

THE CONSULTA SAVES THE PAYBACK: REDUCED BY 52% IS PRO-PORTIONATE

The Constitutional Court, with sentences nos. 139 and 140 of 2024, registered at the records office on 22 July 2024, finally rules on the payback, essentially and definitively confirming its constitutional legitimacy.

The rulings

With **Sentence no. 139/24**, the *"constitutional illegitimacy of the art. 8, paragraph 3, of the decree-law of 30 March 2023, no. 34 [...] converted, with amendments, into law of 26 May 2023, no. 56, where it does not extend the reduction to 48 percent of the quota determined by the regional and provincial provisions referred to in the art. 9-ter, paragraph 9-bis, of the decree-law of 19 June 2015, no. 78, to all the companies supplying medical devices"*. Especially, the Court considered the condition of renouncing the controversies incongruous, defining it as an *"accidental and unforeseeable circumstance"*, even impeding the Regions themselves from determining the actual collectable resources. Thus, *"this reduction is therefore recognized in general terms and is not subordinated to the choice of the amicable settlement of the controversy and the presentation of a specific request to make use of this facilitated method, with consequent lapse of the procedures and terms identified by the same art. 8, paragraph 3, of the decree-law no. 34 of 2023, as converted"*.

With the contemporary **Sentence no. 140/24**, the Court, on the contrary, rejected the complaints of unconstitutionality raised by the companies in the sector, stating, among other things, that **i)** the compression of contractual autonomy and free enterprise is justified by the social utility of the measure and **ii)** the said measure is reasonable and proportionate, given the solidarity aim and considering the possibility introduced by Sentence 139/24, also for *"[...] companies that have not renounced the litigation [...]"* *"[...] to pay, for the years 2015, 2016, 2017 and 2018, an amount corresponding to less than half of what requested from them with the provisions contested in the preliminary proceedings"*.

The effects

The attempt of the Council to achieve a compromise is particularly evident: on one hand, the unconstitutionality is denied (Sentence 140/24), on the other, however, it is recognized (Sentence 139/24) that all operators have the possibility to aspire to reduction of 52% (i.e. paying 48%), pursuant to art. 8, paragraph 3, decree-law 34/23, even regardless of the renunciation of the litigation and the procedures and terms indicated by the same art. 8, paragraph 3.

From a regulatory point of view, provisions must be awaited, for the implementation of what is established by Judgment 139/24; at a regional level, new payment methods must be notified to the companies.

As far as the payback for years after 2018 is concerned, the preferred option is that the Legislator complies with the principles set out in Sentence no. 140/24, in terms of proportionality of the mechanism, recognized - precisely proportionate - only with a reduction of 52% (*"this is a significant reduction, which makes the encumbrance to be paid by the companies, limited to the mentioned period, not disproportionate"*); it should therefore be less than the current one.

Conclusions

As concerns the proceedings pending before the Administrative Regional Court of Lazio-Rome nowadays, the list of complaints advanced does not end with the unconstitutionality defects, since other independent violations have been submitted by various operators in the sector, such as for example the conflict with the rules referred to in Law no. 241/1990 regarding initiation, participation and investigation and disparate treatment (between distinct medical operators and between different products and services).

However, the Court's rulings have clearly confirmed the legitimacy of the underlying medical payback system and, given this, it is reasonable to expect that a large number of the judgments will not end in a favorable direction for companies.

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