appointed or is in default, such suspension does not take effect *ex lege*, but rather in accordance with the procedures set out in Article 300 of the Code of Civil Procedure.

Italian Supreme Court, 5 October 2026, no. 26297 – the receiver's assumption of the tenancy agreement: with regard to pending legal relationships, Article 80, par. 1 of the Italian Bankruptcy Law, (hereby "l.fall.") relates exclusively to the standard scenario in which the insolvency practitioner succeeds *ex lege* to the lease agreement.

INSURANCE LAW

Italian Supreme Court, Order No. 26050 of 1 October 2026 – In light of Constitutional Court Judgment No. 32 of 2024, Article 2952(2) of the Civil Code, including in its earlier version which prescribed a one-year limitation period for 'other rights arising from the insurance contract', must be interpreted consistently with the Constitution, so that the shorter limitation period (one or two years) does not apply where, in the particular circumstances, it is objectively impossible for the insured or the beneficiary to enforce rights arising from a life insurance contract; in such cases, the ordinary ten-year limitation period *under* Article 2946 of the Civil Code applies, running from the event (death or survival to maturity) giving rise to the right to payment. Provided that the defence of limitation has been raised, the court has the power and duty to determine the applicable limitation period of its own motion.

ADMINISTRATIVE LAW

Council of State, 12 October 2026, No. 7475 – the administrative court, in the exercise of its judicial powers, may declare the conversion, in judicial proceedings, of an unlawful administrative measure pursuant to Article 1424 of the Civil Code.

Calabria Regional Administrative Court, Reggio Calabria, 16 October 2026, No. 677 – in electronic tendering procedures, where it is not possible to establish with certainty whether the failure to upload or the irregular uploading of the financial bid was due to an error attributable to the economic operator or to a malfunction of the platform attributable to the contracting authority, the anomalous outcomes of the IT system cannot be resolved to the detriment of the tenderer, having regard to the purely instrumental function of the electronic tool and to the principles of *equal treatment* and *'favor participationis'*.

Campania Regional Administrative Court, Naples, 20 October 2026, No. 5840 – with regard to access to documents for the purposes of defence, unless there is a clear and absolute lack of connection between the requested documentation and the defence needs put forward, neither the administration nor the court granting access may make any preliminary assessment of the decisiveness, relevance or merits of the future action on the merits.

BANKING AND FINANCIAL LAW

Italian Supreme Court, 1 October 2026, No. 26039 – elective professional clients: a request for professional classification under Annex 3 to Consob Regulation No. 16190/2007, as regards possession of the requisite personal qualities, does not constitute a confession. The intermediary must ascertain that the conditions for that classification continue to be met at the time of purchase and monitor their continued fulfilment throughout the investment, taking appropriate measures immediately upon becoming aware of any change.

In Order No. 26039, published on 1 October 2026, the Italian Supreme Court ruled on the classification of a client as an elective professional client and the resulting obligations of the financial intermediary under Annex 3 to Consob Regulation No. 16190/2007.

The Supreme Court ***first held that «a client's request to be treated as a private professional client under Annex 3 to Consob Regulation No. 16190/2007, as regards possession of the personal qualities required therein for recognition of that status, being the expression of a judgement rather than a statement of knowledge and truth concerning an objective fact, does not constitute a confession for the purposes and effects of Article 2730 of the Civil Code***».

As to the intermediary's obligations, the Court referred to the provision that «***the disapplication of conduct of business rules governing the provision of services to non-professional clients is permitted where, after adequately assessing the client's expertise, experience and knowledge, the intermediary may reasonably consider, having regard to the nature of the transactions or services envisaged, that the client is capable of making*** *informed investment decisions and understanding the risks assumed*».

Accordingly, «***it is therefore for the intermediary to prove that it has correctly disapplied the conduct of business rules governing the provision of services to non-professional clients***». *In the absence of such proof, «even a private professional client enjoys the safeguards concerning information on the suitability of the proposed investment for their risk profile, however "high" it may be*».

The Court also referred to professional clients' duty to «*inform the service provider of any changes which might affect their current classification*», while clarifying that the intermediary «***is required, before exposing the client to investment risk without any protection, to ascertain that the conditions existing when the relevant status was conferred continue to be met at the time of purchase and to monitor their continued fulfilment throughout the investment, being obliged to take appropriate***

measures immediately upon becoming aware that those conditions have changed, potentially undermining the legitimacy of the professional classification originally assigned».

The Supreme Court therefore criticised the judgment under appeal for having considered that verification of the criteria for professional classification could legitimise «*the intermediary's complete disregard for the investments ordered by the private professional client», finding that this amounted to a misapplication of* Consob Regulation No. 16190/2007.

In conclusion, the Court upheld the appeal to the extent set out in its reasoning, set aside the judgment under appeal and remitted the case to the Court of Appeal of Milan, sitting in a different composition, also for determination of the costs of the cassation proceedings.

Italian Supreme Court, 16 October 2026, No. 27053 – recovery of undue payments on a current account and the adjusted balance: deposits constituting payments must be identified only after the unlawful charges applied by the bank and declared void by the trial court have been removed from the account balance. Only after that adjustment may deposits constituting payments be identified, without prejudice to the non-recoverability of those for which the claim for repayment has become time-barred.

In Order No. 27053, published on 16 October 2026, the Italian Supreme Court ruled on the criterion for identifying deposits constituting payments for the purposes of limitation of claims for the recovery of undue payments on a current account.

The Supreme Court first reiterated that «*in disputes concerning a claim for the recovery of undue payments following a declaration that contractual clauses and banking practices contrary to mandatory and non-derogable rules are void, the identification of deposits constituting payments must be preceded by the identification and subsequent removal from the balance of all unlawful charges applied by the bank and declared void by the trial court*».

Referring to its earlier Order No. 9141/2020, the Court clarified that «*recalculating the actual and effective balance of amounts owed between the parties, eliminating all charges unlawfully debited by the bank and therefore void, is merely a preliminary and lawful operation preceding the identification of deposits constituting payments*».

Accordingly, «***only after that adjustment may the deposits constituting payments made by the account holder during the contractual relationship involving a current account with a credit facility***

or otherwise overdrawn be identified, without prejudice to the non-recoverability of those payments for which the relevant claim has become time-barred».

As to the distinction between deposits constituting payments and those merely replenishing the available credit, the Court referred to the principle that deposits constitute payments «*where they are made into an account with a debit balance (or, as it is commonly described in such circumstances, an "overdrawn" account) without any credit facility in favour of the account holder, or where they are intended to cover a debit balance exceeding the limits of the credit facility*». Conversely, deposits made within the credit limit «*merely replenish the funds which the account holder may continue to use*».

The Supreme Court therefore clarified that «***it is not true, or at least not in absolute terms, that the account holder cannot recover undue payments while the relationship is ongoing***», since «*an action for recovery is permitted while the account remains open, provided that the claimant, in accordance with the basic rules of procedure, pleads the "payments" made (in the sense described above) and provides evidence of them and of their allegedly undue nature*».

In conclusion, the Court upheld the second and fifth grounds of appeal, set aside the judgment in respect of those grounds and remitted the case to the Court of Appeal of Lecce, sitting in a different composition, for reconsideration.

CORPORATE LAW

Italian Supreme Court, Order, 28 October 2026, No. 27948 – Payments towards a future capital increase and assignment of the repayment claim: a shareholder's repayment claim may be assigned separately from the equity interest, even where it is contingent and not yet due. Leaving the company does not, in itself, give rise to an immediate right to repayment, which crystallises when the capital increase definitively ceases to be possible, without requiring a resolution not to increase the capital. A claim that is not yet due is not a non-existent claim and does not prevent recovery of the agreed assignment price.

The Court rejected the proposition that a shareholder's departure triggers immediate repayment: "*the causa is not the subjective motive, but the practical or concrete function, which does not cease to exist merely because of withdrawal or transfer of the equity interest*".

The repayment claim "*crystallises when any possibility of that capital increase definitively ceases to exist". However, "no shareholders' resolution 'not to increase' the capital need be adopted"*. The earmarking of the payment *"precludes only the ability to demand repayment at will: it does not preclude the right to obtain*

repayment where the specific condition for completion identified when the payment was made is not fulfilled".

Where the reserve is used to cover losses, it is necessary to ascertain, "*by reference to the specific terms of the payment, whether the shareholders' consent at a general meeting to that allocation can or must be established as a matter of fact*". If the claim is subsequently assigned, the court must also "*assess the parties' interests in the specific circumstances, not only in succession to the contingent claim, but also in the previous partial use of the reserve to cover losses*", as part of the same transaction.

The claim "*is by no means non-existent, but merely not yet due*" while the capital increase remains possible. It "*may be assigned separately from the equity interest*", since "*the assignment of a merely anticipated or contingent claim also falls within the assignment of future claims, and is valid*". The warranty under Article 1266 of the Italian Civil Code concerns "*not merely whether the claim is due, but its existence at the time of assignment*".

The Court therefore concluded that "*the assignment agreement remains a valid basis for a claim for performance requiring payment of the agreed price*". It set aside the appealed judgment and, determining the merits, ordered the assignees to pay.

Italian Supreme Court, Order, 28 October 2026, No. 27944 – Business contributions and outstanding consortium contributions: contributing a business that includes an interest in a consortium company does not release the contributor from liabilities for consortium contributions accrued before the transfer, which remain subject to Article 2560 of the Italian Civil Code. Succession to consortium membership is governed by Article 2610, which also applies to consortium companies, subject to statutory and constitutional restrictions on transfers of equity interests. The associative nature of the relationship and the absence of reciprocal consideration for contributions preclude the transfer of the contractual position from releasing the original debtor.

The Court distinguished the scope of Articles 2558 and 2560 of the Italian Civil Code: the former requires "*a reciprocal contract not yet fully performed by either party at the time of the business transfer*", whereas the latter concerns "*cases in which the counterparty has already performed its obligation or* [...] *debts arising from contracts that cannot be so classified, such as associative contracts*".

Regarding a business contribution, "*Article 2610 of the Italian Civil Code, a special provision also applicable to consortium companies under Article 2615-ter, provides for the transferee's succession to the consortium agreement, subject to any contrary agreement and to the other consortium members'*

power to exclude the transferee". Succession must nevertheless comply "*with the rules governing transfers of equity interests applicable to the chosen corporate form, with any statutory or contractual restrictions on transfers of equity interests remaining relevant*".

The contribution obligation "*is not the subject matter of a reciprocal obligation directly and immediately linked to a specific counter-performance by the entity*": "*There is therefore no 'exchange' or reciprocal relationship between the sums paid on that basis and a specific good or service received by the consortium member*". Articles 2610 and 2560 accordingly "*operate concurrently*": consortium membership transfers and governs future dealings, while outstanding contributions remain subject to the rules on business debts.

Consequently, "*the contributor also remains liable for debts accrued by the consortium member before the business transfer*". On procedure, "*treating grounds as absorbed is itself a ruling on the remaining grounds of appeal*". The complaint concerning the recipient company's absence from the proceedings was declared inadmissible for lack of specificity; the Court also noted the binding effect within the proceedings of the unchallenged ruling that the declaration sought was merely incidental.

Italian Supreme Court, Order, 28 October 2026, No. 27997 – Withdrawal from a partnership and valuation of the outgoing partner's interest: settlement under Article 2289 of the Italian Civil Code must reflect the actual value of the partnership's net assets when the partner's membership ends, including goodwill and prudent forecasts of future profitability, rather than book values alone. In the case considered, the accounts, whose approval had not been established, were open to challenge and judicial assessment without a prior action to set them aside. Liabilities for the use of property were excluded because the relevant debt had not been proved, not because of a presumption of gratuitous use.

The Court reiterated that "*settlement of the withdrawing partner's interest must be based on the actual value of the partnership's net assets when the partner's membership ends, rather than merely on the book values shown in the accounts*". The statement of financial position must be prepared "*using economic rather than merely accounting criteria, also taking into account goodwill and the business's earnings prospects*".

In this case, the regulatory compliance work was "*a factor to be considered in the valuation, but not one that reduced the business's value to zero*". The complaint therefore sought "*to replace the lower courts' findings with a different interpretation of the evidence*". Regarding the earlier intra-family transfer, the reasoning had explained "*the fundamental distinction between the consideration contractually agreed for*

a transfer of equity interests and the settlement value of the outgoing partner's interest", and was therefore not merely apparent.

As approval of the accounts had not been established, they constituted "*an accounting document fully open to challenge by the parties and assessment by the court*". In proceedings under Article 2289 of the Italian Civil Code, the court "*must ascertain the actual value of the partnership's net assets and may obtain expert assistance to reconstruct its true financial position*". Furthermore, "*obtaining the accounts during proceedings cannot be equated with their annual communication under Article 2320(3) of the Italian Civil Code for the purposes of assessing the partner's acquiescence*".

Regarding the property liabilities, "*the ratio decidendi* [...] *rests, in this respect, solely on the failure to prove the claim, rather than on the invalidity or non-existence of the lease*". As for profits, "*the Court of Appeal, accepting the expert's conclusions, specifically ruled out the losses on which the complaint was based*". Removing the liabilities does not automatically render the former partner liable in damages: "*Such an automatic consequence, however, has no statutory basis*".

BANKRUPTCY LAW

Italian Supreme Court, 1 October 2026, no. 26021 – closure of bankruptcy proceedings following the approval of the composition with creditors: the closure of bankruptcy proceedings following the approval of the composition with creditors constitutes grounds for the suspension of the proceedings; however, where the insolvency practitioner has been appointed or is in default, such suspension does not take effect *ex lege*, but rather in accordance with the procedures set out in Article 300 of the Code of Civil Procedure.

The Italian Supreme Court, in its judgement no. 26021, published on 1 October 2026, ruled on the closure of bankruptcy proceedings following the approval of a composition with creditors.

Firstly, the Court stated that «*there is no doubt that the closure of bankruptcy proceedings, entailing the loss of the administrator's standing to sue or be sued, results in the interruption of the proceedings*».

The Supreme Court then clarified that «*the case-law of this Court has held, even following the 2006 reform, that the automatic suspension resulting from a declaration of bankruptcy does not also apply to the winding-up of a company where such winding-up follows the approval of a bankruptcy composition*».

The Court therefore noted that «*the grounds (…) justifying the automatic suspension of proceedings in the event of the opening of bankruptcy proceedings – based on public-interest considerations in the broad*

sense, aimed at safeguarding the role of the insolvency practitioner to ensure the speed and maximum effectiveness of the proceedings – do not apply in the event of the proceedings being closed following the approval of a bankruptcy composition agreement».

Furthermore, the Supreme Court added that «*there are therefore no grounds, either of a textual nature (…) or of a systematic nature, for excluding (…) the application of the general provisions set out in Article 300 of the Code of Civil Procedure, since the requirements justifying automatic suspension in the event of the opening of bankruptcy proceedings are not met in the case of the closure of proceedings following the confirmation of the bankruptcy arrangement*».

The Court further clarified that the argument regarding the necessary symmetry between the opening and closure of bankruptcy proceedings «*may be valid in the context of revocation, but not with regard to closure – and in particular closure resulting from the approval of a bankruptcy composition agreement – for which, in view of its distinctive characteristics, there are no grounds justifying the exclusion of the declaration of bankruptcy from the general provisions set out in Article 300 of the Code of Civil Procedure*».

In light of the foregoing, the Supreme Court set out the following principle of law: «***the closure of bankruptcy proceedings following the approval of the composition with creditors constitutes grounds for the suspension of the proceedings; however – unlike in the case of a declaration of bankruptcy, to which the general bankruptcy rules apply, in this instance the special provisions set out in Article 43, l.fall –, where the insolvency practitioner has been appointed or is acting in absentia, does not take effect by operation of law, but rather in accordance with the procedures set out in Article 300 of the Code of Civil Procedure***».

Italian Supreme Court, 5 October 2026, no. 26297 – the receiver's assumption of the tenancy agreement: with regard to pending legal relationships, Article 80, par. 1 of the Italian Bankruptcy Law, (hereby "l.fall.") relates exclusively to the standard scenario in which the insolvency practitioner succeeds *ex lege* to the lease agreement.

The Italian Supreme Court, in its order no. 26297, published on 5 October 2026, ruled on the possibility of the insolvency practitioner taking over the tenancy agreement, pursuant to Article 80, par. 1, l.fall.

Firstly, the Court stated that «*the issue – contrary to the Court's view – does not concern the automatic succession of the liquidator in the event of the lessor's bankruptcy pursuant to Article 80, first paragraph, l.fall.; hence the misapplication of that provision, which is unrelated to the relationship between the lease and the sublease*».

The Supreme Court then noted that «*the subletting of the property by the user – which had been agreed and was subsequently subject to a termination clause in the event of the user's bankruptcy – gave rise to a further issue*».

The Court therefore observed that the judge hearing the appeal, having established that the lease agreement had been terminated «*failed to take into account the existence of the contractual clause contained in the sublease agreement, which constituted an express termination clause*».

Furthermore, the Supreme Court clarified that «*it should have addressed the issue (…) of the consequences of the termination of the lease on the property sublease agreement, by ascertaining whether or not the alleged contractual, originative or functional link – whether voluntary or not – between the lease and the aforementioned sublease existed, in view of the potential implications of Article 1595, paragraph 3, of the Civil Code*».

The Court further added that, once the lease agreement had been terminated at the receiver's discretion, «*it was necessary to ascertain whether Article 80, l.fall., which refers to the simplistic scenario of a property lease agreement in which the solvent company, which subsequently went into administration, acts as the lessor, or whether the alleged contractual link existed, including in relation to the express termination clause contained in the sublease agreement*».

In light of the foregoing, the Supreme Court set out the following principle of law: «***with regard to pending legal relationships, Article 80, par. 1, l.fall., relates exclusively to the standard scenario in which the administrator automatically takes over the lease agreement by operation of law; the provision does not, however, as such, apply to the more complex scenario underpinned by a possible contractual link between the leasing agreement – terminated by the insolvency administrator of the lessee – and the property tenancy or subletting agreement; from this perspective, it is, if anything, the specific task of the trial judge to ascertain the conditions under which the relevant legal mechanisms apply, in light of the alleged link between the lease and the property tenancy or subletting agreement, taking into account the contractual terms and the rules of civil law governing the possible termination of the contract (Article 1595, third paragraph, of the Civil Code)***».

INSURANCE LAW

Italian Supreme Court, Order No. 26050 of 1 October 2026 – In light of Constitutional Court Judgment No. 32 of 2024, Article 2952(2) of the Civil Code, including in its earlier version which prescribed a one-year limitation period for 'other rights arising from the insurance contract', must

be interpreted consistently with the Constitution, so that the shorter limitation period (one or two years) does not apply where, in the particular circumstances, it is objectively impossible for the insured or the beneficiary to enforce rights arising from a life insurance contract; in such cases, the ordinary ten-year limitation period under Article 2946 of the Civil Code applies, running from the event (death or survival to maturity) giving rise to the right to payment. Provided that the defence of limitation has been raised, the court has the power and duty to determine the applicable limitation period of its own motion.

The Italian Supreme Court, in the order referred to above, ruled on the limitation period for the right of third-party beneficiaries to receive the capital sum from two life insurance policies.

In the present case, the beneficiaries had brought proceedings in 2010 to obtain payment of the sums due under two policies taken out in 2004 by a relative of theirs, who died on 24 May 2006. The Court of Appeal had held that the right relating to the policy of which knowledge had been proven from the time of its conclusion was time-barred, whilst it had recognised the right to receive the proceeds of the other policy, considering that the lack of knowledge of the contract in favour of the third party constituted a legally relevant impediment within the meaning of Article 2935 of the Civil Code, and not a mere factual obstacle.

The Supreme Court first observed that the element *«constituting the defence of extinctive limitation is the inaction of the holder of the right asserted in the proceedings, whereas determining the duration required for the extinguishing effect to occur is a quaestio iuris concerning the identification of the right itself and the limitation regime prescribed for it by law. Accordingly, reserving to the party the power to raise the defence means that the party is required only to plead that constituent element, expressing its intention to avail itself of that effect, and not also to identify, directly or indirectly (that is, by specifically referring to the duration of the inaction), the rules applicable to the case, the identification of which falls within the court's power and duty*».

The Italian Supreme Court then pointed out that the Constitutional Court *«has ruled on the matter of life insurance contracts (in that case, too, it concerned an index-linked policy) and, in particular, on the limitation period for the enforcement of rights arising therefrom, prescribed by Article 2952(2) of the Civil Code in the wording introduced by Article 3(2-ter) of Decree-Law No. 134 of 28 August 2008*', finding it unconstitutional *'insofar as it did not exclude from the operation of the two-year limitation period the enforcement of those rights (such as the right to receive the capital sum or annuity payments) arising from life insurance contracts*».

Following the declaration of unconstitutionality, therefore, «*for cases falling within the temporal scope of the provision subjected to constitutional review, the general rule prescribing the ordinary ten-year limitation period under Article 2946 of the Civil Code*' applies, and *'the dies a quo from which the limitation period runs is determined by a criterion which, in the case of sums owed by the insurer to the insured or the beneficiary, is identified by the events - death (the relevant event, therefore, in the case now under consideration) or survival to the maturity date of the contract - giving rise to the right accruing by virtue of the insurance and, in the case of a third-party beneficiary, of the designation*».

On this basis, the Italian Supreme Court has ruled that «*the specific effects of a declaration of unconstitutionality of a provision include, amongst other things: (i) retroactivity (ex tunc): from the day following the publication of the judgment, the provision may no longer be applied. All legal proceedings still in progress ('pending') must comply with the Court's decision; (ii) concluded cases: rights that have become time-barred or situations settled by final judgements cannot be reopened, unless the declaration affects the quantification or nature of the penalty*».

As regards the case under consideration, the Supreme Court observed that *«it is certainly undeniable … that, in the case now before the Court, the potentially applicable text of Article 2952(2) of the Civil Code is not the text held unconstitutional by the aforementioned judgment, but its predecessor … which prescribed a one-year limitation period, subsequently increased to two years in the text later held unconstitutional*' and that, therefore, pursuant to *'an interpretation of that earlier provision consistent with the Constitution …. it must therefore be concluded that the one-year limitation period does not apply to the enforcement of those rights arising from life insurance contracts which, in the particular circumstances, it is objectively impossible to enforce*».

Applying the foregoing principles, the Supreme Court therefore held that, in the case *de quo*, «*the ten-year limitation period had not elapsed, that being the period to be regarded as applicable in the particular case, in accordance with the interpretation deriving from the aforementioned Constitutional Court judgment; it is further reiterated that the court may, of its own motion, determine a limitation period different from that indicated by the parties, provided that the defence of limitation - as undeniably occurred in this case - has been raised in due time by the party concerned. The court has, indeed, the power and duty to give the proper legal characterisation to the facts submitted to it in due time (iura novit curia)*».

ADMINISTRATIVE LAW

Council of State, 12 October 2026, No. 7475 – the administrative court, in the exercise of its judicial powers, may order the conversion, in judicial proceedings, of an unlawful administrative measure pursuant to Article 1424 of the Civil Code.

In Judgment No. 7475 of 12 October 2026, the Fourth Section of the Council of State addressed the possibility for the administrative court to declare the conversion of an unlawful administrative measure into a judicial decision.

Firstly, the Council of State focused on the distinction between the conversion and the reclassification of an unlawful administrative measure, noting that the court of first instance had not merely identified the power that the Administration had exercised and framed the measure within the corresponding regulatory framework (reclassification), but had «*attributed the measure itself to the exercise of a different power, basing this operation on the objective intent expressed in the act (conversion)*».

Having subsequently referred to Article 1424 of the Civil Code, the judges at Palazzo Spada acknowledged the debate concerning the applicability of the doctrine of conversion of a void contract to administrative law. In support of the arguments in favour of such extension, reference is usually made «*also to the provision of Article 26 of Law No. 1034 of 6 December 1971, corresponding to the current Article 34(1)(a) of the Code of Administrative Procedure, according to which the court may annul the contested measure even only partially*», which is why the Court held that «*it may be inferred from this provision that the court has the power to act not only quantitatively but also qualitatively with regard to the invalid act*».

The Council of State does not deny that there is debate regarding the possibility for the administrative court to declare the conversion of an unlawful administrative measure whilst exercising its jurisdiction over the legality of administrative acts, acknowledging that the principle of the separation of powers might preclude this. In particular, the Panel referred to a line of case-law from the first instance administrative courts, according to which «*conversion presupposes a broadly substitutive act (at least in the sense that the court must ascertain that, having regard to the purpose pursued by the measure, it must be considered – adapting the aforementioned provision of the Code to the specific circumstances of the case – that the Administration would have intended it had it been aware of its invalidity): an activity which falls outside the powers of examination and decision-making inherent in judicial review of legality, presupposing that the administrative court also has jurisdiction over the merits of* the *case*» (Campania Regional Administrative Court, Salerno, Section I, 10 January 2014, No. 53).

However, referring to a long-standing line of case law from the same Section handed down in a similar case (see Council of State, Section IV, 11 May 1982, No. 278), in which «*the issue concerned a measure expressly adopted in the exercise of the power of self-protection – and potentially unlawful due to the failure to weigh up the interests at stake – aimed, nevertheless, at bringing to an end a legal effect which, in truth, was already non-existent under the law*».

The Court does not find the criticism regarding a potential breach of the principle of the separation of powers to be convincing: such an argument would not explain «*why conversion is permitted in the case of a void contract – and thus in relation to an act of private autonomy – but should not, on the other hand, be permitted in relation to an administrative measure*». The critical aspect of the operation, the judgment continues, concerns the precise interpretation of the practical intent expressed in the instrument, as the court cannot go beyond this aspect: the Section observes, however, that legal scholarship has also arrived «*at an objective conception of conversion, holding that such a process should not be conducted by examining the subjective will of the parties, but rather the practical intent objectified in the act*». Thus, in the case of the conversion of an administrative measure, according to the Council of State, the *'necessary respect for the principle of the separation of powers requires the court to ascertain the intention pursued by the Administration on the basis of elements intrinsic to the measure itself, identifying the effect to be attributed to the act whilst remaining within the scope of its content and the objectively pursued purpose*».

To substantiate the lawfulness of the conversion of the administrative act, the Council of State therefore carries out a comparative analysis of the institution, paying particular attention to the German Administrative Act of 1976, which, in §47, expressly provides for the institution of conversion of a defective administrative act, excluding it only if the administrative act into which the defective one is to be converted is contrary to «*the recognisable intention of the issuing authority*». Furthermore, the judgment refers to the case law of the German administrative courts, which has devoted particular attention to the principle of the preservation of legal acts. It is precisely the existence of this principle within our legal system as well – «*inherent in the system itself and clearly reflected not only in the general principle of utilitarian interpretation, as set out in Article 1367 of the Civil Code*» – together with the institution of conversion *under* Article 1424 of the Civil Code – as the judgment states – «*leads us to believe that there is nothing to prevent the application of the latter institution also in relation to administrative acts*».

Nor, according to the Court, would there be any grounds for a potential breach of the principle of the separation of powers, provided that the following conditions are cumulatively met: *i)* «*the measure to be converted meets all the substantive and formal requirements of the act into which the conversion is made*»; *(ii)* «*the latter act corresponds to the intention objectively reflected in the content of the act to be converted*»; *(iii)* «*the measure to be converted and the measure resulting from the conversion fall within the competence of the same administrative body*».

The judgment therefore concludes by holding that «*the institution of the conversion of administrative acts must be regarded as fully operative within our legal system, as has, moreover, already been recognised since time immemorial by the case-law of this Section*».

Calabria Regional Administrative Court, Reggio Calabria, 16 October 2026, No. 677 – in electronic tendering procedures, where it is not possible to establish with certainty whether the failure to upload or the irregular upload of the financial bid was due to an error attributable to the economic operator or to a malfunction of the platform attributable to the contracting authority, the anomalous outcomes of the IT system cannot be resolved to the detriment of the tenderer, having regard to the purely instrumental function of the electronic tool and to the principles of *equal treatment* and *'favor participationis'*.

In Judgment No. 677 of 16 October 2026, the First Section of the Regional Administrative Court of Calabria, sitting in Reggio Calabria, ruled on the consequences of anomalous outcomes and malfunctions in electronic tender systems, clarifying that these cannot be attributed to the competing economic operator, unless they were caused by the operator itself.

Firstly, the Regional Administrative Court of Reggio Calabria referred to Article 25(2) of Legislative Decree No. 36/2023, which provides that «*[c]ontracting authorities and concession-granting bodies shall use digital procurement platforms to carry out procedures for the award and performance of public contracts, in accordance with the technical rules referred to in Article 26. Digital procurement platforms must not alter equal access for operators, nor prevent or restrict their participation in the tender procedure, nor distort competition, nor alter the subject-matter of the contract, as defined in the tender documents. Contracting authorities and concession-granting bodies shall ensure participation in the tender procedure even in the event of a proven malfunction, even if temporary, of the platforms, including, where necessary, by ordering the suspension of the deadline for the receipt of tenders for the period of time required to restore normal operation and the extension of that deadline for a duration proportionate to the severity of the malfunction*». Furthermore, the Section also referred to Article 19 of Legislative Decree No. 36/2023, which provides that «*[a]n economic operator intending to participate in a procedure for the award of a contract shall use the digital procurement platform made available by the contracting authority to complete the following documents: […] c) the tender*». Finally, the Panel noted that the Council of State's Report on the Public Contracts Code had commented on the aforementioned Article 25, stating that e-procurement platforms should ensure equal access for economic operators and their participation in the tender, even in the event of a proven malfunction of the platforms.

These principles, observes the Regional Administrative Court of Calabria, are consistent with administrative case-law, «*which has often emphasised the impossibility of excluding from a tender procedure economic operators who were unable to submit their application or complete its submission as a result of malfunctions in the IT platform attributable to the operator […] and has permitted an appeal, with a view to rectifying the malfunction, to all appropriate measures capable of remedying the malfunction, such as, depending on the circumstances, the revocation of the entire procedure […], the*

extension or reopening of the deadlines, whilst not, ultimately, excluding recourse to essentially 'atypical' forms of procedural assistance […] aimed at compensating for the failure to submit the application or the annexes in a timely manner».

The Section further stated that, with regard to the burden of proof, «*even where it is not possible to establish with certainty whether there was an error on the part of the individual economic operator, or whether the submission of the tender was prevented by a fault in the IT system attributable to the contracting authority, the consequences of the system's abnormal behaviour cannot be to the detriment of the participants, given the purely instrumental nature of the IT system (Council of State, Section III, 28 December 2020, No. 8348, Council of State, Section III, 7 January 2020, No. 86 and Council of State, Section V, 20 November 2019, No. 7922), in light of the principles of par condicio and favor participationis*'». Consequently, the right to an extension of the deadline for an individual economic operator who has failed to submit their tender or application to participate in time arises «*not only in the event of a proven malfunction of the contracting authority's digital platform, but also in the event of absolute uncertainty as to the cause of the late submission (namely, whether it was due to the fault of the contracting authority or of the individual economic operator who failed to act in good time)*».

Ultimately, the judgment clarified that «*the risk of an "unknown cause" of the IT malfunction lies with the contracting* authority»; which amounts to an application *of* «*the principle that IT systems are merely instrumental to administrative action, from which case law derives the following rule: "even where it is not possible to establish with certainty whether there was an error on the part of the sender or, rather, whether the transmission was corrupted due to a system fault, the burden of proof lies with the body that launched, organised and managed the tender*» *(Council of State, Section III, No. 86/2020, cited in Council of State No. 2722/2026)*'.

In other words, the judgement continues, «*the principle of proximity of the evidence imposes a burden on the Administration to allege and prove the correct functioning of the platform, which it may fulfil by submitting the documentation in its possession*». The so-called *log files* of the electronic platform do, in fact, allow—as regards public tenders—insight into the activities carried out by the economic operators and the contracting authority that interacted with the system; it follows that, if «*the Administration submits the log files – that is, technical reports reconstructing the interactions between the user and the IT system during the period in question, which show the absence of anomalies or malfunctions in the platform chosen for the tender – the proper functioning of the platform during the application upload process is deemed to have been demonstrated, and the delay, however slight, is therefore attributable to the tenderer, who is consequently correctly excluded from the tender*».

In conclusion, the Regional Administrative Court of Calabria upheld the appeal, given that the appellant had provided *'convincing prima facie* evidence' that the technically anomalous event was not attributable to any action on her part, and that the respondent administration had in any case failed to prove the correct functioning of the platform.

Campania Regional Administrative Court, Naples, 20 October 2026, No. 5840 – with regard to access to information for the purposes of defence, unless there is a clear and absolute lack of connection between the requested documentation and the defence needs put forward, neither the administration nor the court granting access may make any preliminary assessment of the decisiveness, relevance or merits of the future action on the merits.

In Judgment No. 5840 of 20 October 2026, the Sixth Section of the Campania Regional Administrative Court, sitting in Naples, ruled on the limits of access for defence purposes, clarifying that a refusal by the administration on grounds relating to the decisiveness, relevance or validity of the documents requested for the purposes of future proceedings on the merits is unlawful.

The Section first made detailed observations regarding the nature of the documents to which access was sought, noting that the applicant's request was specific and fully definable, that it was not formulated with reference to inaccessible administrative documents, that the requested *disclosure* did not require any unauthorised document processing and that, finally, there was no lack of evidence in the present case as to the actual existence of the requested document.

In particular, the Panel then focused on the defensive nature of the access requested, noting that the applicant had made it clear from the outset that the request was intended to safeguard his claim for compensation in relation to the damages suffered. In this regard, the Section referred to the most recent case law, which has clarified that «*access for defence purposes enjoys particular protection due to its close connection with the right of defence and that, except in cases of an evident and absolute lack of connection between the requested document and defence needs, neither the administration nor the access judge may carry out a preliminary assessment of the decisiveness, influence or merits of the future action on the merits (Council of State, Plenary Session, Plenary Session, 25 September 2020, Nos. 19, 20 and 21; Council of State, Section VI, 1 March 2023, No. 2193; Council of State, Section VI, 7 April 2023, No. 3589; Campania Regional Administrative Court, Naples, Section VI, 14 March 2023, No. 1672; Campania Regional Administrative Court, Naples, Section VI, 2 May 2023, No. 2608)*».

In response to the defendant's defences, which had sought «*to surreptitiously shift the focus of the proceedings from determining whether the document in question served a defensive purpose to an early assessment of its formal structure or its ultimate utility in the separate damages proceedings*», the

Regional Administrative Court observed that *'it is precisely the defensive nature of the request for access that precludes a refusal based on documentary formalities when the content requested is already on record and directly relevant to the matter in dispute*».

The Section therefore concludes that «*the contested refusal is unlawful, as it is based on an erroneous interpretation of the concept of an administrative document, on an incorrect application of the restriction concerning data processing, and on an impermissible restriction of the right of defence*», with the consequent finding that the claimant is entitled to access the requested data.