COMPETITION AND CONTRACT

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Abstract:
The EU principle of an open market economy with free competition are having a significant effect on Italian contract law. Private autonomy is being affected by the requirement to lower the number of market failures. Information, transparency, contractual equilibrium, proportionality and fairness have become extremely important. The field of application of the ban on abusing legislation that protects the weaker party is being widened. New contractual remedies are being created. A modern competitive model of contracts, which brings higher levels of economic efficiency and more incisive ethical control of the market through protection of the individual, is thus gaining ground.

Keywords: competition law, contract law - b2c, contracts - b2b contracts

JEL Classification: K 12, K 21

1. THE PRINCIPLE OF AN OPEN MARKET ECONOMY WITH FREE COMPETITION AS A "SYSTEM DECISION" (*SYSTEMENTSCHEIDUNG*) IN THE ITALO-EUROPEAN MARKET LAW

The changes introduced to contract legislation as a result of the Italo-European principle of competition are certainly one of the great innovations of recent economic regulation, which has also introduced the concept of the market as a legal entity in the sense of the German theory of the *Ordoliberalismus* [1]. This paper offers an overview of the recent changes in Italy law system.

The point of departure is the fact that the regulations have adopted as a "system decision" (in the German sense of *Systementscheidung*) a social market model (art. 3 § 3 of the Treaty on European Union, TUE) [2] based on the democratic government of the economy which is legislatively in accordance with the principle of an open market economy with free competition, as described in article 119, §§ 1 e 2, of the Treaty on the Functioning of the European Union (TFUE) [3].

The market can be understood as a system of rules and principles aiming to govern the mechanisms and relationships involved in the production and exchange of goods and services which take place within the European Union [4]. This describes the overall structure of the regulatory environment in which exchanges ideally take place. There is not one single market therefore, but rather as many markets as there are rules and regulations which govern them.

Competition on the other hand indicates the duties of the market, the type of structure the exchange dynamics must adopt within the system. This leads to the decisive importance of the principle of competition, the definition of which models the progress of the exchanges. The aforementioned principle has a strong conforming influence on private law relationships both in terms of the macro-systems of the various markets and the micro-systems of single transactions, thus directly concerning the rules and regulations of its activity.

The function of competition is to improve the economic efficiency and assure that the market operates correctly. In this sense, both the overall system of exchanges and every single transaction, as a segment of the aforementioned system, are both general and private stakeholders, and this creates a mandatory nature for the majority of the new regulations. Alongside the mixture of private and public interests lies the need to make the regulations objective, removing almost all of its subjective profiles due to the need to guarantee a substantial and functional effect in governing mass economic phenomena.

2. COMPETITION, MARKET FAILURES AND CONFORMATION OF THE CONTRACTUAL AUTONOMY

Competition is part of the conflict-choice-selection process, in which many competitors draw up proposals, the recipients choose, and the losers, unable to survive, abandon the fight. In this perspective, competition can be defined as the selective struggle regulation based on the ability of the businesses working in the internal market to perform [5]. With competition defined in this way, the only compatible entrepreneurial behaviour is that of those whose tools of success exercise a purely psychological influence over the will of their customers, who themselves comparatively evaluate the results of their production skills [6].

Any deviation from such standard, any distortion occurring in the conflict-choice-selection process represents the failure of the market that prevents it from producing any positive effects. In this case, Italian and European legislation is required to intervene and restore the ideal operating conditions for competition at all times, correcting any false results that concretely occur through appropriate interventions at any stage of the transaction.

Among the forms of market failure, two of them have been particularly important for European contract law: the restrictions of competition and information asymmetries. The restrictions are the result of both agreements and decisions by trade associations or agreed practices which hinder the operation of the competition process and of abuses by businesses which exploit their structural superiority to impose disadvantageous conditions for other contractors. The second type of failure is found in information asymmetries. If one party is not able to acquire information on the quality of the supply (goods, services, contractual conditions), the supply is at best deemed to be of average level. Therefore the customer focuses on the offers with prices which lie in the lower ranges. Those who offer high quality products and services therefore obtain a price which, in the best case scenario, is appropriate for an average or low quality product or service. This not only means that consumers are not able to distinguish between good and bad offers, but that the good offers are systematically rejected by the market. This causes a downward trend, which leads to the Market for Lemons [7].

From this we can understand the importance of intervening in order to reduce such failures by introducing new hypotheses which forbid abuses, a set of regulations aiming to reduce information asymmetries and introduce new forms of protection. In this way, the group of principles which traditionally represented the foundations of contract law has changed.

First and foremost, the general principle of order here becomes that of competition which conforms contractual autonomy, filling it with general interests and specialising its contents according to the quality of the contracting parties. The consumer's freedom of choice (artt. 8 Directive 2005/29/EC and 24 of Italian Consumer Code - *cod. cons.*), the right to true and correct information, the duty of transparency and contractual balance represent the new defences which safeguard correct market operations and weak contracting party, which are no longer available to the latter. The mandatory non-abuse of these rights sees a new season, and all cases of abuse are required to be reported, with the support of the general clause of "good faith"; the same can be said for the principle of fairness and unfair practices.

3. INFORMATION, FORM AND TRANSPARENCY. THE FAIRNESS OF THE COMMERCIAL EXCHANGES. THE PROHIBITION OF ABUSE OF THE DOMINANT POSITION AND OF ECONOMIC DEPENDENCY AND THE NEW LEGAL OBLIGATIONS OF THE CONCLUSION OF CONTRACTS

In this context the new rules of form and transparency are closely linked to the strategy of information and protection of weaker contracting party. The transmission of information on

contractual contents is conveyed by the widest variety of expressive modules, including advertisements, electronic and paper documents, product labels and more generally everything which during pre-contractual and contractual phases constitutes a decision-making tool for the contracting party receiving the information and a form of protection in the event of disputes. Contract forms therefore once more adopt the written form of agreement, including more widely all information communication methods which characterise contract negotiation and execution. In short, it covers both the form of the act in its strictest sense and the form of publicity, publication of contractual conditions and all other forms of supply stimulus in the market, as well as all information documents which must be made available to the counterpart during the conclusive and executive phases of the relationship [8].

The duty of transparency unequivocally marks the overcoming of the distinction between form and content (art. 2 Law no. 192 of 1998). Formulation also has constant consequence on the content of contractual clauses. The way in which they are drawn up sets forth and influences their content. Therefore there is no doubt that in this context the form-content distinction has no meaning, as the text cannot be separated from the way in which it is written. Moreover, as shown in German literature, the lack of transparency often hides substantial disadvantages and prevents us from harvesting the opportunities of competition, deforming the market and consequently causing an injustice in content due to the impossibility of making choices.

The prohibition of unfair commercial practices also contributes to creating a new dynamic in consumer relations, aiming to guarantee the free use of the right to choose based on true, correct and transparent information. The exchange model aimed for by the legislator is therefore based on the aware and unconditioned choice of the recipient of the supply.

The main consequence of these regulations is the establishment of an information phase in contractual relation, which takes place prior to negotiation. The procedural profile of the contract is highlighted, as occurs for example in IT, banking, insurance and financial market contracts. In this regulatory framework, the form of the act blends with that of the activity, which itself equally becomes one of the sources of contractual regulation or a cause of contractual invalidity, when unlawfully done. The overcoming of the distinction between activity and act is definitively marked by unfair commercial practices in consumer relations, which represent a varied and eclectic figure including advertising, marketing, declarations, communications and material behaviour of the professional figure.

New dimensions and a consistent expansion become legal obligations of the conclusion of contracts, particularly in business-to-business sector. The non-abuse of the dominant position (artt. 102 TFUE and 3 of Italian Antitrust Law no. 287 of 1990) and of economic dependency (Law no. 192 of 1998), which are closely connected, are the fields affected by this new issue. Article 9, para. 2, Law no. 192 of 1998 includes among the prohibited deeds those consisting in the «refusal to sell or purchase, the imposition of unjustifiably harsh or discriminatory conditions, the arbitrary interruption of existing commercial relations». Also in antitrust law there is a tendency to qualify the refusal to contract with no objective justification as an abuse of the dominant position. In the past few years the European Commission, the Court of First Instance of the European Communities and the Italian Antitrust Authority have considered the right of access for competitors to the essential facilities of dominant firms [9]. The refusal or access at discriminatory conditions is considered an abuse [10]. The essential facilities doctrine aims to assure effective competition in the concerned markets. The cases of essential facilities indicate that a facility can be deemed to be essential when it is unique in its referred market, or cannot be duplicated for legal reasons (covered, for example, by an exclusive concession) or for economic reasons.

4. THE AWARE AND NOT UNDULY CONDITIONED CONSENT. THE *CAUSA IN CONCRETO* AND THE OBJECT, FORM AND CONTENT OF THE CONTRACT BETWEEN TRANSPARENCY, NORMATIVE BALANCE AND PROPORTIONALITY

Also the traditional requirements of the contract structure, regulated in articles 1325-1352 of Italian Civil Code (*cod. civ.*), have been greatly influenced by the principle of competition.

It is certain that, to be considered validly formed, an agreement (artt. 1321 and 1325, no. 1, *cod. civ.*) must be aware and unconditioned. Particularly in the financial markets sector, the recent legal repercussions of the famous Cirio, Parmalat and Argentina cases have shown the development of a consistent legal current which aims to guarantee the development of informed consent by the purchasers of financial tools and products. The adoption of a general regulation prohibiting unfair commercial practices in articles 18-27*quater cod. cons.* definitively marks the introduction of the requirement of the granting of consent which is not unduly conditioned by the legislation.

The *causa* of the contract (artt. 1325, no. 2, 1343-1345 *cod. civ.*) in the new system behaves increasingly as a requirement to be substantially assessed according to a specific case [11], with the expansion of the number of effects which traditionally qualify a contract [12]. In antitrust law, unlawfulness depends on the restrictive effects produced by a given agreement, decision or practice. If the effect is to prevent, restrict or falsify competition, the case is prohibited whatever the type of contract. What counts is the substantial, concrete dimension of the functional profile.

The application of some very important laws depends on the position of the contract in the production chain. As a result, categories of horizontal understandings and vertical understandings are created. This is particularly interesting in the case of distribution contracts. These have been the subject of EC regulation which considers mainly the constraints used to link different members of the distribution chain, limiting their own freedom of competition and that of others. In order to protect the latter, Regulation (EC) no. 330/2010, regarding to categories of vertical agreements and concerted practices, introduced in articles 4 and 5 a transversal control of the characterising clauses of these kinds of contracts which can affect economic competition, such as those which impose territorial restrictions, obligations of exclusivity and other forms which limit the decision-making and operational autonomy of the parties. It is not therefore an organic subject which offers solutions to the various conflicts of interest between the parties, but is rather an evaluation of the lawfulness or unlawfulness of certain agreements according to their potential influence on market operations. The problem of network contracts, irrepressible wealth-creating instruments in current economics, also lies in this context.

Also in the case of consumer contracts, for the purposes of the applicable legislation today a pre-eminent position is held not by contracts but rather the effects of individual agreements and the way in which they are drawn up. The significant imbalance of the rights and obligations of the parties (artt. 3 Directive 93/13/EEC, 33 *cod. cons.*) or the lack of transparency in their formulation (artt. 5 Directive 93/13/EEC, 35 *cod. cons.*) need to be assessed according to the considered clause within the framework of the contractual regulation or other linked negotiations and within the overall panorama of the whole economic operation of which the contract is a non-separable segment.

In short, it appears possible to state that in the new contract law, the difference between typical and atypical has been progressively effaced, losing a considerable part of its traditional importance. Increasing importance is on the other hand given to trans-typical regulation which is applied according to the (essential or otherwise) effects it concretely produces and the quality of the contracting parties. In this context, undisputable confirmation is found for the doctrine which, rightly so and for some time, has considered the interpretation as the identification of the regulation to apply to each concrete case, overcoming the artificial distinction between qualification and subsumption [13].

From this point of view, the subject (artt. 1325 no. 3, 1346-1349 *cod. civ.*) and *causa* of the contract seem to become confused, not conceptually but at least in terms of the applicable legislation. The subject, and with it the content [14], must be not only admissible, possible, determinate or determinable (art. 1346 *cod. civ.*). It must also be clear and understandable, balanced and proportionate (artt. 3 Directive 93/13/ECC and 33 *cod. cons.*; artt. 2, 9 Law no. 192 of 1998). The lack of one of these essential connotations opens the way for various sanctions applied to the contract, but which can also concern the activity, as in the various hypotheses of unfair commercial practices and misleading advertising.

Also the form (artt. 1325 no. 4, 1350-1352 *cod. civ.*), as has been seen, takes on new meanings and functions, in some aspects being merged in the content of the contract at least in terms of the principle of transparency, where the non-clarity and comprehensibility of a clause hides a significant imbalance of rights and obligations of the parties.

5. INTERPRETATION, CONTROL AND INTEGRATION. THE FAIR EXECUTION AND THE PROHIBITION OF THE ABUSE

The functional profile of the relationship, the interpretation (art. 1362-1370 *cod. civ.*) and execution phases (artt. 1372, 1375 *cod. civ.*) see a new era in which the heteronomous integration of the contractual regulation of interests (art. 1374 *cod. civ.*) whatever the will of the parties, the control of content, transparency and fairness predominate.

In all market contracts control of content against unfair clauses [15] and control of transparency are foreseen. Consumer contract legislation was the first to introduce mechanisms to remove market failures and protect the weaker contracting party against abuse (artt. 3, 5 Directive 93/13/EEC, 33, 35 *cod. cons.*). In the business contract sector, the way was paved by article 2 on transparency of form and content and by article 9 Law no. 192 of 1998, the general rule of non-abuse of economic dependency, which already governs the significant imbalance of rights and obligations and the imposition of unjustifiably harsh or discriminatory contractual conditions. In fact, a list of actual or presumed unfair clauses is missing. This gap could easily be filled by integrating article 9 of Italian Law no. 192 of 1998 with the provisions listed in articles 101, 102 TFUE and 2, 3 of Law no. 287 of 1990, which provide indication of the forbidden clauses which are a manifestation of forbidden agreements or abuses of the dominant position. This operation is permitted by paragraph 3*bis* of the aforementioned article 9 of Law no. 192 of 1998 which expressly creates a link between the contentious provision and the antitrust legislation.

The control of content and transparency, together with the principle of conservation (art. 1367 *cod. civ.*), allow for the redesign of contractual regulation, removing any unfair and non-transparent clauses and integrating them with legal provisions or self-integration techniques.

The interpretation is connoted by objectivity, under the influence of the market which is the regulatory framework in which the contract lies. The most important hermeneutical rule given in its widespread workability is the “most favourable interpretation for the consumer”, in the event of doubt over the meaning of a clause (artt. 5 Directive 93/13/EEC, 35 *cod. cons.*). We can certainly see here the potential to act as a substantial control tool over the weak position of the contracting party-subscriber [16], but its relationship with the principle of transparency as its specification is certainly remarkable [17]. This close link which can be seen not only in the placement of the rule in question in the same article 35 of the Consumer Code which establishes the principle from which this derives, but also in the fact that the doubt, the supposition for enforcement of the interpretation that is most favourable to the consumer, is undoubtedly one of the possible manifestations of the lack of transparency. From this emerges the significant continuity between the principle of consumer protection and that of transparency with the above hermeneutical technique, and thus the moment of interpretation must be rightfully entered in the overall strategy pursued by EC

legislators, specifically aiming here to effectively eliminate the consequences of the market imperfections both at macro-system and individual consumer level. The reason of the rule of the most favourable interpretation for the consumer is therefore two-fold [18]. On one hand, it does not appear deniable that its foundation lies in the self-accountability of the professional for his behaviours and declarations made. This aspect fits perfectly in the framework of the characterising principles of the market understood as a regulatory environment, in particular referring to the general principle of competition. It is equally found in a number of provisions which are inspired by the same idea [19]. Moreover, also the considerations on the position of the consumer in the market, institutionally led to sign pre-set contracts or negotiate with professional experts in order to satisfy the essential or non-essential personal needs of himself or members of his family or others close to him, certainly carried some weight in the legislative decision. Indeed, the consumer gives a consent which is generally "nude", and not truly free as it is reduced to the mere subscription to contractual conditions and forms which are not perfectly understood and evaluated, or of which he is not sufficiently aware as an appropriate level of information or experience is not always available [20]. The merging of these two aspects is done according to the principle of transparency, in this context aiming to eliminate the grey areas of the market and at the same time protect the consumer using a hermeneutical tool which can influence contractual regulation more directly.

A decisive mechanism in this contractual reorganisation is its integration with mandatory rules (art. 1339 cod. civ.) [21]. Sometimes the legislation requires the automatic substitution of any clauses which are in contrast to it, sanctioning the breach of binding provisions by integrating the contract [22]. When provisions of this kind cannot be found, the question is asked as to whether it is legitimate to hermeneutically draw up the substitution clause according to the mandatory regulation, precluding the application of the invalidity of the contract. The conservative solution seems to be extendable even beyond the area of unfair clauses [23]. Placing the aforementioned value of the most favourable interpretation for the consumer in this category, it is easy to consider that the recognition of the general value of the integrative technique is coherent with the effective protection of consumer interests which the legislation aims to pursue. In the absence of such provisions, the aforementioned hermeneutical regulation, combined with the principles of conservation and integration of the contract in order to substantially favour the consumer, where required, forces the interpreter to search the regulatory provisions for criteria for the construction of the substitution clauses. The integration of consumer contracts with contractual and regulatory conditions must on the other hand be permitted only where expressly foreseen [24]. The assurance of a minimum necessary content of certain contractual conditions, the duty of transparency and the widespread obligations concerning information on contractual conditions, the provision of forms of protection and the suspected abusive character of agreements which regard or affect the subscription of consumers to clauses which they have not had the possibility to know prior to the conclusion of the contract would seem to support the adopted solution. On the contrary, generalised effectiveness must be recognised for good faith and equity, the expression of contractual balance, as sources of integration of the regulation of interests, as these are express and contextual provisions in art. 2, para. 2, *lit*. e, of the Consumer Code.

Similar conclusions must also be reached for the interpretation of business contracts. The antitrust law is certainly marked by the objective interpretation of contracts which implement anti-competitive clauses, aiming to understand the substance profiles of the produced effects. The provisions protecting the weaker contracting party also in this sector demand an objective hermeneutical technique, aiming to gather not the subjective intentions of the contracting parties but rather the objective dimension of the contractual regulation and any inherent unbalances and distortions. The mandatory regulations covering this context also have an integrative function, due to the unavailability of other protective defences [25]. Here integration has a particular connotation.

In the case of anti-competition clauses, the control bodies can also intervene by imposing further clauses regulating interests, to make them compatible with the protection of competition.

The control of fairness, based on general clause of good faith [26], and the non-abuse of economic dependency require operational conduct which aims to protect the weaker contracting party which must aim to assure the execution of the contractual prerogatives in an effective, aware and unconditioned manner. The protection granted appears far stronger than in the past. We may think only of the aggressive, unduly conditioning coercive practices or non-contractual obstacles, which guarantee important protection of a person in positions of inferiority caused by weaknesses, character and cultural limits, personal feelings and affections, against exploitation by companies.

6. RIGHT OF THE WITHDRAWAL, PROTECTION NULLITY AND NULLITY FOR THE BREACH OF BEHAVIOURS RULES

The area of contract pathology has seen substantial changes compared to traditional models [27]. Basically, some key points can be outlined.

First of all, the traditional fault of error (artt. 1427-1433 *cod. civ.*) has lost great meaning in consumer law both due to the scarce compatibility with the principle of transparency, which is not reconcilable with the requirement of knowledge of the fault, and the introduction of the right to withdrawal or retraction, which is an effective tool for the out-of-court protection of consumer.

Secondly, the system of protection nullity laid down in business or consumer (for example, artt. 6 § 1 Directive 93/13/EEC, 36 *cod. cons.*) contracts has marked the supersedence of the traditional legal rules of Civil Code (artt. 1418-1424 *cod.civ.*), acting as a tool to protect the weaker contracting party. The new necessary relative partial nullity represents an invalidity model which is perfectly suited to the market regulation and the need to effectively remove market failures.

Finally, financial market law has posed the problem of the applicability of the nullity regulation or contract termination due to breach of information obligations. It is a complex question. In short, we may in any case state that there are some decisive considerations which lie in favour of the nullity solution. Generally speaking, it is agreed that such sanction not only concerns the contract structure but also the regulation of interests. In any case, consent must today be understood as aware and not unduly conditioned. Any agreement drawn up on the basis of illicit conditioning or not in an appropriately informed manner thus presents a structural defect. However, it should be remembered that the legislator has drawn up an exchange model which must be executed in respect of a precise procedural technique. Any exchange which in fact is removed from that model must be considered invalid, in whatever phase the pathology occurs, if it affects the essential moments of the contact, including information and freedom of choice. Finally, the joint presence of private and general interests in the new contract law certainly allows us to state also from this point of view the validity of the recourse to the general remedy of the nullity for the breach of mandatory rules (art. 1418, para. 1, *cod. civ.*) that makes no expressly provision of this sanction (so-called “virtual” nullity).

These considerations are supported by the choice made by legislator in art. 67-*septies decies*, para. 4, of the Consumer Code concerning the remote sale of financial services to consumers, which lays down the sanction of contract nullity in the event of the supplier hindering the consumer’s right to retraction, without reimbursing the amounts paid, or beaching the rules on pre-contractual information thus significantly altering the representation of its features.

7. CONCLUSIONS - the new paradigma of the competitive exchange model and overcoming of the distinction between activity and act, structure and relationship of the contract.

This rapid and surely incomplete overview offers some ideas for our closing considerations.

The new contract legislation is very different from the traditional regulation laid down in the Civil Code. This leads to some difficulties in reconciling the two models and highlights the systematic and other inconsistencies marking the current regulatory system. It would therefore seem appropriate to look further into the modernisation of the law of obligations and contracts, as has been done in other experiences.

In particular, it should be noted that competition has led to the reformulation of contract, now including a central phase of information. This reformulation has generated a new competitive exchange model, with clearly defined dynamic and phases, all strictly interdependent. A key consequence of the model which constitutes the regulatory base of the contract is the overcoming of the distinction between activity and act and structure and relationship of the contract, with clear effects and mutual influences on the pathologies of both.

In this review, finally, close attention must surely be paid to competition as a new principle of order aiming not only to guarantee economic efficiency, but also to promote contractual justice and, ultimately, the moralisation of the market with new techniques to protect consumers.

ENDNOTES

[1] On the German theory of the *Ordoliberalismus* elaborated by F. Böhm (called Freiburg School; the major work is F. BÖHM, *Wettbewerb und Monopolkampf*, Berlin, 1933) see L. DI NELLA, *La scuola di Friburgo, o dell'ordoliberalismo*, in N. IRTI (editor), *Diritto ed economia. Problemi e orientamenti teorici*, Padova, 1999, p. 171 ff.; in the Italian doctrine Irti follows the *Ordoliberalismus* (N. IRTI, *L'ordine giuridico del mercato*, 5 ed., Bari, 2003); on the dispute about the relation between law and market, aroused by the above mentioned study of Irti, see AA.VV., *Il dibattito sull'ordine giuridico del mercato*, Bari, 1999; on the new conception of contract law based on the *Ordoliberalismus* see the papers published in P. SIRENA (editor), *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato*, Milano, 2006.

[2] The choice of the social economic model is expressly confirmed by article 3 § 3 TUE: «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance».

[3] This is the text of the article 119, §§ 1 and 2, TFUE: «1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. 2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition. ».

[4] Compare to the general legal definition of the market elaborated by N. IRTI, *Teoria generale del diritto e problema del mercato*, in *Riv. dir. civ.*, 1999, p. 19: «unità giuridica delle relazioni di scambio di un dato bene o di una categoria di beni» (legal unity of exchange relationships of a good or category of goods); see also L. DI NELLA, *Mercato e autonomia contrattuale nell'ordinamento comunitario*, Napoli, 2003, p. 163 ff.

[5] F. BÖHM, *Wettbewerb und Monopolkampf*, cit., p. 212.

[6] In the opinion F. BÖHM, *op cit*., p. 212, institutional purpose of the organization of competition by the legal system is exactly the creation of psychological pressure to develop the capacity whose use has a positive influence for the whole economical system.

[7] G. AKERLOF, *The Market for «Lemons»: Quality Uncertainty and the Market Mechanism*, in 84 *Q. J. Econ.*, 1970, p. 488 ss. In the recent economical literature see W. EMONS, *Warranties, Moral Hazard and the Lemons Problem*, in *J. Econ. Theory*, 1988, p. 16 ff.; R. RICHTER, E. FURUBOTN, *Neue Institutionenökonomik. Eine Einführung und kritische Würdigung*, 2 ed., Tübingen, 1999, p. 236 ff.; M. FRITSCH, TH. WEIN, J. EWERS, *Marktversagen und Wirtschaftpolitik. Mikroökonomische Grundlagen staatlichen Handels*, 3 ed., München, 1999, p. 262 ff. In law literature see H.-B.

SCHÄFER, C. OTT, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, Berlin, Heidelberg, New York e a., 2000, p. 283 ff.

[8] See on regard L. DI NELLA, *Mercato e autonomia contrattuale nell'ordinamento comunitario*, cit., p. 163.

[9] In the European legal system see Commissione, Sea Containers/Stena Sealink, in *G.U.C.E.*, L 15/94, p. 8 ff.; Commissione, Porto di Rødby, in *G.U.C.E.*, L 55/94, p. 52 ff.; Cause riunite C-241 e 242/91, RTE (Magill), in *Raccolta*, 1995, I, p. 743 ff.; Causa C-7/97, Oscar Bronner GmbH, in *Raccolta*, 1998, I, p. 7791 ff.; Causa T-504/93, Tiercé Ladbroke, in *Raccolta*, 1997, II, p. 923 ff. In the Italian law system see P. GIUDICI, *sub art. 3 l. antitrust*, in L.C. UBERTAZZI (editor), *Commentario breve al diritto della concorrenza*, 3 ed., Padova, 2004, p. 2329.

[10] On regard see A. VANZETTI, V. DI CATALDO, *Manuale di diritto industriale*, Milano, 2009, p. 541 ff.; V. MANGINI, G. OLIVIERI, *Diritto antitrust*, 2 ed., Torino, 2005, p. 79 f.; L. TOFFOLETTI, *La nozione di essential facilities*, in *Conc. merc.*, 1998, p. 329 ff.; V. EMMERICH, *Kartellrecht*, 10 ed., München, 2006, p. 135 ff.; R. BECHTOLD, W. BOSCH, I. BRINKER, S. HIRSBRUNNER, *EG-Kartellrecht. Kommentar*, München, 2005, p. 95 ff.

[11] Recently is diffused the conception of *causa* as «interesse concreto perseguito» (concrete pursued interest) (see C.M. BIANCA, *Il contratto*, 2 ed., Milano, 2002, p. 447 ff.; V. ROPPO, *Il contratto*, Milano, 2001, p. 364). In the traditional literature was prevailing the conception of *causa* as «funzione economico-sociale» (economical-social function) (see E. BETTI, *Teoria del negozio giuridico*, Torino, 1960, p. 172 ff.; F. SANTORO PASSARELLI, *Dottrine generali del diritto civile*, Napoli, 1986, p. 127 ff.).

[12] On regard see P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli, 2006, p. 612 ff.; V. RIZZO, *Interpretazione dei contratti e relatività delle sue regole*, Napoli, 1985.

[13] P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, cit., p. 612 ss.; V. RIZZO, *Interpretazione dei contratti e relatività delle sue regole*, cit.

[14] The concept of the contract subject is very disputed in literature. See, for all, F. GALGANO, *Diritto civile e commerciale*, II, 1, Padova, 2004, p. 251; C.M. BIANCA, *Il contratto*, cit., p. 321; E. BETTI, *Teoria del negozio giuridico*, cit., p. 79; L. CARIOTA FERRARA, *Il negozio giuridico nel diritto privato italiano*, Napoli, 1964, p. 607; A. FALZEA, *La condizione e gli elementi dell'atto giuridico*, Milano, 1941, p. 300; R. SACCO, F. DE NOVA, *Il contratto*, II, 3 ed., Torino 2004, p. 6 ff.

[15] The German, French and Italian version of the Directive 93/13/EEC use more correctly the locution «abusive clauses» (*missbräuchliche Klauseln*, *clauses abusives*, *clausole abusive*).

[16] This can be seen very well in V. RIZZO, *Trasparenza e contratti dei consumatori (la novella al codice civile)*, Napoli, 1997, p. 91.

[17] See V. RIZZO, *op. cit.*, p. 21 ss.

[18] In this sense V. RIZZO, *op. cit.*, p. 91 s.

[19] See, for example, art. 3 of the Directive 90/314/EEC on package travel, package holidays and package tours: «The particulars contained in the brochure are binding on the organizer or retailer, unless: - changes in such particulars have been clearly communicated to the consumer before conclusion of the contract, in which case the brochure shall expressly state so, - changes are made later following an agreement between the parties to the contract».

[20] See for these considerations G. CHINÈ, *Il diritto comunitario dei contratti*, in A. TIZZANO (editor), *Il diritto privato dell'Unione Europea*, *Tratt. dir. priv.* Bessone, XXVI, 1, 2 ed., Torino, 2000, p. 652.

[21] See S. RODOTÀ, *Le fonti di integrazione del contratto*, Milano, 1969, p. 101 f.

[22] Compare, for example, art. 6 § 1 Directive 93/13/EEC on unfair terms in consumer contracts: «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»; artt. 5 and 6 Directive 85/577/EEC, to protect the consumer in respect of contracts negotiated away from business premises, enacts that the consumer may not waive the right of the withdrawal and the other rights conferred on him by this Directive; art. 12 Directive 85/374/EEC: «The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability». See also G. CHINÈ, *Il diritto comunitario dei contratti*, cit., p. 660.

[23] In this sense M.A. LIVI, *L'integrazione del contratto*, in N. LIPARI (editor), *Trattato di diritto privato europeo*, III, Padova, 2003, p. 398 f.; G. CHINÈ, *op. cit.*, p. 659 f.

[24] See, for example, art. 3 § 1 Directive 93/13/EEC: «A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer».

[25] L. DI NELLA, *Mercato e autonomia contrattuale nell'ordinamento comunitario*, cit., p. 360 ff.

[26] L. DI NELLA, *Il controllo di lealtà delle pratiche commerciali*, in G. CAVAZZONI, L. DI NELLA, L. MEZZASOMA, V. RIZZO (editors), *Il diritto dei consumi. Realtà e prospettive*, Napoli, 2008, p. 255.

[27] On regard see S. POLIDORI, *Discipline delle nullità e interessi protetti*, Napoli, 2001.

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