PRO VERITATE ACCIPITUR? THE "DIALOGUE" BETWEEN THE COURTS JEOPARDIZING THE RES JUDICATA

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SOMMARIO: 1. The problem: the resilience of the res judicata to the CJEU's attacks that undermine its stabilizing function. – 2. The "dialogue" between the Italian Supreme Court (*Corte di Cassazione*) and the Court of Justice of the European Union. – 3. The Olimpiclub Case and the defeat of the res judicata in the trial before the tax courts. – 4. The CJEU's "attack" on res judicata concerning unfair terms in consumer contracts. – 5. Conclusions.

1. – *Le besoin de certitude a toujours été plus fort que le besoin de vérité*[1], this is how French anthropologist Gustave Le Bon summarized the need for certainty that, in organized societies, is constantly place before the need for truth. In other words, truth, which is unknowable due to the finiteness of human beings, can be supplanted by a certainty of statements that, even if not true, become truth once there is agreement on them by those in that society dictate the rules of common living. This is essential to maintain peace and social order and to prevent what Hobbes called *bellum omnium contra omnes* (*i.e.*, anarchy). As can be expected, this need for certainty and stability can only find its highest expression and definition in law. Indeed, in legal systems related to the Western Legal Tradition, res judicata represents the center around which the entire system of judicial protection of rights rotates and that rationalizes the need for certainty that the organized societies have always needed. And this is because the res judicata not only brings with it (by definition) the stability of relationships but, at the same time, is able to "create" new truths. Actually, the res judicata generates "The Truth" (*Res iudicata pro veritate accipitur*)[2] to the point that, even if wrong, it is so powerful that it can turn what is white into black; so meaningful that it creates new points of departure; so strong that, nearly magically, it is able to assimilate square things to round things and transform blood relations;

[1] G. LE BON, *Aphorismes du temps présent*, 1913.
[2] Ulp. 1 ad leg. Iul. et Pap. D. 50.17.207.

lastly, so solid, that it turns what is false into true[3]. And this has been going on forever.

Recently, however, the "strength" of the res judicata is being subjected to a process of continuous de-evaluation of its margin of operation by the Court of Justice of the European Union (CJEU). The CJEU is questioning the foundations of res judicata in the name of alleged values considered superior and of general interest that cannot be sacrificed by too rigid applications of the res judicata doctrine.

This happened firstly in the tax system (in VAT-related matters) and, even more recently, in the area of unfair consumer contracts.

2. – The progressive work of questioning the principles related to the stability of rulings carried out by the CJEU – which undermine the value of the res judicata – produces different reactions depending on the perspective from which we place ourselves. The immediate temptation would be to use the Ciceronian expression "*o tempora, o mores*" and thus limit ourselves to labelling the CJEU's statements as "extemporaneous" with respect to our system of procedural values, in which the res judicata plays a role of primacy, so that it cannot be undermined by any "external" interventions that would challenge its constraint of negative (*ne bis in idem*) and positive (conclusive effect in a subsequent proceeding) effects. Yet this cannot be done.

Not only because of the immediate application of the principles enshrined by CJEU in the legal systems of the State members, but also because of the subjection that the National Supreme Courts[4] have to the CJEU. For this reason, we will try to briefly retrace the aforementioned deconstruction of the principles of the res judicata put in place by the CJEU by illustrating: on the one hand, how in the tax system the Italian Supreme Court reacted to the rulings released by the CJEU; and, on the other hand, the recent rulings of the CJEU of 17 May 2022 which jeopardize the res judicata in the name of consumer protection rights.

3. – The CJEU issued the first rulings that undermined the stability of res judicata in the Italian legal system, as mentioned above, in tax related matters. Even if the tax trial has such peculiarities as to make it almost

[3] As summarized perfectly in the Latin saying "*Res iudicata pro veritate habetur facit de albo nigrum, originem creat, aequat quadrata rotundis, naturalia sanguinis vincula et falsum in verum mutat*".

[4] We are referring to the famous "dialogue between Courts" that today takes on increasingly authoritarian contours in which one side (the CJEU) commands and the other (the Supreme Court) executes.

unique in the panorama of the effective legal protection in Italy and Europe, it is also true that it has the roots of its jurisdictional function in the Code of Civil Procedure. Moreover, just as a particle embedded in a system does not merely suffer the effects of the others around it, but itself contributes to influencing the relations with the others, the tax procedure does not passively suffer the mutability of the arrangements made in civil matters through the extensions made by case law; but the solutions that emerge in it also influence the flow of the civil procedure. Indeed, very often the tax process seems to anticipate the changes that later spill over into the civil process. This has also been the case of the deconstruction of res judicata by the CJEU. It is almost as if the tax process were a "laboratory" in which to experiment with solutions to be extended, once perfected and verified, to the civil process.

The current Italian tax system is governed by Legislative Decree No. 546 of December 31, 1992, which assigns disputes "concerning taxes of every kind and species however named"[5] to the jurisdiction of the tax courts[6].

[5] Article 2(1) of Legislative Decree No. 546 of December 31, 1992.

[6] The tax courts are part of a special jurisdiction alongside the ordinary and administrative jurisdictions. The jurisdiction of the tax court is determined on the basis of the subject matter (*i.e.*, taxes) unlike what happens with ordinary and administrative jurisdiction, which is identified, instead, on the basis of the cause of action claimed by the plaintiff: *i.e.*, subjective right (*diritto soggettivo*) and legitimate interest (*interesse legittimo*), respectively. Moreover, it can be said that, following the amendments to Article 2 of Legislative Decree No. 546/1992 made by Article 12, paragraph 2, Law No. 448/2001 there has been a generalization of the disputes attributed to the tax courts by recognizing to them *all* disputes concerning "taxes of every kind and species." In this way, Article 9(2) of the Code of Civil Procedure, which regulates the "jurisdiction of the court," and which expressly provides that "the court is also competent for cases concerning taxes and fees", has undergone a drastic downsizing. In fact, there are now few cases that can be said to be outside the jurisdiction of the tax courts and are referred to that of the ordinary courts. These are those cases in which, for example, the Revenue Agency does not act in the exercise of a taxing power granted to it by the State, but rather by virtue of a contractual relationship that binds it to the taxpayer. Said otherwise, it falls under the jurisdiction of the ordinary courts to litigate the dispute concerning the challenge of a tax bill with which the reclamation consortium (*i.e.*, the entity that provides the service of drinking water supply), has acted against the user for the recovery of sums due for the use of the same service. In this case, in fact, the entity does not act in the exercise of the power of taxation, but by virtue of a contractual relationship that does not even involve the user's registration with the consortium. On this point, see: L. PASSANANTE, sub *art.* 9, in F. CARPI – M. TARUFFO, *Commentario breve al codice di procedura civile*, 9ª ed., Milano, 2018, 73 ff. spec. 74-75; F. AULETTA – A. PANZAROLA, sub *art.* 9, in S. CHIARLONI (ed.), *Commentario del Codice di Procedura Civile. Competenza per materia e valore. Competenza per territorio*, Bologna, 2015, 40 ff; M. MARINELLI – P. WIDMANN, sub *art. 9*, in C. CONSOLO (ed.), *Codice di procedura civile commentario*, 6ª ed.,

The 1992 legislature clearly gave the tax process a strictly contesting character of acts issued by the tax authorities against taxpayers. Less clear, however, are the limits of tax jurisdiction.

Indeed, in the "traditional" dimension, tax rulings can only concern a *specific year* of a particular tax without the assessment made on it having a binding effect on other years of the same tax (which, therefore, can be the subject of new and separate proceedings).

In the caselaw, all things considered, there arises the need, under certain conditions, to ensure such an extension in order to avoid a waste of judicial activity, in obedience to the principles of reasonable duration of the process and judicial economy, which are constitutionally protected.

Now, without going into the details of the theoretical constructions that have addressed the issue of res judicata on tax matters and their *ultra litem* effectiveness[7], it is sufficient here to state how the process of progressive structuring of principles capable of offering coherent and predeterminable solutions to the issue of the *extra litem* effects of tax rulings suffered a setback in 2010 due to the CJEU "Olimpiclub Case"[8]. This case paralyzed both subsequent jurisprudence and doctrine in the development of a system capable of explaining the effects of res judicata on the reasoning of the judgments concerning tax law matter.

2018, Milano, 322 ff. On the long path to the recognition of tax courts as "judges" and not as part of administrative bodies, see A. GUIDARA, *La giurisdizione tributaria italiana: confini e oggetto del processo*, in *Dir. prat. trib. int*, 2020, 1496 ff.; F. TESAURO, *Manuale del processo tributario*, 5ª ed., Torino, 2020, 16 ff. and F. BATISTONI FERRARA – B. BELLÉ, *Diritto tributario processuale*, Padova, 2020, 24 ff. For further considerations on the topic, see also C. GLENDI, *La "speciale" specialità della giurisdizione tributaria*, in A. GUIDARA (ed.), *Specialità delle giurisdizioni ed effettività delle tutele*, Torino, 2021, 414 ff.

[7] See D. CORRARO, *L'efficacia* ultra litem *del giudicato tributario tra vecchi modelli e nuove teorizzazioni: il lungo cammino della Corte di cassazione nel segno di una costante incertezza sistematica*, in *Dir. prat. trib.*, 2020, 2547 ss.; and ID., *L'oggetto del processo tributario fra teorie dichiarative e teorie costitutive: tracciati evolutivi*, in *Dir. prat. trib.*, 2019, 1586 ss., spec. 1612 ss.

[8] See Case C-2/08 Judgment of the Court of 3 September 2009, in *GT – Riv. giur. trib.*, 2010, 1, 13, annotated by M. BASILAVECCHIA, *Il giudicato esterno cede all'abuso di diritto (ma non solo)*; and in *Rass. trib*, 2009, 1839, annotated by R. MICELI, *Riflessioni sul giudicato tributario alla luce della recente sentenza "Olimpiclub"*; in *Riv. dir. trib.*, 2009, IV, 185, annotated by G. D'ANGELO, *Giudicato tributario (esterno) e diritto comunitario: un equilibrio difficile*, in *Riv. dir. trib.*, 2009, IV, 303. See also C. CONSOLO, *Il percorso della Corte di Giustizia, la sentenza* Olimpiclub *e gli eventuali limiti di diritto europeo all'efficacia esterna ultrannuale del giudicato tributario (davvero ridimensionato in funzione antielusiva IVA del divieto comunitario di abusi della libertà negoziale?)*, in *Riv. dir. trib.*, 2010, 1143 ff.

This case, although on several occasions criticized by the scholars[9] – especially following the CJEU "Lucchini Case"[10] – has not failed to raise interest in tax doctrine where, even today, it constitutes a real "enigma" encountered by those who intend to study res judicata in the tax field[11]. Indeed, the principle that arises from the Olimpiclub Case does not seem otherwise explicable except in the sense that the res judicata in matters related to VAT – mostly regulated by EU Law – would not find "usual" application. In particular, the Olimpiclub Case states that EU Law precludes the application of a provision of National Law, such as Article 2909 of the Italian Civil Code (laying down the principle of res judicata) where the application of that provision prevents the recovery of State aid granted in breach of EU Law considering the principle of res judicata to be relative and requiring it to be disapplied in order to uphold the primacy of provisions of EU Law and to prevent conflict with those provisions[12]. However, if we limit ourselves to read only that principle, without taking into account the factual context behind it, we run the risk of inferring a broader application of the res judicata than the CJEU probably meant to pursue.

[9] C. CONSOLO, *Il primato del diritto comunitario può spingersi fino ad intaccare la "ferrea" forza del giudicato sostanziale?*, in *Corr. giur.*, 2007, 1189 ff.; F. TESAURO, *Divieto comunitario di abuso del diritto (fiscale) e vincolo da giudicato esterno incompatibile con il diritto comunitario*, in *Giur. it.*, 2008, 1029 ff.

[10] See Case C-119/05 Judgment of the Court (Grand Chamber) of 18 July 2007, in *BIG IPSOA Database*, criticized by C. CONSOLO, *Il primato del diritto comunitario può spingersi fino ad intaccare la "ferrea" forza del giudicato sostanziale?*, cit., 1189; ID., *La sentenza "Lucchini" alla Corte di giustizia: quale possibile adattamento degli ordinamenti processuali interni e in specie del nostro?*, in *Riv. dir. proc.*, 2008, 225; P. BIAVATI, *La sentenza "Lucchini": il giudicato nazionale cede al diritto comunitario*, in *Rass. trib.*, 2007, 1579.

[11] According to F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, 2010, in "*Diritto Oggi*" (Enciclopedia Treccani Online), the reason for such media attention is also due to the fascination that res judicata under Article 2909 of the Civil Code is still able to inspire but, nonetheless, to the extreme delicate nature of the problems raised by the interpretative "relativism" of the EU caselaw on the subject, both from a practical point of view and in terms of the resilience of the system of rights protection as a whole.

[12] Case C-2/08 Judgment of the Court of 3 September 2009, cit. It should be noted that, until the Olimpiclub Case in taxation matters, when interpreting Article 2909 of the Italian Civil Code, the Italian courts adhered for a long time to the principle of the discreteness of final judgments, in accordance with which each tax year remains separate from other tax years, also in terms of the legal relationship between the taxpayer and the tax authorities, which is distinct from that of previous or subsequent tax years. The effect is that, whenever disputes relating to different tax years for the same tax (even if they concern similar questions) are decided separately by a number of judgments, each dispute remains separate and the final ruling has no force of res judicata for disputes concerning a different tax year.

The case has deep roots from the early 1990s, when it began to be assumed that the loan agreement signed by the taxpayer could act as a "legal screen" that was able to evade tax regulations in order to obtain undue tax savings in the form of undue VAT deductions.

However, following two judgments in favor of the taxpayer that had established the non-existence of any elusive element, the Internal Revenue Agency decided to appeal to the Supreme Court, where it was raised by the taxpayer (*i.e.*, Olimpiclub) the existence of a previous res judicata between the same parties on the same point[13]. In this case, the Supreme Court, while not highlighting the reason in the request to a preliminary ruling to the CJEU[14], leaned in the other direction and decided to agree with the Internal Revenue Agency, embracing a view open to possible elusive conduct. Despite this, applying the provision of Supreme Court ruling No. 13916/2006[15] – which opens to a res judicata on the reasoning of the judgment – and recognizing the existence of a previous res judicata on the same point between the same parties, the Supreme Court believes that its

[13] In particular, as summarized by F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit., these were two judgments of the Regional Tax Court of Lazio, not appealed before the Supreme Court, concerning VAT adjustment notices, drawn up by the tax authority following the same tax audit against Olimpiclub, but for different years than the one in dispute.

[14] See F. TESAURO, *Divieto comunitario di abuso del diritto (fiscale) e vincolo da giudicato esterno incompatibile con il diritto comunitario*, in *Giur. it.*, 2008, 1029 ff.

[15] The judgment has been annotated and criticized, *inter alia*, by: C. MAGNANI, *Sui limiti oggettivi del giudicato tributario*, in *GT – Riv. giur. trib.*, 2006, 755 ff.; E. MANZON, *I limiti oggettivi del giudicato tributario nell'ottica del "giusto processo": lo* swing-over *della Cassazione*, in *Corr. giur.*, 2006, 1694 ff.; C. GLENDI, *Giuste aperture al "*ne bis in idem*" in Cassazione ma discutibili estensioni del "giudicato tributario"* extra moenia, in *GT – Riv. giur. trib.*, 2006, 557 ff.; F. TESAURO, *Giudicato tributario, questioni pregiudiziali e imposte periodiche*, in *Boll. trib.*, 2006, 1173 ff.; M. BASILAVECCHIA – A. PACE, *Valenza ultrannuale del giudicato*, in *Corr. trib.*, 2006, 2693 ff. The judgment was also criticized in later years by: S. DALLA BONTÀ, *Eccezione di giudicato esterno nei vari gradi di impugnazione*, in *GT – Riv. giur. trib.*, 3, 2020, 232 ff.; EAD., *L'impervio cammino della giurisprudenza di legittimità nella concretizzazione del vincolo da giudicato tributario esterno*, in *GT – Riv. giur. trib.*, 2016, 421; EAD., *L'ultrattività del giudicato nel processo tributario*, in *Dir. prat. trib.*, 2013, 695 ff.; G.S. TOTO, *Considerazioni attuali sul giudicato tributario*, in *www.judicium.it*; E. MANONI, *Rilevanza del giudicato esterno in caso di tributi periodici*, in *GT – Riv. giur. trib.*, 2018, 171 ff.; EAD., *L'efficacia del giudicato esterno in relazione ad imposte diverse*, in *GT – Riv. giur. trib.*, 2014, 959 ff.; G. FRANSONI – P. RUSSO, *I limiti oggettivi del giudicato nel processo tributario*, in *Rass. trib.*, 2012, 858 ff.; S. BUTTUS, *Ulteriori ridimensionamenti giurisprudenziali all'estensione del giudicato tributario*, in *GT – Riv. giur. trib.*, 2010, 505 ff.; M. BASILAVECCHIA, *Il giudicato esterno cede all'abuso del diritto (ma non solo)*, in *GT – Riv. giur. trib.*, 2010, 18.

"hands are tied" in the face of the first res judicata and its binding effect in subsequent proceedings[16].

Therefore, the Supreme Court was faced with two opposing problems: 1) according to the 2006 ruling, it should have extended the res judicata raised by the taxpayer and consequently rejected the Internal Revenue Agency's claim; but 2) in doing so, it would have been obstructing the application of the principles of EU Law on fighting the abuse of tax law[17]. For this reason, the Supreme Court raised the preliminary ruling proceeding to the CJEU.

On closer inspection, despite the usual brevity of the CJEU's reasoning, and although there seems to be no doubt that the CJEU recognizes a "relative" effectiveness of res judicata, its statement seems to be dictated more by a desire to reaffirm – beyond a reasonable doubt – the supremacy of EU Law in order to ensure its widest and most uniform application throughout the European judicial area, rather than to implement a systematic deconstruction of res judicata.

The Court, in fact, departs from an approach of true respect for the res judicata, which is interpreted, once again[18], as the last "stronghold" of legal certainty and the need for stability to which all proceedings are meant to be.

From this statement, the Court infers two limits: on the one hand, the limit, so-called "external" on the basis of which the EU Law cannot force the overcoming of the effectiveness of res judicata, even if this would make it possible to remedy a violation of EU Law carried out by a wrong national ruling; on the other hand – this is the limit so-called "internal" – the influence of EU Law cannot be too strong since procedural matters are left to the competence of every Member State[19]. On the base of this second limitation the Court affirms that "the interpretation of Article 2909 of the Italian Civil Code may be justified with a view to protecting the principle of

[16] See F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit.

[17] F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit., also points out that in the request for a preliminary ruling to the CJEU specific reference is made to the judgment of the Case C-255/02 Judgment of the Court (Grand Chamber) of 21 February 2006, *Halifax plc and others* v. *Commissioners* (in *Riv. dir. trib*, 2007, 3 ff.), where it is recalled how the taxpayer is entitled to reduce his tax burden on condition that he does not carry out cases of abuse identifiable *inter alia* when he pursues the exclusive purpose of obtaining a tax advantage.

[18] The direct precedent in which the Court had dealt with the issue and in which it had shown a "deferential" attitude toward the res judicata can be found in the Case C-126/97 Judgment of the Court of 1 June 1999 *Eco Swiss-Benetton*.

[19] See F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit.

legal certainty, in the light of its implications for the application of Community law". However, it should be noted that such an interpretation not only prevents a point that has acquired the strength of res judicata from being called into question (even if the decision involves a violation of EU law), but also prevents any decision on points (subject to the effects of the res judicata) common to other cases, from being rediscussed in other proceedings concerning the same taxpayer but relating to a different tax year[20].

Because of the importance, breadth, and complexity of the arguments addressed by the CJEU, an entire book would probably not suffice to summarize all the systematic implications that the Olimpiclub Case could have on the resilience of the Italian judicial system if a "deconstructive" view of the effectiveness of the res judicata is adopted[21]. However, this is not the place to systematically address such arguments.

Nevertheless, the statement that the Court meant to "relativize" res judicata with the Olimpiclub Case should be scaled down[22] and simply

[20] See F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit. This conclusion can be drawn, in particular, from an overall reading of points 28-30 of the Olimpiclub Case reasoning from which it follows that the national court may diverge from previous ruling when the application of Article 2909 of the Civil Code leads to a violation of the EU law on unlawful, deceptive and abusive behavior.

[21] Indeed, critiques of this decision have been made on several levels. One of the most interesting profiles is certainly that the Court implements a "EU-oriented" interpretation of domestic law that does not belong to it. As observed by F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit., such power, indeed, belongs to the national courts, which, however, often do not help to provide clarity and are often the first to voluntarily "divest" themselves of the task of "guarding" the interpretation of the domestic law in order to ask the CJEU to deal with it directly. Instead, the CJEU should limit itself to providing, to the national court, all those elements suitable for identifying the meaning of the European rule applicable to the case so that the latter can determine whether to disapply the domestic one, which is clearly in conflict with the former.

[22] See, on this point, the opinion of Adv. Gen. Jàn Mazák to the Olimpiclub Case who states, on one hand, that "the referring court is uncertain as to the pertinence to the present case of *Lucchini*, in which the Court affirmed the principle that Community law precludes the application of a provision of national law such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata*, where the application of such a provision prevents the recovery of State aid granted in breach of Community law. In the view of the Corte suprema di cassazione, that judgment appears to form part of a more general trend in the case-law of the Court of Justice towards considering the authority of judgments handed down by national courts to be relative, and requiring them to be disregarded on grounds of the primacy of Community law" (point 23); and, on the other hand, that in the light of the principle of finality in litigation, "the Court has – more specifically,

brought back to the level of, on the one hand, the "dialogue between courts" and, on the other hand, the fact that National Law must be read in light of EU Law[23].

Indeed this "relativization" of the res judicata, despite the drastic consequences that an excessively lax interpretation of the principle expressed by the CJEU could have entailed, has not occurred at the national level. Actually, the Supreme Court has adopted solutions that are often contradictory and illogical with respect to what should be the scope of the tax process. In short, a caselaw already orphaned of a systematic model has also had to deal with a profile intended as "deconstructing" the res judicata, which, instead of investigating the systematic profiles of the matter, has given rise to a "jurisprudential definition" of a constellation of hypotheses covered by res judicata on the case-by-case approach.

In particular, the first reaction following the Olimpiclub Case was that of a complete submission of the Italian Supreme Court to the CJEU's ruling. In other words, instead of activating the so-called "theory of counter-limits"[24] and affirming the non-subjection of the rule of res judicata to any alleged EU interest, the Supreme Court affirmed that VAT disputes are counted among those that require compliance with mandatory EU rules, the application of which cannot be prevented by the binding character of the

in *Eco Swiss*, *Köbler* and *Kapferer*, which concerned the finality of judicial decisions and, as regards *Eco Swiss*, the finality of an arbitration award – acknowledged the importance, both for the Community legal order and the national legal systems, of the principle of *res judicata*. It has recognised that in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all legal remedies have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question" (point 45). To reach the conclusion that the Olimpiclub Case "is comparable rather with that in *Köbler*, in which the Court dismissed the argument, based on *res judicata*, against the recognition of the principle of State liability for a decision of a court adjudicating at last instance, on the grounds that that recognition does *not in itself* have the consequence of calling in question that decision as *res judicata*" (point 74).

[23] See S. DALLA BONTÀ, *L'ultrattività del giudicato nel processo tributario*, cit., 701.

[24] The reference is to the famous "Taricco Saga" (Cf. R. ALFANO, *La vicenda Taricco: controlimiti, principio di legalità ed effettività del sistema sanzionatorio tributario interno*, in *Dir. prat. trib. int*, 2018, 945 ff.) which involved the CJEU and the Italian Constitutional Court and led to a more comprehensive declination of the relationship between Member States and the European Union, going so far as to define, in the criminal tax field, the principle that sanctions, within the limits set by the caselaw of the CJEU such as reasonableness, proportionality and *ne bis in idem*, are within the availability of the legislatures of the member states.

national res judicata and its projection even beyond the tax period as established by the Olimpiclub Case[25].

However, to the fears of those who believed that this principle could be extended to encompass the entire tax matter, the Supreme Court answered with a series of judgments through which it effectively limited the "relativization" of the res judicata to VAT disputes only[26].

From this point forward, all attempts to extend or restrict the validity of res judicata in other proceedings among the same parties will be carried out differentially by the Supreme Court. Thus, on the one hand, the analysis with regard to VAT will no longer be disengaged from the parameters set by Olimpiclub Case and, on the other hand, other taxes will follow different and, in a sense, more traditional parameters.

The outcome reached, then, was to isolate the matter of the formation of res judicata with respect to VAT from all the other hypotheses in which res judicata continues to move within the framework of the limits put in place by the domestic regulations.

The major criticism of such an approach can be summed up in the fact that such an operation debases the systematic tightness of a system that appears increasingly frayed, but, then again, without the activation of any counter-limit this was probably the only solution that the Supreme Court could put in place to avoid a relativization of the res judicata throughout the tax discipline. The only way, in short, to avoid decision-making anarchy and instability in the system.

4. – As mentioned above, the CJEU's attack on res judicata was not limited to tax matters, since some of the considerations that arose in the area of VAT abuses can be found, *mutatis mutandis*, in the CJEU judgments questioning

[25] See Case No. 12249 Judgment of the Italian Supreme Court of 19 May 2010, in Dir. *economia assicur.* (since 2012, *Dir. e Fiscalità assicur.*), 2011, 390. By applying the principle, the Supreme Court rejected the value of res judicata of judgments that, issued with reference to VAT assessment notices for different tax years, had ruled out that an agreement for the loan of sports facilities, entered into between a company and a sports association for the sole purpose of obtaining tax savings.

[26] See, *inter alia*, Case No. 25508 Judgment of the Italian Supreme Court of 13 November 2013, in *Giustizia Civile Massimario*, 2013; Case No. 8855 Judgment of the Italian Supreme Court of 4 May 2016, in *Giustizia Civile Massimario*, 2016; Case No. 14596 Judgment of the Italian Supreme Court of 6 June 2018, in *Giustizia Civile Massimario*, 2018; Case No. 33572 Judgment of the Italian Supreme Court of 28 December 2018, in *Giustizia Civile Massimario*, 2019; Case No. 16010 Judgment of the Italian Supreme Court of 14 June 2019, in *Giustizia Civile Massimario*, 2019; and, most recently, Case No. 33596 Judgment of the Italian Supreme Court of 18 December 2019, in *Giustizia Civile Massimario*, 2020.

the res judicata of an order for payment that has become final because the party failed to file any opposition to the order.

The CJEU, in particular, in a judgment of 17 May 2022[27] – issued along with three other "twin" judgments[28] – ruled that Articles 6.1 and 7.1 of Directive 93/13/EEC (on unfair terms in consumer contracts)[29] must be interpreted "as precluding national legislation which provides that, where an order for payment made by a court at the request of a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings cannot, on the ground that the force of res judicata of that order applies by implication to the validity of those terms, thus excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms on which that order is based"[30].

The judgment seeks to reduce the concrete risk that the res judicata that "arises" in the wake of the order for payment that has become final (which acquired the force of res judicata on the validity of the terms of an enforceable instrument) may fail to protect the rights that the consumer has under EU law; for this reason it becomes necessary in the subsequent – even if only potential – proceedings to oppose the enforceability of the order for payment to give the court the opportunity to know the validity of the terms

[27] See Joined Cases C-693/19 and C-831/19 Judgments of the Court (Grand Chambre) of 17 May 2022 (*SPV Project 1503*). The ruling arose in response to two preliminary rulings requested by the Court of First Instance of Milan firstly analyzed by F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022, (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, in *Judicium online,* 24 June 2022; and M. ARANCI, *Tutela del consumatore e giudicato implicito: una coesistenza (davvero) impossibile? Note a prima lettura di Corte di giustizia 17 maggio 2022,* SPV Project, in *eurojus*, 3, 2022, 29 ff.

[28] See Case C-600/19 Judgment of the Court (Grande Chambre) of 17 May 2022, Case C-600/19 Judgment of the Court (Grande Chambre) of 17 May 2022 (*Ibercaja* v. *Banco*); Case C-725/19 Judgment of the Court (Grande Chambre) of 17 May 2022 (*Impuls Leasing* v. *România*); Case C-869/19 Judgment of the Court (Grande Chambre) of 17 May 2022 (*Unicaja Banco*).

[29] Which state, respectively: "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms"; and "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".

[30] See Joined Cases C-693/19 and C-831/19 Judgments of the Court (Grand Chambre) of 17 May 2022 (point 50).

– overcoming the res judicata – and therefore to censure any unfair terms under Directive 93/13/EEC.

The ruling – which raises consumer protection to a cornerstone principle of the EU Law – causes perplexity that, once again, is pendant with a poor extension of the reasoning, especially on the trickiest parts of the reasoning that have to deal with the deconstruction of the res judicata. Moreover, the similarity with Olimpiclub Case's reasoning is astonishing and again departs from a respect for res judicata, which is recognized as having the fundamental role of ensuring the certainty of legal transactions within the European legal system.

Furthermore, the CJEU takes the opportunity to re-affirm that "without effective review of whether the terms of the contract concerned are unfair, observance of the rights conferred by Directive 93/13 cannot be guaranteed"[31]. This is the main reason why the Court must review the unfairness of the terms, despite the assumption of a res judicata on the point[32].

In short, the need to protect the consumer, in the CJEU's view, is emphasized to such an extent that it sacrifices res judicata and requires examination of unfair terms even if enforcement proceeding has already begun. If this interpretation were confirmed, however, there would be an alteration of the principle of stability of res judicata that would be found in the order for payments not opposed. Between the lines, it is clear that the CJEU wants to criticize the lack of the order for payment investigation with consumer protection.

On closer inspection, it is also true that the consumer may not be sufficiently protected since – due to the summary proceeding as it is for the order for payment – the examination of the contract (and consequently its value as res judicata) is based only on the creditor's assumptions[33]. The

[31] See Joined Cases C-693/19 and C-831/19 Judgments of the Court (Grand Chambre) of 17 May 2022 (point 62).

[32] This is stated, for example, in Case C-725/19 Judgment of the Court of 17 May 2022 (*IO v. Impuls Leasing Romania IFN SA*). See on this point, G. FIENGO, *Il ruolo del giudice alla luce della giurisprudenza della Corte di giustizia*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, in S. CAPORUSSO – E. D'ALESSANDRO (eds.), *Consumatore e procedimento monitorio nel prisma del diritto europeo*, in *Giur. it.*, 2022, 532 ss.; e F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022, (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, cit., 1.

[33] A. PANZAROLA, *Su alcuni profili dell'ingiunzione di pagamento europea nella prassi*, in S. CAPORUSSO – E. D'ALESSANDRO (eds.), *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., 498.

problem is that once the res judicata is broken down[34] for the sole benefit of the debtor (which in the present case is the consumer, but in perspective may cover a much wider range of parties not as well protected by European consumer law), a very high price is paid in terms of legal certainty.

What is certain is that the judgment, although driven by concerns about the effectiveness of law, goes to enrich the procedural status of the consumer at the expense of the certainty of legal transactions that finds its procedural basis in the res judicata.

But was it really necessary to go so far as to demolish the rule of res judicata? Isn't there a risk of implementing a case-by-case approach – exactly as happened in the VAT field after the Olimpiclub Case – that risks limiting these effects to consumer protection only? Yet, on these issues, the CJEU does not conduct an analysis that highlights the critical issues arising from the dismantling of res judicata. Actually, the feeling is that the CJEU has misunderstood the functioning of the Italian civil process, in which the enforcement proceedings stand as a consequence of the process in which the issues are analyzed, without the two moments being able (and should) overlap. This template, which reflects the necessary consequentiality between the ordinary proceedings and the enforcement proceedings, would be distorted the instant the debtor is given the option of relying on any element that he also might have (and should have) raised before the judge ruling on the merits[35].

Not only that. This approach could also legitimize the behavior of that debtor who, reached by the order for payment, could (strategically) remain passive and then claim – only at a later stage and in the face of a new or different interpretation of the circumstances – protection against unfair terms, which can also be activated in enforcement proceedings.

From this perspective, the creditor might have a legitimate expectation of the stability of the judicial decision, only to be exposed to the debtor's subsequent defensive initiative; actually, the application of the CJEU ruling might even provide a justification for behavior contrary to the good faith, as the consumer might decide, only when subjected to enforcement

[34] See S. CAPORUSSO, *Procedimento monitorio interno e tutela consumeristica*, in S. CAPORUSSO – E. D'ALESSANDRO (eds.), *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., 542; and F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022, (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, cit., 2.

[35] M. ARANCI, *Tutela del consumatore e giudicato implicito: una coesistenza (davvero) impossibile? Note a prima lettura di Corte di giustizia 17 maggio 2022*, SPV Project, cit., 40-41.

proceedings, to raise an objection of unfairness of contractual terms that are per se harmful[36].

5. – To return to the issue of the deconstruction of res judicata with which we opened this paper, we cannot but ask the following questions: are we witnessing the decline of the centrality of the res judicata?[37] Is this an era of an increasingly pronounced sectorialization of matters which, finding their new foundation in the international dimension – where they have a more pronounced dimension of protection – appear increasingly "disengaged" from the system of domestic law? The feeling is that we are moving toward this second direction without, however, being fully aware of the consequences this may have on the resilience of res judicata.

Indeed, to draw a lesson from Olimpiclub Case, it seems that it does not represent an "attempt to sabotage" the Italian jurisdictional system through an attack on one of its fundamental pillars, but rather represents, in CJEU's intentions, a piece of that famous "dialogue between national and international courts"[38] and the limits within which European Court judgments can move within national systems. A dialogue that, however, does not take into account the characteristics of domestic systems and that, by dropping a tile (*i.e.*, the stability of the res judicata in a specific field such as the VAT field or consumer protection), risks dragging with it – in an irremediable domino effect – all those guarantees that citizens ascribe to res judicata. In short, the goal of protection and stability that the CJEU would also like to follow with these judgments, risks turning into a *boomerang* that, instead of ensuring the uniform application of EU law throughout the member states and protecting weak contracting parties, could betray this goal and lead to "unfairness" generated by uneven and contradictory applications between protections that find their source in EU law and those that instead find it in domestic law.

However, all of this calls for a fundamental reflection: beyond the political implications that may arise from a further cession of sovereignty to a body that was created to resolve issues related to the interpretation or validity of a provision of EU law, and not to dictate rules of general

[36] M. ARANCI, *Tutela del consumatore e giudicato implicito: una coesistenza (davvero) impossibile? Note a prima lettura di Corte di giustizia 17 maggio 2022*, SPV Project, cit., 41.

[37] G. TRISORIO LIUZZI, *Centralità del giudicato al tramonto?*, Napoli, 2016, *passim*.

[38] On this point see B. HESS, *Justizielle Kooperation*, in *General Report World Congress on Procedural Justice*, Heidelberg, 2011; R. CAPONI, *Cooperazione giudiziaria in materia civile ed integrazione europea*, in G. AMATO – R. GUALTIERI (eds.), *Le istituzioni europee dopo il Trattato di Lisbona*, Bologna, 2013; E. CANNIZZARO, *Sui rapporti fra sistemi processuali nazionali e diritto dell'Unione europea*, in *Dir. Un. eur.*, 2008, 3 ss.

application, what needs to be asked is: can the interpretation of an agreement among States go so far as to destabilize the resilience of a national legal system? In other words, are we willing to give up the demands of legal certainty that is a natural counterbalance to res judicata in order not to compromise a matter (certainly important but of secondary importance when considered in the overall systematics) such as that of alleged VAT abuses or consumer protection? And even if we were willing to accept such an "opening" (*i.e.*, not to consider res judicata fully operative in the matters mentioned), can we be sure that this will not be used as a "bridgehead" for future expansions aimed at implementing further profiles of deconstructing the discipline of res judicata with catastrophic consequences in terms of the tightness of the entire domestic system?

Indeed, the CJEU seems to implicitly state that within the European legal system the error of law consisting of the fact that a final judgment may be at odds with the principles expressed in the European treaties cannot be tolerated. Thinking in this way, however, one forgets to consider all the debate on the subject of "unfair" judgments that has Liebman as its greatest exponent and which postulates an ontological nonexistence of the problem, since there is no other means of checking whether a judgment is fair or unfair other than a new judgment that takes up the same dispute again: a hypothesis which, besides being ruled out by law, gives no certainty that the second judgment is fairer than the first, nor the third more than the second, and so on *ad infinitum*[39].

Abstract

***PRO VERITATE ACCIPITUR?* THE "DIALOGUE" BETWEEN THE COURTS JEOPARDIZING THE RES JUDICATA**

Recentemente la "millenaria forza" della *res iudicata* è stata sottoposta a un processo di "decostruzione" da parte della Corte di giustizia europea (CGUE) in nome di valori che, secondo la CGUE, non possono essere sacrificati in alcun modo. Ciò è avvenuto dapprima in campo fiscale (su questioni relative all'IVA) e, ancora più recentemente, nel campo delle clausole abusive contenute nei contratti con i consumatori.

Queste decisioni, pur essendo giustificate da preoccupazioni sull'efficacia del diritto in tutto il territorio dell'Unione Europea, vanno ad arricchire lo status procedurale dei cittadini europei a scapito della certezza dei negozi giuridici basata

[39] See E.T. LIEBMAN, *Giudicato I) Diritto processuale civile*, in *Enc. Giur. Treccani*, XV, Roma, 1989, 7. The same thought is also found in A. SEGNI, *Sulla natura dell'eccezione di cosa giudicata*, in *Scritti giuridici*, I, Torino, 1965, 631; e F. FRADEANI, *La sentenza "Olimpiclub" della Corte di giustizia CE e la stabilità del giudicato*, cit.

sulla forza della *res iudicata*.

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Recently the "millennial strength" of res judicata has been subjected to a process of "deconstruction" enacted by the European Court of Justice (ECJ) in the name of values that, according to the ECJ, cannot be sacrificed in any way. This happened first in the tax field (on VAT-related matters) and, even more recently, in the field of unfair terms in consumer contracts.

These decisions, while justified by concerns about the effectiveness of the law throughout the territory of the European Union, go to enrich the procedural status of the European citizens at the expense of the certainty of legal transactions based on the strength of res judicata.
