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## **6 JULY 2011 - EXPROPRIATION: THE SO CALLED “ACQUISIZIONE SANANTE” IS BACK INTO FORCE.**

Following a ruling of unconstitutionality - for excessive delegation - of Article 43 of D.P.R. no. 327/2011 (Constitutional Court, no 293, of 4-8 October 2010), D.L. 6 July 2011, converted by Law no. 111 of 17 July 2011, has reintroduced in the Consolidated Expropriation Act (Article 42-bis) - albeit with certain modifications - the institute of “Acquisizione Sanante” (acquisition of ownership through an act of indemnity).

The institute of Acquisizione Sanante gives the Public Administration the power to enact measures for the acquisition of ownership of assets formerly belonging to a private person without a valid measure of expropriation or the need of declaring the public utility. This is true - in short - for all those cases where, although the expropriation of the private asset took place spuriously (or illegally), the public work, however, has been carried out on the acquired property with the irreversible transformation of the latter.

Although the new rule closely follows former art. 43 (which as said above has been declared unconstitutional), it contains a few changes which are worth mentioning:

- 1) The person deprived of the asset is to be paid an "indemnity" for the pecuniary and non pecuniary loss (the latter paid with a lump sum equal to 10% of the market value of the asset) and not a "compensation" as it was previously formulated (this difference in terminology could lead to problems in the determination of the jurisdiction over compensation proceedings).
- 2) The payment of compensation for the pecuniary and non pecuniary loss suffered by the person deprived of the asset is conditional to the effectiveness of the transfer of ownership and shall be completed within 30 days of the date of acquisition;
- 3) The new rule (paragraph 8) establishes the retroactivity of the institute to facts occurred before its entry into force. It should be noted, however, that - by contrast - the acquisition is not retroactive; in other words, in line with existing case law that

formed under the old art. 43, the transfer of ownership is linked to the date of enactment of the measure.



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- 4) The Public Administration must explain the "exceptional public interest" justifying the decision to acquire, evaluate "comparatively the conflicting private interests" and highlight "the absence of alternative measures" to the acquisition.
  
- 5) In the context of the proceedings for the restitution of the asset or the challenging of the unlawful act of expropriation - should the action be allowed - it seems now impossible for the Public Administration to ask the judge to be convicted to the payment of damages, together with the indefinite exclusion of the asset's restitution (old art. 43, paragraph 3). Under the new Article 42-bis, in fact, if the act of unlawful expropriation is challenged, the Public Administration should withdraw it and only then will be able to apply the institute in question (Article 42-bis, paragraph 2).

It is also worth pointing out that the Constitutional Court, in declaring the illegality of Article 43 for excessive delegation, had, however, expressed doubts about the compatibility with Community Law of a rule of similar content, with the result that it is still unclear for how long the reintroduced institute will survive.

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For more information or clarification on the issues discussed in this article please contact the authors, **Mr Massimo Colicchia and Mr Federico Novelli**, at our Milan office.

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