

# The Procompetitive Interpretation of Italian Private Law

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### Abstract

This paper investigates the opportunity of a Procompetitive interpretation of Private Law through an interdisciplinary analysis of Competition Law with Contract Law. The purpose of the research is to demonstrate that the traditional Civil Law might be differently considered and interpreted in the specific market where contractual obligation arises. Under this point of view, for example, it is necessary to adopt a new approach to the traditional notion of legal 'consideration' of the contract, to the ancient rule '*in pari causa turpitudinis melior est condicio possidentis*', to the doctrinal category of 'protection obligations' (*Schutzpflichten*). All these institutions of Private Law show a full regulatory efficiency in the perspective of Antitrust Law, so that studying nowadays Contract Law requires the interpreter to value both the single contract and the whole complex environment of market where each single contract is made. The final aim of this suggested method is to make Economy and Freedom of Contract more consonant with the value of Human Person.

## I. Competition Law and Contract Law between interaction and interdisciplinary analysis

The Procompetitive interpretation of Private Law is a current topic in European literature who has recently focused attention on the incidence of Competition Law<sup>1</sup> upon the classic institutions of

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<sup>1</sup> For a more complete analysis see V. Donativi, *Introduzione alla disciplina*

Private Law, particularly upon contract law<sup>2</sup> and, more generally, upon the law of obligations.<sup>3</sup>

In this prospective Italian scholars have concentrated particular interest on the phenomenon of ‘*subjugation of the modern contracts to anticompetitive*’ purposes,<sup>4</sup> since it turns out that many antitrust cases, such as prohibited agreements and abuse of dominant position, can take a contractual nature. The basic idea of these studies is the necessity of an interdisciplinary analysis of Competition Law with Contract Law. All too often, in fact, who studies Contract Law ignores competition rules and market regulation. Also who usually studies Competition Law sometimes ignores the fundamental relationship between market regulation and mandatory or dispositive norms proposed by the common law of contracts.<sup>5</sup>

Therefore the traditional notion of Freedom of Contract becomes more complex and articulated, since it means not only freedom to regulate own economic interests, but also requires the individual

*antitrust nel sistema legislativo italiano* (Milano: Giuffrè, 1990); A. Frignani, R. Pardolesi, A. Patroni Griffi, L.C. Ubertazzi eds, *Diritto antitrust italiano, Commentario alla legge 10 ottobre 1990, n. 287* (Bologna: Zanichelli, 1990); V. Mangini and G. Olivieri eds, *Diritto antitrust* (Torino: Giappichelli, 2012); M. Libertini, ‘Concorrenza’, in *Enciclopedia del diritto* (Milano: Giuffrè, 2011) Annali III, 197.

<sup>2</sup> This aspect is well underlined by G. Alpa and V. Afferni eds, *Concorrenza e mercato* (Padova: Cedam, 1994); M.R. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: Il Mulino, 2009); G. Olivieri, ‘Iniziativa economica e mercato nel pensiero di Giorgio Oppo’ *Rivista di diritto civile*, 509 (2012); J. Busche, *Privatautonomie und Kontrahierungszwang* (Tübingen: Mohr Siebeck, 1999), 319; B. Fages and J. Mestre, ‘L’emprise du droit de la concurrence sur le contrat’ *Revue trimestrielle de droit commercial*, 75 (1998); B. Montels, ‘La violence économique, illustration du conflit entre droit commun des contrats et droit de la concurrence’ *Revue trimestrielle de droit commercial et de droit économique*, 417 (2002).

<sup>3</sup> For more details see M. Chagny, *Droit de la concurrence et droit commun des obligations* (Paris: Dalloz, 2004); F. Dreifuss-Netter, ‘Droit de la concurrence et droit commun des obligations’, *Revue trimestrielle de droit civil*, 387 (1990).

<sup>4</sup> These words are by A. Genovese, ‘Disciplina del rapporto obbligatorio e regole di concorrenza’, in G. Olivieri and A. Zoppini eds, *Contratto e antitrust* (Bari-Roma: Laterza, 2008), 137.

<sup>5</sup> A. Zoppini, ‘Autonomia contrattuale, regolazione del mercato, diritto della concorrenza’, in G. Olivieri and A. Zoppini eds n 4 above, 22.

contract to participate in the dynamic competitive dimension. The final result, more or less shared by Italian authors, is that the traditional Civil Law might be differently considered and interpreted in the specific market where contractual obligation arises. The inner destination of the contract to market regulation has an evident effect upon the Procompetitive interpretation of the contract itself and, more generally, upon the acts and behaviors of individuals and businesses. Competition Law becomes a sort of ‘*general clause*’<sup>6</sup> of European Civil Law.

## **II. Consequences on both Contractual Functions and the traditional concepts of Civil Law: the case of ‘*bonos mores*’ (remedy of restitution)**

Consider first the traditional notion of legal ‘consideration’ of the contract. It has been demonstrated that Competition Law supports the prevalent thesis according to which legal ‘consideration’ of the contract identifies not only the single contract type but also the concrete function of the negotiation of a contract.<sup>7</sup> As a consequence it is necessary to rethink the notion of gross unfair advantage and the remedy of restitution, since the abstract formal justification of the contract makes way for the concrete economic reason of the single case and the latter sometimes might well diverge from the former.

This has clearly been demonstrated by the *case Courage*,<sup>8</sup> which has undermined the force of the ancient rule ‘*in pari causa*

<sup>6</sup> This expression is used by C. Osti, ‘L’obbligo a contrarre: il diritto concorrenziale tra comunicazione privata e comunicazione pubblica’, in G. Olivieri and A. Zoppini eds n 4 above, 36.

<sup>7</sup> M. Libertini, ‘La causa nei patti limitativi della concorrenza tra imprese’, in G. Olivieri and A. Zoppini eds n 4 above, 89; see, also, U. Breccia, ‘Articolo 1325 c.c.’, in E. Navarretta and A. Orestano eds, *Dei contratti in generale* (Torino: Utet, 2011), 248.

<sup>8</sup> Case C-453/99 *Courage Ltd. v. Crehan*, E.C.J. 20 September 2001, *Foro italiano*, 75 (2002), with note of A. Palmieri and R. Pardolesi, ‘Intesa illecita e risarcimento a favore di una parte: ‘chi è causa del suo mal .... si lagni e chiedi i danni’.

*turpitudinis melior est condicio possidentis*.<sup>9</sup> It concretely happened that a small operator of a pub (Mr Crehan), according to a contractual term imposed by the supplier (Courage Ltd), had been forced to indefinite supplies of beer at a not competitive price. The above-mentioned rule '*in pari causa turpitudinis melior est condicio possidentis*' was applied at first instance by the High Court in order to deny Mr Crehan damages for violation of Art 81 of the EC Treaty. The Court applies the rule in question arguing on the basis that the participation of Mr Crehan to an unlawful agreement in terms of competition had made it impossible for the same Mr Crehan to claim for damages. But the European Court of Justice has appropriately considered Mr Crehan as the 'weaker contractual party' – inevitably forced to accept the illegal anticompetitive clause in order to receive the supply of beer – and has acknowledged damages in favour of him.

This is one consequence of the fact that competition economic rules too often intersect also ethics and morality ('*bonos mores*'), as in the case of an agreement to boycott a contractor<sup>10</sup> or even in the case of sums of money paid repeatedly by the entrepreneur to an employee of the client in order to always get new contracts, so as to alter the rules of competition.<sup>11</sup> Also in France, in the case of a franchise agreement, it was assumed the unjustified enrichment if only one party to the contract had an advantage of non-compete clause.<sup>12</sup> This implies that the ancient principle '*pacta servanda sunt*' is no more strictly essential to the existence of the market but it

<sup>9</sup> About the general attitude of European Private Law to modify the traditional concepts of Civil Law culture see – most recently – A. Gentili, *Il diritto come discorso* (Milano: Giuffrè, 2013), 248.

<sup>10</sup> Corte di Cassazione 26 June 1973 no 1829, *Massimario del Foro italiano*, 526 (1973).

<sup>11</sup> Tribunale di Milano 12 February 2001, *Foro padano*, 619 (2001). See also the comment of A. Albanese, 'Immoralità, illiceità e soluti retentio' *Corriere giuridico*, 865 (2005).

<sup>12</sup> See F. Dreifuss-Netter, n 3 above, 387, who emphasizes that '[i] est important d'y insister car une partie de la doctrine a cru voir, dans l'abus de dépendance économique une révolution par rapport au droit commun des obligations'. On the same theme – in Italy – A. Frignani, *Factoring, leasing, franchising, concorrenza* (Torino: Giappichelli, 1983), 245; R. Pardolesi, *I contratti di distribuzione* (Napoli: Jovene, 1979), 325 and 330.

allows the evolution of the market itself to models of increasing complexity and productivity. At the same time the recent rules on abuse of economic dependence show a strong impact upon ordinary Contract Law.

### **III. Law of Obligations and Procompetitive Interpretation: *Schutzpflichten* ('*protection obligations*') within the concrete market contexts**

Under the same profile it is nowadays necessary a general re-interpretation of the Law of obligations in a Procompetitive way. For example, it could be possible to use the German doctrinal category of '*protection obligations*' (which supplement the main performance), in order to guarantee a more competitive market by first preventing and then repairing the abuses of economic asymmetry. In fact '*protection obligations*' or so-called *Schutzpflichten*, from the specific point of view of the German Civil Code,<sup>13</sup> are not contractual obligations but rather legal secondary obligations deriving from Law and Good Faith (so not from Freedom of Contract and Party Autonomy).<sup>14</sup> They are rather protection and loyalty duties imposed to the parties by law or judges (not by the parties to the contract themselves) according to good faith clause, just as to renegotiate a long-term commercial contract,<sup>15</sup> not to abruptly terminate the

<sup>13</sup> In this specific perspective see C-W. Canaris, 'Ansprüche wegen "positiver Vertragsverletzung" und "Schutzwirkung für Dritte" bei nichtigen Verträgen', *Juristenzeitung*, 475 (1965); on the specific point I would refer to F. Longobucco, 'Obblighi di protezione e regole di concorrenza nella contrattazione di (e tra) impresa (e)' *Contratto e impresa/Europa*, 56 (2010).

<sup>14</sup> This category is not pacifically accepted in Italian Private Law: see, for example, L. Bigliuzzi Geri, 'Buona fede nel diritto civile', in *Digesto delle discipline privatistiche* (Torino: Utet, 1988), Sezione civile, II, 171. Most recently, about the relationship between freedom of contract and good faith, see M. Grondona, 'Gravità dell'inadempimento, buona fede contrattuale, clausola risolutiva espressa, poteri del giudice sul contratto: per una difesa antidogmatica dell'autonomia privata e alla ricerca di un criterio di giudizio', available at [www.consiglionazionaleforense.it/site/documento6366.html](http://www.consiglionazionaleforense.it/site/documento6366.html).

<sup>15</sup> F. Macario, 'Adeguamento e rinegoziazione del contratto di appalto privato', available at <http://appinter.csm.it/incontri>. Lastly see, also, C. Crea, *Connessioni tra contratti e obblighi di rinegoziare* (Napoli: Edizioni Scientifiche Italiane, 2013), 123 ff.

contractual relationship,<sup>16</sup> to have any other behavior directed towards realizing fair dealing in the single contractual context, which show a possible regulatory efficiency in the perspective of Antitrust Law.

Therefore the conduct of the debtor and creditor might be supplemented, through the general clause of good faith, by some relevant obligations arising from the position of each party in the market. In this perspective judges, especially in France, usually refer to the mentioned category of ‘*protection obligations*’ by aiming to assure the objective economic balance between performance and counter-performance in the contract and, only indirectly, to protect the weaker party.<sup>17</sup> In this way also the economic balance of the single contract is functional to avoid the distortion of competition of the whole market in which the same contract is made.<sup>18</sup>

It follows that Private Law (specifically the category in question of ‘*protection obligations*’) shows all its regulatory efficiency in the perspective of Antitrust Law. In fact judges are called to verify the conformity between the single private contract and the characteristics of the market in which the contract itself is done. This by analyzing a lot of factors, such as the location of the supplier and competitors, the market position of the purchaser, the presence of

<sup>16</sup> Corte di Cassazione, 18 September 2009 no 20106, *Foro italiano*, 95 (2010), with note of A. Palmieri and R. Pardolesi, ‘Della serie ‘a volte ritornano’: l’abuso del diritto alla riscossa’; F. Macario, ‘Recesso *ad nutum* e valutazione di abusività nei contratti tra imprese: spunti da una recente sentenza della Cassazione’ *Corriere giuridico*, 1577 (2009); E. Giorgini, ‘Recesso *ad nutum* secondo ragionevolezza’ *Rassegna di diritto civile*, 586 (2010).

<sup>17</sup> See M. Chagny, n 3 above, 772.

<sup>18</sup> For a practical application of this observation – referring the general theme of ‘business network contracts’ – I would refer to F. Longobucco, ‘Abuso di dipendenza economica e reti di imprese’ *Contratto e impresa*, 390 (2012). In the same perspective see also the observations of G. Teubner and M. Amstutz eds, ‘Vertragsnetze: Rechtsprobleme vertraglicher Multilateralität’, *Krit. Vierteljahr. für Gesetzg. u. Rechtswiss.*, Sonderheft, 103-290 (2006); in Italy, where the phenomenon has been regulated by legge 9 April 2009 no 33, see F. Cafaggi ed, *Il contratto di rete. Commentario* (Bologna: Il Mulino, 2009) and C. Crea, *Reti contrattuali e organizzazione dell’attività di impresa* (Napoli: Edizioni Scientifiche Italiane, 2008), *passim*.

barriers to entry, the degree of maturity of the market, the nature of the product, etc.<sup>19</sup>

In this context parties to the contract might be forced by the judge, in accordance with the general clause of good faith, to renegotiate a long-term commercial contract. They also might be forced not to abruptly terminate the contractual relationship, so that the validity of the termination of the contract should be assessed having regard to the concrete market conditions existing outside the private contract. Parties to the contract might even be forced by judges to have any other behavior directed towards realizing not only good faith and fair dealing in the single contract or the equilibrium of the individual agreement, but also to regulate the same market in which the private contract is placed.<sup>20</sup>

#### **IV. ‘Contractual Externalities’ and Consumer protection: the Private Enforcement of Antitrust Law**

As a result of this situation, studying nowadays Contract Law requires the interpreter to value the whole complex environment of market where each single contract is made. In other words the single contract reveals its inherent ‘*cognitive limits*’, as a category by itself, and economic phenomena cannot only be understood through the category of contract but also referring to the general ‘*way of doing contracts*’ in the market, that is to the ‘*series of contracts*’ the single entrepreneur is able to conclude with the consumers.<sup>21</sup>

Consider for example, under this point of view, the well-known problem of the contracts done by the entrepreneurs with the single consumer just in order to realize an anticompetitive price fixing agreement (the so-called ‘*Folgeberträge*’ or ‘*ancillary contracts*’ or ‘*tools contracts*’). While the single contract stipulated with the

<sup>19</sup> A. Zoppini, ‘Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza’ *Rivista di diritto civile*, 515 (2008).

<sup>20</sup> F. Longobucco, n 13 above, 41.

<sup>21</sup> In this specific sense see the words – set out in italics above in the text – of P. Femia, ‘Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione’, in G. Gitti and G. Villa eds, *Il terzo contratto. L’abuso di potere contrattuale nei rapporti tra imprese* (Bologna: Il Mulino, 2008), 215.

consumer is formally unobjectionable, at the same time it is vitiated from the outside, by valuing the ‘externalities’ of the contract itself, because of being part of a superior anticompetitive design. Therefore the abusive exercise of economic power by the entrepreneurs might justify damages in favour of the injured consumer who should claim for antitrust damages.<sup>22</sup> In fact the contract is clearly detrimental to the consumer who is a ‘third party’ (victim) with respect to the antitrust infringements or cartels.<sup>23</sup> As an important consequence it is not possible to evaluate the antitrust agreement without considering its effects upon the general market and especially upon consumers’ interests, since the antitrust cartel is normally against third parties and a source of damages for them (the consumers).

## V. Freedom of Contract and balancing test: the regulatory efficiency of Private Law in the perspective of Antitrust Law

So it has been demonstrated that the use of the classic institutions of Private Law might realize the purpose of market regulation together with the Public Enforcement of Antitrust Law. In fact the regulatory attitude of Private Law derives from the osmotic relationship between market rules and Contract Law.<sup>24</sup> Therefore it is

<sup>22</sup> About this particular problem see, in Italy, M.R. Maugeri, *Violazione di norme antitrust e rimedi civilistici* (Catania: Ed it, 2006); E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* (Napoli: Jovene, 2008). I would also refer to F. Longobucco, *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione ‘a valle’* (Napoli: Edizioni Scientifiche Italiane, 2009). In the other countries see V. Emmerich, *Kartellrecht* (München: C.H. Beck, 7<sup>th</sup> ed, 1994); E. Langen and H-J. Bunte eds, *Kommentar zum deutschen und europäischen Kartellrech, Band. 1, Neuwied, Kriftel* (Berlin: Luchterhand, Rn. 219), 158; M.S. Gal, ‘Harmful Remedies: Optimal Reformation of Anticompetitive Contracts’ 22 *Cardozo Law Review*, 91 (2000); R. Houin, ‘Les conséquences civiles d’une infraction aux règles de concurrence’, in *Annales de la Faculté de Droit de Liège*, 28 (1963).

<sup>23</sup> I would still refer to F. Longobucco, *ibid* 49-51; see, also, F. Longobucco, ‘Profili evolutivi del principio *fraus omnia corrumpit* tra “contratto in frode al terzo” e “contratto in danno di terzi” *Rassegna di diritto civile*, 712 (2012). M. Onorato, *Nullità dei contratti nell’intesa anticompetitiva* (Milano: Giuffrè, 2012), 87 and note 155.

<sup>24</sup> For a first introduction see A. Komninos, ‘Introduction’, in C.D. Ehlermann

very opportune to avoid sectoral approaches to Competition Law in order to promote the rights of the 'weaker subjects' of the market. The interplay between Private and Public interests becomes decisive to make Economy and Freedom of Contract more consonant with the value of Human Person.<sup>25</sup> This conclusion becomes stronger under the assumption that Antitrust Legislation might be analyzed and interpreted through balancing the various interests of the different actors of the market (both entrepreneurs and consumers).

and I. Atanasiu eds, *Effective Private Enforcement of EC Antitrust Law, European Competition Law Annual 2001 XXIV ff* (Oxford: Hart Publishing, 2003); J. Lewer QC, 'Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: The Viewpoint of an English Lawyer', *ibid* 109; Mar. Monti, *Effective Private Enforcement of EC Antitrust Law*, *ibid* 3; W. Van Gerven, 'Enforcement of EC Competition Rules in the ECJ – *Courage v. Crehan* and the Way Ahead', in J. Basedow, *Private Enforcement of EC Competition Law* (The Netherlands: Kluwer, 2007), 19.

<sup>25</sup> I refer to the famous *Case Omega*: cf *Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH c. Oberbürgermeisterin der Bundesstadt Bonn*, E.C.J. 14 October 2004, *Raccolta*, I-5659 (2004). For an in-depth examination about this recent relevant issue see T. Ascarelli, *Teoria della concorrenza e dei beni immateriali* (Milano: Giuffrè, 3<sup>rd</sup> ed., 1960); G. Oppo, 'Diritto dell'impresa e morale sociale', *Rivista di diritto civile*, 36 (1992); L. Raiser, 'Funzione del contratto e libertà contrattuale', in L. Raiser ed, *Il compito del diritto privato. Saggi di diritto privato e di diritto dell'economia di tre decenni*, Italian translation (Milano: Giuffrè, 1990); P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3<sup>rd</sup> ed, 2006); N. Irti, *L'ordine giuridico del mercato* (Roma-Bari: Laterza, 5<sup>th</sup> ed, 2004); S. Grundmann ed, *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law, 2008), 3.