# *Actio Pauliana* And Divisions (IGI c Cicenia, C-394/18): Not Everything That Is Done, Is Well Done

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**ABSTRACT**

By IGI c Cicenia C 394/18, a decision of Jan. 30th, 2020, the European Court of Justice has solved questions concerning an action to set aside a division (so-called *actio pauliana*). The Court holds that neither the objection granted before the division is implemented, nor the rules establishing the cases in which "nullity" of a division may be declared preclude creditors from bringing an *actio pauliana*, in cases where this is appropriate: indeed, such an action does not affect the validity of a division but merely allows for that division to be rendered unenforceable against the acting creditors. The note, after reviewing the case, the background debate and the reasoning of the ECJ, marks that an *actio pauliana* is aimed at reversing the effects of the asset transfer, not at causing the recipient company to cease to exist. Also, it underlines that the joint and several liability of the recipient companies is not equivalent to an action to set aside: unless EU law would not consider creditors' protection and grant them *at least* the right to request adequate guarantees, in case the division affects them negatively.

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## 1. IGI C CICENIA C-394/18 - A BRIEF SUMMARY OF THE CASE.

An Italian building company (Costruzioni Ing. G. Iandolo Srl, or the 'company being divided') transferred, within the context of a division by formation of a new company, a part of its assets to a newly established recipient company (IGI Srl, or the 'recipient company'). Taking the view that that division had caused the company being divided to lose a large part of its assets and that the company now owned only land plots of low value, some creditors brought an action against both companies before the District Court of Avellino (Italy). Principally, they brought an action to set aside (a so-called *actio pauliana*) [1], requesting that the transfer of assets being consequence of the division be

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[1] *Actio pauliana* or also "azione revocatoria ordinaria" (an action to set aside) is regulated by Article 2901 of the Italian Civil Code, as follows: "Even where the credit is subject to conditions or deadlines, a creditor may request that transfers of assets through which a debtor causes a prejudice to its interests be declared without effect vis-à-vis that creditor, where the following conditions are met: (1) the debtor is aware of the prejudice that the act has caused to the interests of the creditor or, in the case of an act antedating the existence of the credit, the act was deliberately planned to prejudice the settlement of the claim; (2) furthermore, in relation to an act for consideration, the third party was aware of the prejudice and, in the case of an act antedating the existence of the credit, was a party to the deliberate planning of that act." Such an action may be brought against a common debtor, as well as a business undertaking; in the latter case, it may be also brought in a bankruptcy proceeding, along with other actions to set aside regulated by the bankruptcy code and available to only bankruptcy liquidators, not to common creditors (so-called: azioni revocatorie fallimentari).

declared without effect vis-à-vis themselves. In the alternative, they requested that both companies be declared jointly and severally liable for the debts of the company being divided[2].

The District Court of Avellino allowed the principal claim of the creditors and declared the asset transfer instrument contained in the instrument of division without effect vis-à-vis them. The two companies lodged an appeal against that judgment before the Court of Appeal of Naples (Italy), arguing that – both under Italian and EU law – creditors of companies involved in a division may enjoy of a sole judicial remedy, that is the objection allowed before the division is entered in the commercial (or companies) register[3]. In addition, those companies also stated that Italian law – strengthening Union law – precludes situations in which an instrument of division is declared invalid after the publication formalities have been complied with; therefore, also an action to set aside a division transaction should be deemed inadmissible.

Considering wide discussion on these points in the Italian case law and law reviews, the Court of Appeals of Naples stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling with regards to Articles 12 and 19 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies ('the Sixth Directive').

## 2. THE DEBATE ON THE SETTING ASIDE A DIVISION OPERATION. THE REFERENCE TO THE ECJ FOR A PRELIMINARY RULING.

As mentioned, Italian Courts have experienced a deep contrast as to whether an action to set aside a division conflicts or not with the law of divisions implementing the Sixth Directive (now Articles 135-160 Directive 2017/1132/EU). It is worth mentioning that the Italian law of divisions (as well as mergers and conversions) is applicable to all companies and firms, regardless of whether the interested company is a 'società per azioni' (the type of company referred to in the annex to the Directive for Italy) or another type of company.[4]

Some court decisions[5], along with some commentators, believe that both Italian and EU law adopt a broad concept of "nullity" of a division, including also actions to set aside, whose purpose is that of

[2] Article 2506 quater Italian Civil Code, implementing Article 12, par. 3, Sixth Directive (now Article 146, par. 3, Dir. 2017/1132/UE).

[3] Article 2503 Italian Civil Code, as regards mergers but also applicable to divisions, implementing Article 12, par. 2, Sixth Directive (now Article 146, par. 3, Dir. 2017/1132/UE) reads as follows: "A merger may be implemented only 60 days after the last of the registrations required under Article 2502-bis, unless (i) the merger has the consent of the creditors of the companies involved in the merger who have claims existing before the registration or publication required under Article 2501-ter(3), (ii) payment is made to creditors that have not given their consent, (iii) the corresponding sums are deposited with a bank, or (iv) the report required under Article 2501-sexies, which has been drafted, for all companies involved in the merger, by a single auditing company, in accordance with its liability under the sixth paragraph of Article 2501-sexies, has certified that the assets and liabilities and financial situation of the companies involved in the merger are such that it is not necessary to provide safeguards for the protection of the aforementioned creditors.
If none of those exceptions applies, the creditors referred to in the previous paragraph may file an objection within the period of 60 days indicted above. In such a case, the final paragraph of Article 2445 shall apply."

[4] The issue whether the ECJ has jurisdiction in cases where directives are made applicable more broadly than required by the directive itself, is affirmatively solved by the ECJ in IGI c Cicenia C-394/18, paras 39-54.

[5] See, amongst the newest, Court of Appeals, Rome, 27 march 2019, Foro italiano, I, 2919 ff. (2019) (*see*, for critical comment, L. Sicignano, *La dibattuta problematica dell'azione revocatoria dell'atto di scissione: l'interpretazione della norma europea, in attesa della Corte di Giustizia*, available at <giustiziacivile.com>; for favourable comment, E. Macrì, *La revocatoria dell'atto di scissione alla luce della nuova disciplina dettata dal d.lgs. n. 14 del 12 gennaio 2019*, Vita notarile, 1457 ff. (2019)); Court of Appeals, Catania, 19 september 2017, case note of P. Pototschnig, *Il persistente contrasto interpretativo sull'ammissibilità dell'azione revocatoria della scissione societaria*, Fallimento, 902 ff. (2018); District Court, Naples, 26 novembre 2018, case note of F. Fimmanò, *Scissione societaria e irrevocabilità della circolazione del patrimonio*, Società, 469 ff. (2019); District Court, Rome, 7 novembre 2016, Foro italiano, Rep. 2017, voce *Società*, n. 608; District Court, Bologna, 1 april 2016, case note of A. Ruotolo & D. Boggiali, *(In)compatibilità fra scissione e azioni revocatorie*, Rivista del notariato, 945 ff. (2016); District Court, Naples, 18 february 2013, case note of L. Rivieccio, *Tutela dei creditori sociali tra azione revocatoria e scissione societaria*, Giurisprudenza commerciale,

declaring the division ineffective vis-à-vis the interested creditors. As a consequence, an *actio pauliana* would not be admissible in case of divisions: on the one hand, EU law does not list actions to set aside amongst the cases where "nullity" of a division may be declared; on the other hand, Italian law – being more restrictive than EU law – does not permit a declaration of "nullity" of a division in any case.

Moreover, the same line of reasoning holds that, since creditors are granted a right to object to the division before it is implemented, allowing an action to set aside would conflict with the rationale behind this remedy, which is aimed at granting to interested creditors immediate payment or an adequate guarantee.

Last, it is argued that granting an action to set aside would be useless as the effects of the action are equivalent to the possibility, granted by both EU and Italian law, to claim payment of debts of the divided companies from all recipients of the division, these being jointly and severally liable – *pro rata* – for obligations entered by the divided company before the instrument of division has been implemented.

Other decisions,[6] however, disagree on the assumptions that an action to set aside affects the validity of the division, that enjoying of the objection prevents creditors from exercising other remedies (in cases where there are grounds for the exercise of such remedies), and that the joint and several liability of the recipient companies is equivalent to an action to set aside a division operation. As such, these court decisions – amongst which that of the court of first instance in the case of IGI c Cicenia – allow actions to set aside a division of companies.

Being aware of these diverging opinions, the Court of Appeal of Naples stayed the proceedings and referred the two aforementioned questions to the ECJ for a preliminary ruling. With its first question the referring court asked whether Article 12 of the Sixth Directive must be interpreted as precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the recipient company.

By its second question, the referring court asked whether Article 19 of the Sixth Directive, which lays down nullity rules for divisions, must be interpreted as precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.

The ECJ has negatively solved both questions, affirming that:

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II, 1040 ff. (2014); District Court, Naples, 31 october 2013, e District Court, Naples, 4 march 2013, case note of C. Angelici, *La revocatoria della scissione nella giurisprudenza*, Rivista del diritto commerciale, II, 111 ff. (2014). Similarly, amogst scholars, see A. Paciello, *La revocatoria della scissione*, in *Crisi e insolvenza*. In ricordo di M. Sandulli, 531 ff. (Giappichelli, 2019), where also other references, maintaining that the action to set aside is inadmissible because recipient companies are jointly and severally liable.

[6] See, Italian Supreme Court [ord.], sez. I, 4 december 2019, n. 31654, Foro italiano, Rep. 2019, voce *Revocatoria (azione)*, n. 45 (this decision is an *obiter dictum*). See also, amongst the newest, Court of Appeals, Naples, 17 october 2015, Foro italiano, Rep. 2016, voce *Revocatoria (azione)*, n. 20; District Court, Rome, 12 giugno 2018, Foro italiano, I, 3291 (2018); see also V. Sangiovanni, *La revocabilità della scissione fra diritto societario e fallimentare*, Giurisprudenza italiana, 1583 ff. (2019), for favourable remarks; District Court, Benevento, 12 october 2017, Foro italiano, Rep. 2019, voce *Revocatoria (azione)*, n. 42; see also A. Bello, *Revocatoria dell'atto di scissione: una questione ancora aperta*, Giurisprudenza commerciale, II, 392 ff. (2019); District Court, Pescara, 17 may 2017 and District Court, Pescara, 4 may 2017, case note of S. Messina, *La revocatoria dell'atto di scissione*, Vita notarile, 1093 ff. and 1442 ff. (2017); District Court, Rome, 7 novembre 2016, case note of L. Luchetti, *L'operazione di scissione tra tutela dei creditori e certezza dei traffici giuridici*, Diritto fallimentare, 184 ff. (2018); see also M. Pin, *Scissione e azione revocatoria ordinaria e fallimentare*, Giurisprudenza commerciale, II, 136 (2018); District Court, Venice, 5 february 2016, case note of S. Cassani, *Scissione e azione revocatoria*, Società, 67 ff. (2017); see also P. Pototschnig, *Scissione societaria e azione revocatoria: un nervo scoperto per la tutela dei creditori?*, Fallimento, 51 ff. (2017).

1. Article 12, read in conjunction with Articles 21 and 22 of the Sixth Directive, must be interpreted as not precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the newly formed company.
2. Article 19, read in conjunction with Articles 21 and 22 of the Sixth Directive, which lays down nullity rules for divisions, must be interpreted as not precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.

**3. THE REASONING BEHIND THE DECISION OF THE ECJ.**

As regards the first question, the Court observes that under Article 12(1) of the Sixth Directive, the Member States must provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication. The same Article 12 of the Sixth Directive, in its second paragraph, provides that the Member States are to *at least* provide that such creditors are to be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards. Furthermore, the Member States may provide that the newly formed companies are to be jointly and severally liable for the obligations of the company being divided (Article 12(3) of the Sixth Directive).
Given this picture of EU law of divisions, the Court observes that the *actio pauliana* is not listed amongst the tools for protecting the creditors of a company being divided. Despite this, the court marks that "the use of the expression 'at least' in Article 12(2) of the Sixth Directive indicates that that article provides for a minimum system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication. Therefore, that paragraph does not prevent the Member States from providing for tools for protecting the interests of those additional creditors in relation to those claims".[7] As a consequence, Article 12 of the Sixth Directive does not exclude the possibility, for the creditors of a company being divided, to bring an *actio pauliana*, where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary.
In addition, it is noted that Article 12 of the Sixth Directive does not require the protection for the creditors of newly formed companies provided for by the Member States to be equivalent to that provided for the creditors of a company being divided. It therefore follows from all those provisions that the minimum harmonisation, under the Sixth Directive, of the protection of the interests of the creditors of companies involved in a division does not preclude, within the context of a division by the formation of a new company, as is the case in the main proceedings, priority being given to the protection of the interests of the creditors of the company being divided. [8]
As regards the second question, the Court observes that Article 19 of the Sixth Directive (laying down nullity rules for divisions) limits the cases in which nullity can arise, restricts the period within which nullification proceedings may be commenced and provides that, where it is possible to remedy a defect liable to render a division void, a period of time is to be granted to the companies involved to rectify the situation.

[7] IGI c Cicenia C 394/18, para. 67.
[8] *Ibid.,* paras 73-74.

Notwithstanding that the concept of 'nullity' is not defined in the Sixth Directive, it is arguable that "the concept of 'nullity', in its usual meaning, refers to actions seeking the annulment of an act, that result in its elimination and that have an effect *erga omnes*".[9] Article 19(1)(b) of the Sixth Directive states that divisions which have taken effect may be declared void in three cases only: (1) if there has been no judicial or administrative preventive supervision of their legality, (2) if they have not been drawn up and certified in due legal form, or (3) if it is shown that the decision of the general meeting which approved the draft terms of division is void or voidable under national law. "Those three cases in which nullity can arise concern the coming into being of the division and affect its very existence. Therefore, these are cases which result in the elimination of the division". [10]
The Court expresses the opinion that an *actio pauliana* "has the sole aim of protecting creditors to whose rights the division has caused harm", not to penalise failure to comply with the requirements for the coming into being of the instrument of division. It follows that "the *actio pauliana* brought by the respondents in the main proceedings under Article 2901 of the Civil Code only allows for the division in question, in particular the transfer of certain assets referred to in the instrument of division, to be declared unenforceable against those respondents. That action does not affect the validity of that division, does not result in its elimination and does not have an effect *erga omnes*." [11]
In the light of all considerations made, the Court concludes that answers to both questions shall be negative. (1) The answer to the first question is that Article 12 of the Sixth Directive, read in conjunction with Articles 21 and 22 of that directive, must be interpreted as not precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that Article 12, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the newly formed company (§ 75 and Operative Part 1). The answer to the second question is that Article 19 of the Sixth Directive, read in conjunction with Articles 21 and 22 of that directive, which lays down nullity rules for divisions, must be interpreted as not precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors (§ 88 and Operative Part 2).

## 4. SOME REFLECTIONS ON *ACTIO PAULIANA* AND DIVISION OPERATIONS.

As noted before the Luxembourg judges' decision, it was somewhat obvious that to questions posed by the referring court "the Court of Justice [would have given] a solution in the sense that the admissibility of the action to set aside, affecting the effectiveness of the transfer of assets and not the validity of the instrument of division, is not precluded by the European provisions".[12] The predictability of the ECJ's solution, however, does not diminish the relevance of the issue that arises in Italian law.
To analyse the impact of the ECJ's decision, it is useful to consider first the question raising the doubt that an action to set aside may conflict with the rule restricting the cases in which "nullity" a division operation may be declared. As the Court puts it, "nullity" refers to actions seeking the annulment of an act, that result in its elimination and that have an effect *erga omnes*. The Court takes the view that an *actio pauliana* does not affect the validity of the division but merely allows for that division to be rendered unenforceable against those creditors; hence, it is admissible.
Under EU law, a division by the formation of new companies means the operation whereby (after being wound up without going into liquidation or without the company being divided ceasing to

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[9] *Ibid.,* para. 80.
[10] *Ibid.,* para. 83.
[11] *Ibid.,* paras 85-86.
[12] See, A. Stagno d'Alcontres & N. de Luca, *Le società*, III, *Le società mutualistiche. Gli istituti transtipici*, at 987 f. (Giappichelli, 2019).

exist), a company transfers to one or more newly-formed companies (all or part of) its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies. [13] Contrary to some decisions of Italian domestic courts and the opinion of some authoritative legal scholars, [14] an *actio pauliana* does not aim at declaring the newly-formed recipient company null and void, rather at making the transfer to that recipient company ineffective vis-à-vis the creditors. Indeed, consequence of an *actio pauliana* being allowed, is that only some effects of the division operation are set aside: reference is made "to the asset transfer instrument contained in the instrument of division".[15] So, despite the recipient company survives, its directors bear an obligation to re-transfer the assets (and liabilities) to the company being divided and not ceased to exist, for the benefit of its creditors.

The idea that the transfer of assets may be ineffective, although the instrument of division is valid, perfectly fits with the doctrine that recognises the viability of an action to set aside a contribution in kind, whilst maintaining the validity of the instrument of constitution of a company. Indeed, Article 11 Directive 2017/1132/EU defines the grounds for declaring the nullity of company: as clarified in *Marleasing*,[16] nullity of a company may not be declared for grounds not listed in the directive, e.g. a sham transaction, but in no case such a restriction limits the possibility to set aside a contribution in kind found to be a fraud to creditors.[17] As nullity of a company and that of a division are similar cases,[18] solutions must be harmonious.

This being clarified, the solution to the other question referred to the ECJ – as to whether other means provided for in the interest of creditors preclude the admissibility of an action to set aside – may be better understood and approved. Some domestic decisions maintain that the objection granted to creditors before the division is the only tool of protection of which creditors may avail themselves. The decision of the ECJ easily proves this assumption to be wrong, as EU law requires that creditors are granted *at least* the right to object to the proposed division. The ECJ's decision, however, does not directly tackle another argument which is generally underlined by those who hold that the *actio pauliana* is not permissible in case of divisions. Indeed, some legal scholars[19] are of the opinion that the joint and several liability of the recipient companies[20] is equivalent to the effects of an action to

[13] Article 136 read in conjunction with Article 159 Directive 2017/1132/EU.

[14] See decisions listed above in note 4. Some scholars assert that a division entails two sets of effects (the creation of one or more new companies and the transfer of assets and liabilities to them), which could not be separated: see, e.g., Angelici, 2014, n. 4, at 121; and more recently Paciello, 2019, n. 4, at 536, who states as follows: «there is no doubt that the rule [on the invalidity of the division] intends to ensure the stability of the overall effects of the transaction and therefore also of the assets which, in a dynamic perspective, which suites to company law, have now become part of the assets of another firm». These authors, however, overvalue the meaning of the language used in the Italian Civil Code: its 2003 reform replaced the word "*trasferimento*" (corresponding to the wording of the directive: in English, "transfer") with "*assegnazione*" (taken from the language used in the directive for shares: e.g. an "allocation" or "assignment" of shares in exchange for the transfer of assets to the recipient), as the lawmaker wanted to make clear that the company being divided and the recipient company are not different legal persons, rather the latter is the reorganization of the former (this being very important, e.g. for taxation or civil procedure matters). However, in the creditors' perspective, assets "leaving" the company being divided are "transferred" to the recipient (in exchange for nothing, as shareholders not the company are given shares), regardless of whether the law speaks about an "allocation" or "assignment" of assets.

[15] IGI c Cicenia C 394/18, para. 27.

[16] Marleasing C-106/89. See also, N. de Luca, *European Company Law. Text, Cases and Materials,* at 137 f. (Cambridge University Press, 2017).

[17] Italian case law recognises the possibility to set aside a contribution in kind: see, Italian Supreme Court, 22 october 2013, n. 23891, Foro italiano, Rep. 2013, voce *Revocatoria (azione)*, n. 17; Italian Supreme Court, 22 november 1996, n. 10359, Foro italiano, Rep. 1997, voce *Revocatoria (azione)*, n. 15; Italian Supreme Court, 11 march 1995, n. 2817, Foro italiano, I, 3509 (1996). See recently, District Court, Rome, 27 january 2020, Foro italiano, I, in course of publication (2020).

[18] Article 136 Directive 2017/1132/EU defines a division by acquisition as on operation whereby the shareholders of the company being divided receive shares of "the companies receiving contributions as a result of the division".

[19] See, e.g., M. Maltoni & M.S. Spolidoro, *Revocatoria della scissione e direttiva europea*, Società, 1082 ff., at 1095 f. (2017); Paciello, 2019, n. 4, at 543.

[20] Article 2506 quater Italian Civil Code, implementing Article 12, par. 3, Sixth Directive (now Article 146, par. 3, Dir. 2017/1132/UE).

set aside, as all asset transferred to the recipient companies are still available for the satisfaction of creditors of the company being divided.
At least two reasons suggest not to share this argument. First, the possibility to claim joint and several liability of the recipient companies does not give to creditors of the company being divided a right to bring enforcement or protective actions in relation to the assets transferred, in case these are no longer in the availability of the recipient company; an action to set aside would indeed grant this opportunity. Second, if it were true that joint and several liability of the recipient companies grants the same effects as an action to set aside, it would be impossible to understand why EU law takes warries about creditors' protection and grants them *at least* the right to make an objection and request adequate guarantees. Instead, as creditors may be negatively affected by a division operation regardless of whether the recipient companies are jointly and severally liable with the company being divided, an action to set aside shall be deemed admissible, as it proves to be useful.