

Treatment of mergers under the revised Italian Civil Code (Article 2504-bis)

With Judgement n. 19509 dated 14 September 2010, the Italian Supreme Court handed down its decision on the long-debated issue of how to treat mergers completed prior to the 2003 revision of the Italian Civil Code.

In 2003 Parliament removed all references to a company's dissolution in a merger situation by stating, in Article 2504-bis of the Civil Code, that the company deriving from the merger or being taken over would assume all the rights and obligations of the companies involved in the merger and all relationships would be retained, including any pending legal actions in existence prior to the merger. This article, in direct contrast with the interpretation prevalent prior to the revision of the Civil Code, highlights that mergers do not involve the dissolution of the company taken over nor, in the case of a merger between two equals, the creation of a new legal entity and, as a result, do not involve a succession.

Questions arose in relation to the application of the new law and the concept of evolution/modification for mergers arranged prior to 1st January 2004. Specifically it was unclear as to whether pending court cases should be interrupted or not.

The Supreme Court, in its 14 September 2010 decision, excluded the Article 2504-bis application on a retroactive basis clarifying that the revised Civil Code does not apply to mergers completed prior to 2004. According to the Court, however, the above decision does not mean any ongoing court proceedings should be interrupted.

In reaching this view, the Italian Supreme Court drew a clear distinction between the succession on a person's death and the merger of a company. More specifically, an heir could effectively not be aware of a pending court case and, therefore, if the latter were not interrupted, could suffer a serious breach of his right to a proper defense. On the contrary, a merger is the voluntary act of the companies involved and, as a consequence, they do not suffer in any way by the continuance of a court case about which they are fully aware. For this reason, the legal obligations of merged companies are retained, notwithstanding the merger, including existing legal actions against them.

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