

Private Enforcement and Market Regulation*

Sara Landini**

ABSTRACT: The article examines the technique of private enforcement as a juridical instrument to protect the market in combination with the punitive sanction mechanisms of public law.

After a first definition of private enforcement, we investigate the position taken by the European Commission on the use of private enforcement, verifying its function with respect to the objectives of market protection.

The main instruments of private enforcement are therefore considered: civil liability, termination of the contract, nullity of the contract, injunction. We will focus on the main constraints to the application of the abovementioned instruments of private enforcement proposing solutions in the light of an overcoming of the boundaries between public law and private law.

As highlighted in Directive 2014/104/EU, “the practical effect of the prohibitions laid down requires that anyone – be they an individual, including consumers and undertakings, or a public authority – can claim compensation before national courts for the harm caused to them by an infringement of those provisions.” For this reason it is important to consider all the different private enforcement tools and try to remove the obstacles to their effective functioning.

Private law is activated on the action of individuals who exercise the rights recognised by the law. Individuals being closer to the emergence of the problem are able to represent the violation of the interests at stake according to the logic proper to the principle of subsidiarity.

The Principle of subsidiarity states that a wider and greater body, such as a government, should not exercise functions that can be carried out efficiently by a smaller one, such as an individual or a private group, acting independently.

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** Sara Landini is an Associate Professor, Dipartimento di Scienze Giuridiche, University of Florence, 50127 Florence, Italy, sara.landini@unifi.it.

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Introduction

Compliance with EU market rules (Competition Law, Consumer Law, Insurance Law, Banking Law, Financial Market Law, etc.) needs to be ensured through the strong public enforcement of these rules, in combination with private enforcement.

One of the first sectors where private enforcement has been told is Competition Law.

With regard to competition law the observance of EU competition rules is in fact ensured through the public enforcement of these rules by the Commission and the NCAs (National Competition Authorities), in combination with private enforcement by national courts with the application of Tort Law.

The goals of private enforcement underlined by the EU Commission in the 2013 Proposal for a Directive of the European Parliament and of the Council (on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) are:

(i) optimising the interaction between the public and private enforcement of competition Law, (ii) the cooperation between EU Commission and national courts; and (iii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for their losses.

The article examines the technique of private enforcement as an instrument to protect the market in conjunction with the punitive sanction mechanisms of public law. Not only competition law, but also the other EU market rules in general need the intervention of public sanctions combined with private enforcement.

Public sanctions have a strong deterrent function but cannot restore the victims. Public sanctions are paid to public funds. This is one of the most important and common distinctions between private sanctions and public sanctions.¹ Moreover, we cannot forget that also private law remedies (like voidness, compensation, etc.) have a deterrent function.

¹ Karl Binding, *Die Normen und ihre Übertretung*, vol. I, *Normen und Strafgesetze* (Leipzig, Verlag von Felix Meiner, 4th ed., 1922), 288: "Das Wesen des Schadenersatzes besteht in seiner Bestimmung zu reparieren, einen im Rechte nicht begründeten Zustand zu verdrängen durch den Rechtsordnung gemässen; derjenige aber, der Strafe leidet, soll und kann durch sein Leiden nicht

Private enforcement is a strong tool wanted and supported by the European Commission which considers an effective support to the activity of repression of the antitrust behaviours of companies and which relates to the public enforcement activity brought by the Commission itself in collaboration with the national Authorities. The possibility for companies and citizens to activate a judicial instrument in their national courts for compensation for the damage suffered constitutes not only an opportunity to exercise a subjective right that the Community has imposed to protect them adequately, but also a deterrent and perhaps even more effective juridical instrument than the administrative pecuniary sanction.

Public law must favour the implementation of instruments of private enforcement at the national level. Where in the different states there is a different use of such instruments under private law, there will also be a different implementation of Community law as private law instruments have an impact on the effectiveness of the rules, including those of public interest.

Whenever a rule of public interest also identifies individual rights, and for the purpose of the effectiveness of the law itself, it is important to protect such individual rights according to the rules of private law as well.

This article aims to go beyond the results achieved with regard to private enforcement in the field of competition law due to the intervention of the European Commission and the Court of Justice of the European Union.²

Private enforcement is also a tool to strengthen the deterrence of the public sanction and at the same time restore the victim from the harm suffered.³

einen widerrechtlichen Zustand aufheben; die Strafe ist bestimmungsgemäss etwas anderes als Reparation”.

² Wouter P. J. Wils, “Private enforcement of EU antitrust law and its relationship with public enforcement: Past, present and future”, *World Competition: Law and Economics Review* 40, no. 1 (2016): 5-10. With regard to CJCE see particularly judgment of 6 April 1962, *De Geus v. Bosch and Van Rijn*, 13/61, EU:C:1962:11. The Court of Justice clarified that Article 101(1) and Article 102 TFEU produce direct effects between individuals creating rights for these individuals, and that the national courts have to apply the provisions of EU law in areas within their jurisdiction ensuring that those rules take full effect and must protect the rights which they confer on individuals. See also judgment of 27 March 1974, *BRT and SABAM*, 127/73, EU:C:1974:25; judgment of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, and judgment of 20 September 2001, *Courage v. Crehan*, C-453/99, EU:C:2001:465.

³ Jonathan H. Ray and Andrei Shleifer, “Private enforcement of public laws: a theory of legal reform”, *American Economic Review Papers and Proceedings* 88, no. 2 (1998): 391.

Therefore, Private Enforcement assumes relevance not only beyond the restricted sector of competition Law, but also beyond the scope of Community law. Even in all the hypotheses of national rules designed to protect general interests and supported under public law (through criminal sanctions or administrative sanctions), individual rights, activated according to the rules of private law, are able to strengthen the effectiveness of the law. Moreover, the instruments of private law present a better “malleability” with respect to evaluation of the concrete case and therefore a better correspondence to the axiology of the violated norms.⁴

After a first definition of private enforcement, in the next paragraphs we will investigate the position taken by the European Commission on the use of private enforcement, verifying its function with respect to the objectives of market protection.

The EU Commission underlines the role of damage and tort law in the enforcement of Competition law.⁵

⁴ Pietro Perlingieri, “L’interpretazione della legge come sistematica ed assiologica. Il broccardo in claris non fit interpretatio, il ruolo dell’art. 12 disp. prel. c.c. e la nuova scuola dell’esegesi”, *Rassegna di Diritto Civile* 4 (1985): 990 ; Pietro Perlingieri, “Applicazione e controllo nell’interpretazione giuridica”, *Rivista di Diritto Civile* 1 (2010): 317 ; Pietro Perlingieri, “Fonti del diritto e ordinamento del caso concreto”, *Rivista di Diritto Privato* 4 (2010), 7; Paolo Grossi, “Il diritto civile nella legalità costituzionale”, *Rassegna di Diritto Civile* 3 (2009): 914; Mauro Pennasilico, *Metodo e Valori nell’Interpretazione dei Contratti. Per un’Ermeneutica Contrattuale Rinnovata* (Napoli: Esi, 2011), 135 and 185.

⁵ “In addition to public enforcement, the direct effect of Articles 101 and 102 of the Treaty means that these provisions create rights and obligations for individuals, which can be enforced by Member States’ national courts. This is referred to as the private enforcement of EU competition rules. Damages claims for breaches of Articles 101 or 102 of the Treaty constitute an important area of private enforcement of EU competition law. It follows from the direct effect of the prohibitions laid down in Articles 101 and 102 of the Treaty that any individual can claim compensation for the harm suffered, where there is a causal relationship between that harm and an infringement of the EU competition rules. Injured parties must be able to seek compensation not only for the actual loss suffered (*damnum emergens*) but also for the gain of which they have been deprived (*loss of profit or *lucrum cessans**) plus interest. Compensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. Awarding compensation is outside the field of competence of the Commission and the NCAs and within the domain of national courts and of civil law and procedure”: Strasbourg, 11.6.2013 COM (2013) 404 final 2013/0185 (COD).

Wils, “Private Enforcement of EU Antitrust Law”; Franchis G. Jacobs and Thomas Deisenhofer, “Procedural aspects of the effective private enforcement of EC competition rules: A community perspective”, in *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu, (Oxford: Hart Publishing, 2003), 187 and 189.

We will consider private enforcement with regard to Market Law in general. Market regulation represents an important point of view to consider the importance of private enforcement. By “Market Regulation” we mean all the legal rules governing the market: competition law, consumer law, unfair commercial practice, advertising law, insurance law, banking law, financial market law, etc. In fact, rules regulating the market also contain norms on individual rights of operators acting on the market (consumers and companies).

All main instruments of private enforcement are therefore considered in the present article: civil liability, termination of the contract, nullity of the contract, and injunction. These forms of private enforcement will be considered in the last paragraph of the article.

Some conclusions on the actual borders of private and public law will be drawn at the end.

See also Gary S. Becker, “Crime and punishment: An economic approach”, *Journal of Political Economy*, 76, no. 2 (1968): 169; Margaret Bloom, “Despite its great success, the EC leniency program faces great challenges”, in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford: Hart Publishing, 2006), 543; Nadia Calviño, “Public enforcement in the EU: Deterrent effect and proportionality of fines”, in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford: Hart Publishing, 2007), 317; Dorothy Cohen, “Remedies for consumers protection: prevention, restitution or punishment”, *Journal of Marketing* 39, no. 4 (1975): 24; Kriss Dekeyser, “Impact of public enforcement on antitrust damages actions: some likely effects of settlements and commitments on private actions for damages”, in *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, ed. Claus-Dieter Ehlermann and Mel Marquis (Oxford: Hart Publishing, 2008), 157; Francesco Denozza and Luca Toffoletti, “Le funzioni delle azioni private nel libro bianco sul risarcimento del danno antitrust: compensazione, deterrenza e coordinamento con l’azione pubblica”, in *Il Private Enforcement delle Norme sulla Concorrenza*, ed. Francesco Rossi dal Pozzo and Bruno Nascimbene (Milan: Giuffrè Editore, 2009), 101, 116; Julian Joshua, “The European cartel enforcement regime post-modernization: How is it working?” *George Mason Law Review* 13, no.6 (2006): 1247; Assimakis Komninos, “The relationship between public and private enforcement: Quod dei deo, quod caesaris caesari”, June 23, 2011, <https://ssrn.com/abstract=1870723> or <http://dx.doi.org/10.2139/ssrn.1870723>; George Stigler, “The optimum enforcement of laws”, *The Journal of Political Economy* 78, no.36 (1970): 526-536; Denis Waelbroeck and Donald Slater, “The Commission’s Green Paper on Private Enforcement: ‘Americanization’ of EC competition law enforcement?”, in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford: Hart Publishing, 2007), 425-445.

Private enforcement in European Law

Private enforcement is used at the level of Community law as a means of strengthening the deterrent scope of the public enforcement represented by the intervention of the supervisory authority.⁶

The recourse to ordinary justice for violation of rules that require the intervention of the Supervisory Authority has been a practice in the field of competition law, but can generally be invoked as a tool to strengthen the deterrent function of legislation and public intervention.

Violations of EU antitrust rules (Articles 101 and 102 of the TFEU – Treaty on the Functioning of the European Union), such as cartels or abuse of a dominant position on the market, are not only harmful to the economy and to consumers in general, but cause actual damage to individual customers and competitors as well.

The Court of Justice of the European Union (C-295/04 to C-298/04) established that every citizen or company is entitled to full compensation for damages caused by the violation of EU antitrust rules.⁷

⁶ Regarding the Italian law, see Marco Frigessi di Rattalma, “Uniformità del diritto della concorrenza e della tutela del consumatore in Europa: mito o realtà?”, in *Nuove Sfide in Tema di Concorrenza e Aiuti di Stato nell’Unione Europea: Problemi Sostanziali e Equo Processo*, ed. Marco Frigessi di Rattalma and Patricia de Cesari (Napoli: Editoriale Scientifica, 2013), 30, 36 and Sara Landini “Intese anticoncorrenziali nel settore assicurativo e risarcimento del danno a favore degli assicurati”, in *La Disciplina della Concorrenza in Ambito Assicurativo*, ed. Marco Frigessi di Rattalma (Tourin: Giappichelli, 2014), 37-47.

⁷ Judgment of the Court (Third Chamber) of 13 July 2006 (references for a preliminary ruling from the Giudice di Pace di Bitonto – Italy), *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, *Antonio Cannito v. Fondiaria Sai SpA*, C-296/04, *Nicolò Tricarico v. Assitalia SpA* (C-297/04) and *Pasqualina Murgolo v. Assitalia SpA*, C-298/04, EU:C:2006:461 (Joined Cases C-295/04 to C-298/04): “In the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

Therefore, first, in accordance with the principle of equivalence, if it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.

Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest”.

However, the Commission noted that in practice most victims find an obstacle to operating their right in the national rules on compensation for damages.

That is why in 2013 the Commission proposed a directive to remove the main barriers to effective compensation and to ensure minimum protection for citizens and businesses, anywhere in the EU. At the end of the ordinary legislative procedure, the 2014/104 / EU directive on actions against damages caused by antitrust came into force on 26 December 2014.

A complementary measure to the directive is the Commission's recommendation on collective redress, which called on Member States to introduce collective redress mechanisms by 26 July 2015, including actions for damages.

The European Parliament and the European Council of the European Union, through of DIRECTIVE 2014/104/EU, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, underline that:

- the public enforcement of Articles 101 and 102 TFEU can be carried out by the Commission using the powers provided by Council Regulation (EC) No. 1/2003. Public enforcement is also carried out by national competition authorities, as in Article 5 of Regulation (EC) No. 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU, which can play the role of “public enforcers”, and carry out the various functions conferred upon competition authorities by that Regulation.
- Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts have to enforce. When ruling on disputes between private individuals, national Courts must protect subjective rights under Union law, for example by awarding damages to the victims of infringements. Damages are only an example of private enforcement. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that consumers and undertakings, or a public authority, can claim compensation before national courts for the harm suffered because of an infringement of those provisions.

- The right to compensation for harm resulting from infringements of EU and national competition law requires each Member State to have procedural rules ensuring the exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection. Member States have to ensure the effectiveness of legal protection in the fields covered by Union law.
- Actions for damages are only one of the possible instruments of the system of private enforcement of infringements of competition law. They can be complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that incentive parties to provide compensation.⁸

Considering the importance of private enforcement it is necessary to regulate the coordination of those forms of enforcement in a coherent manner, in order to avoid the divergence of applicable rules at national level, which could jeopardise the functioning of the internal market.

⁸ Of particular importance with regard to this aspect, articles 3 and 4 of the Directive.

Article 3, titled *Right to full compensation*, states that: “Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. 2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages”.

Article 4, titled *Principles of effectiveness and equivalence*, states that “In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law”. In order to ensure the effective and consistent application of Articles 101 and 102 TFEU, national competition authorities need a common approach across the Union on the effect of national competition authorities’ final infringement decisions on subsequent actions for damages. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be limited to subsequent actions for damages.

Article 3(1) of Regulation (EC) No. 1/2003 provides that “[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU]”.

In order to guarantee the proper functioning of the internal market with a view to greater legal certainty the Directive 2014/104/EU reaffirms “the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.⁹

⁹ Another field, in which private enforcement has been told, is Market Manipulation. See Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. See Klaus U. Schmolke, “Private Enforcement und institutionelle Balance – Verlangt das Effektivitätsgebot des Art. 4 III EUV eine Schadensersatzhaftung bei Verstoß gegen Art. 15 MAR?”, *Neue Zeitschrift für Gesellschaftsrecht* 19 (2016): 721-728.

Private law remedies and private enforcement

As underlined in Directive 2014/104/EU, “actions for damages are only one element of an effective system of private enforcement of infringements of competition law”.¹⁰

In Italy the doctrine and jurisprudence identify different instruments of private execution of the norms containing conduct rules of Market Regulation:

¹⁰ In regard to consumer protection remedies we can recall a famous distinction: preventive measures, restitution and punishment. See Cohen, “Remedies for consumers protection”, 24.

The promulgation of codes of conduct inspired by customers’ satisfaction principles could be considered a preventative measure. Moreover, many existing consumer legislations are based on the presumption that consumers should have the necessary information in order to compare products in the market place. This kind of measure can be considered a preventative measure.

Restitution is usually defined as reparations made by providing an equivalent product or compensation for loss damages or injury caused, or restoration of property rights previously taken away.

We can consider, regarding restitution, invalidity of contracts in violation of imperative norms or rescission of contracts in case of misrepresentation (a false statement of fact made by one party to another party), invalidity or violability of contracts in case of and consequently refunds of payments. Consumers can also claim damages in case of violation of their rights.

Actual damages are monetary compensation awarded to an injured party in order to compensate the individual for losses. When monetary compensation goes beyond that which is necessary to compensate the individual for losses we have a sanction issued to punish the wrongdoer (so-called punitive damage).

Punitive damages (also known as exemplary damages) may be awarded by a judge (or a jury) in addition to actual damages, which compensate a plaintiff for the losses suffered due to the harm caused by the defendant. Punitive damages are a measure of punishing the defendant in a civil lawsuit recognised in some American States. In other countries, such as Italy and Germany, punitive damages are not provided. Punitive damages are a settled principle of common law in the U.S. They are generally a matter of state law although we have some important judgments of the U.S. Supreme Court. In particular the U.S. Supreme Court, in *BMW of North America v. Gore*, 517 U.S. 519, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), also developed guidelines for assessing punitive damages. The Court held that the “degree of reprehensibility of defendant’s conduct” is the most important indication of reasonableness in measuring punitive damages. In 1993, in case *TXO Productions Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the U.S. Supreme Court stated that the *due process clause* of the fourteenth Amendment to the U.S. Constitution prohibits a state from imposing a “grossly excessive” punishment on a person held liable in tort. Whether a verdict is grossly excessive must be assessed based on an identification of the state interests that a punitive award is designed to serve. If the award is disproportionate to the interests served, it violates due process. See particularly David G. Owen, “Punitive damages overview: Functions, problems and reform”, *Villanova Law Review* 39, 1994. With regard to Germany, see Madeleine Tolani, “U.S. punitive damages before German courts: A comparative analysis with respect to the *ordre public*”, *Annual Survey of International & Comparative Law*, 1 ff. The comparative analysis of this article will identify parallels between U.S. punitive damages and German damages and will show penal elements within the German civil law. The unenforceability of punitive damages in Germany depends on the German point of view towards punitive damages.

1. Civil liability and particularly precontractual liability in case of violation of conduct rules (i.e. duties of information, transparency, consulting in financial intermediation)¹¹. Parties are free to negotiate a contract and they are not liable for failure to reach agreement with the other party, but they have to negotiate in good faith: a party who breaks off contract negotiations in bad faith is liable for the losses caused to the other party (“culpa in contrahendo”). A party is in bad faith when it enters into or continues negotiations while intending not to reach an agreement with the other party and leaving the other party under the justified assumption that a contract will be concluded. The same applies if a party insists on contract terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, provided that there is some demonstrable advantage to be gained for that party by avoiding the contemplated transaction.¹²

¹¹ With regard to the consequences of violations of the rules of conduct, the Italian Supreme Court observes: “On the subject of financial intermediation, in the event of omitted information on the risk propensity of the client and / or omitted information on the risks of the investment or in any case on the inadequacy of the transactions from the intermediary institution and also in all the cases in which it should have abstained, a contractual liability is proposed; In fact, the object of the dispute is not a circumstance pertaining to the genetic moment of the obligation, but relating to its actual becoming and its implementation. Of course, the application cannot be classified in the category of the invalidity action of the contract, but in that of the action of non-contractual liability – if the damage generates itself in the phase of pre-contractual negotiations – or contract type if it deals with the operations carried out in fulfillment of the brokerage contract as in this case. It must therefore be excluded that the framework contract may be null and void as a result of any failure to comply with the obligations of the intermediary concerning the conduct to be carried out on the occasion of the individual executive negotiation deeds”: Italian Supreme Court 16 may 2016, no. 9981, *Massimario Giustizia Civile*, 2016. The Supreme Court has expressed its support for the application of the liability rules pursuant to art. 1337 in case of violation of rules of conduct in the pre-contractual phase. See in this sense Italian Supreme Court, 29 January 2005, no. 19024, *Foro Italiano*, 2006, 1105 with the comment of Enrico Scoditti, “Regole di comportamento e regole di validità: I nuovi sviluppi della responsabilità precontrattuale”, *Danno e Responsabilità* (2006), 34 with comment of Vincenzo Roppo and Giorgio Afferni, “Dai contratti finanziari al contratto in genere: punti fermi della Cassazione su nullità virtuale e responsabilità precontrattuale” and Cassazione a sezioni unite, 19 December 2007, no. 26724, *Foro Italiano* 1 (2008) with the comment of Enrico Scoditti, “La violazione delle regole di comportamento dell’intermediario finanziario e le sezioni unite”.

¹² Tommaso Febbrajo, “Good faith and pre-contractual liability in Italy: Recent developments in the interpretation of article 1337 of the Italian Civil Code”, *Italian Law Journal* 2, no. 2 (2016): 291. In Italy, pre-contractual liability is governed by a statutory provision that requires parties to act in good faith during the negotiation and formation of the contract (Art 1337 Civil Code).

2. Nullity for violation of mandatory rules and particularly nullity of the contract concluded in violation of the above mentioned conducts rules.¹³

We can use the term nullity or voidness of the contract to indicate a state of invalidity of the act. When an agreement is enforceable by the law, it becomes a contract. Void contracts and voidable contracts are quite commonly misconstrued, but they are legally different. Void Contract implies a contract which lacks enforceability by the law, whereas Voidable Contract alludes to a contract where one party has the right to enforce or not the contract. Nullity have a very strong impact because it is ordered to remove an invalid contract from the market. But the nullity of the contract can be of no interest for the customer who wanted to conclude the contract with fairer conditions. In this case only civil liability could represent a solution in respect of the interest of the customer.

3. Voidability due to deceit, that is, the intentional act of misleading a person of ordinary prudence by giving false impression and/or information. In this case, however, the subjectivity of the condition of misrepresentation determines a difficulty in the proof unless the existence of the misrepresentation is presumed automatically

Nonetheless, since the entry into force in Italy of the current 1942 Civil Code, Art. 1337 has been consistently given a narrow interpretation. From this narrow perspective, pre-contractual liability applies only in two cases: 1) when a party terminates negotiations without a valid reason, or 2) when a party, aware of the existence of grounds for invalidity of the contract, fails to communicate these grounds to the other party (art. 1338). Over the last decade, however, courts seem to have phased out this narrow interpretation, and case law has broadened the boundaries of pre-contractual liability.

The Author retraces the key steps that led to the broader interpretation of precontractual liability currently adopted within Italian courts and outlines the new and innovative broad scope of pre-contractual liability, with the aim of indicating when the duty of good faith attaches and what this duty entails. The article then illustrates to what extent damage relating to pre-contractual liability is compensable and what role the traditional distinction between positive and negative interests actually plays.

¹³ See Enrico Scoditti, "Regole di validità e principio di correttezza nei contratti del consumatore", *Rivista di Diritto Civile* 52, no. 1 (2006) 119 ff.; Giuseppe Amadio, "Nullità del contratto e conformazione del contratto (note minime in tema di 'abuso dell'autonomia contrattuale)", *Rivista di Diritto Civile* 10 (2005): 299-303; Emanuela Navarretta, "Buona fede oggettiva, contratti di impresa e diritto europeo", *Rivista di Diritto Civile* 51, no. 5 (2005), 521; Pietro Maria Putti, "L'invalidità dei contratti", in *Trattato di Diritto Privato Europeo*, vol. III, *L'Attività e il Contratto*, 603-739 (Padova, Cedam, 2003).

whenever rules of conduct aimed at the knowledge and awareness in the contractual choices of the counterpart are violated.

4. Combination of invalidity and liability. The person who, with his/her own conduct, determined the invalidity of the contract can be held responsible towards the counterpart who has confided in good faith in the conclusion of a valid contract in accordance with his/her expectations. In Italian law such a responsibility is expressed in a specific provision of the Civil Code regarding pre-contractual liability: art. 1338 CC.

5. Resolution for non-fulfilment of the contract.¹⁴

We have a breach of contract when we have an unjustifiable failure to perform terms of a contract, when we have a violation of contract through failure to perform, or through interference with the performance of the contractual obligations. In this case the other party can act to obtain a judicial termination of the contract and ask for damage.

The respect for rules of conduct can be considered as part of the obligation of the contractual relationship. So their violation is a breach of contract. Yet, this solution, just as nullity, may not be satisfactory for consumers who wanted to conclude the contract.

6. Moreover, we have to consider the importance of Injunction as a possible instrument of private enforcement. An injunction, in legal terms, is an order given by a court to one or more of the parties in a civil trial to refrain from doing (so-called prohibitory or preventive injunctions), or to do some specified acts (so-called mandatory injunctions). The purpose of an injunction is usually to preserve the situations in which further specific acts, or the failure to perform such acts, would cause irreparable harm to one of the parties. Injunction can be of particular importance where harm cannot be

¹⁴ As referred in Cassazione a sezioni unite 19 december 2007, no. 26724 “the violation of the duties of the intermediary concerning the phase following the conclusion of the brokerage contract can assume the connotations of a real breach (or not exact fulfillment) of the contract: since those duties, although of legal source, derive from mandatory and are therefore intended to fully integrate the existing settlement agreement between the parties. It follows that any violation, in addition to generating any compensation obligations under the general principles on the breach of contract, may, where they occur the extremes of gravity of the breach of contract postulated by Article 1455 of the Civil Code, also lead to the termination of the ongoing financial brokerage contract”. See also Teresa Pasquino, “Obblighi di informazione e rimedi contrattuali nella fornitura dei servizi telematici”, *Studium Juris* (2005): 860.

adequately remedied by an award of monetary damages. Injunctions can be preliminary, or temporary, when they are issued before the start of a trial and expire upon resolution of the proceeding or at an earlier specified time. Permanent, or perpetual, injunctions, in turn, are issued at the end of a trial as part of the court's judgment.¹⁵

With regard to injunctions we have to remember that in EU Law this instrument takes a particular importance. We can remember some directives recalling forms of injunctions.

Directive 93/13 on Consumers contract refers in its article 7 "1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms".

A norm on Actions for Injunctions is contained in art. 2 of European Directive 27/98: "Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking: (a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement; (b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement; (c) insofar as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event

¹⁵ See Everette MacIntyre, "Antitrust injunctions a flexible private remedy", *Duke Law Journal* 15, no. 1 (1966): 23 ff. The cost and time required by a treble damage action have traditionally acted as a strong brake to private antitrust enforcement.

The author urges consideration by a potential litigant faced with this problem of the advantages of seeking injunctive relief, rather than treble damages; and he points out the special utility of the preliminary injunction. He also proposes some controversial and important possible uses of prior government action in preliminary injunction proceedings.

of failure to comply with the decision within a time-limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions”.

Another example is contained in art. 11, 2 of the European Directive on unfair commercial practices 2005/29: “Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or (b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice, even without proof of actual loss or damage or of intention or negligence on the part of the trader”.

We can also remember the EU Regulation 207/2009 on Trade Mark. Art. 102 states: “1. Where a Community trade mark court finds that the defendant has infringed or threatened to infringe a Community trade mark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe the Community trade mark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with”.

In some cases we do not have a separate application of each measure. It is frequent to find an interplay between the different remedies of private law, like in the case of the interaction between regulation of unfair commercial practices, applicable to consumers and micro-enterprises, rules of pre-contractual correctness and pre-contractual liability, rules on the contract with the consumer and unfair terms.¹⁶ In B2C contracts the unclarity of the terms of the contract can represent a case of unfair contractual term,¹⁷

¹⁶ See Stephen Weatherill and Ulf Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29/CE. New Rules and New Techniques* (Oxford: Hart Publishing, 2007); Geraint Howells, Hans-W. Micklitz, and Thomas Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Farnham: Ashgate, 2006); Vincenzo Meli, “I rimedi per la violazione del divieto di pubblicità ingannevole”, *Rivista di Diritto Industriale* 49, no. 1 (2000): 17-48.

¹⁷ According to Art. 4, 2 of EU Directive 93/13, “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the

a case of unfair commercial practice when the unclarity is misleading,¹⁸ or a case of precontractual liability, since an unclear text of a proposal can distort the other party's freedom of consent during the formation of the contract. In this case we also find a complex regulatory interweaving consisting of provisions of law and regulations intended to dialogue with each other.

Among the aforementioned remedies, particular attention must be paid to the remedy of the junctions which represents, in many cases, as mentioned, the necessary alternative with respect to some violations as the compensatory remedy cannot compensate for the loss.

In some countries such as Italy, doctrine and jurisprudence have identified possible solutions to the violation of market rules according to private law. In other countries the legislator has identified the remedies. Thus, in Germany, in § 6 paragraph 5 VVG – Versicherungsvertragsgesetz [the German Insurance Contract Code] (for the violation by the insurer of the “Beratungspflicht”, the insurance intermediaries' duty to provide advice to customers) and in § 63 VVG (for the violation by the intermediary of the advice and information obligations pursuant to §§ 60 and 61)

price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language”.

¹⁸ According to art. 5 of Directive 29/2005, “Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a)

it is contrary to the requirements of professional diligence,

and

(b)

it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

4. In particular, commercial practices shall be unfair which:

(a)

are misleading as set out in Articles 6 and 7,

or

(b)

are aggressive as set out in Articles 8 and 9”.

compensation for damages is provided for.¹⁹ In other cases, such provision is also lacking in the VVG. In the silence of § 7 on the effects in case of violation of the obligations of disclosure to be borne by the insurer, the doctrine immediately recalled the compensatory remedy referred to in §§ 280 and 311 BGB.²⁰

It may also be noted that such a solution has long been supported by the jurisprudence and the German doctrine for the violation of the pre-contractual disclosure obligations in general which are inserted, according to a recent system, in the category of remedies against unwanted contracts (“die unerwünschten Verträge”) or contracts in which the free determination of one of the contractors has found limitation in information asymmetries, cognitive distortions or other circumstances that may have influenced the self-determination of one of the parties.²¹

The examples mentioned above show that, beyond the scope indicated in Directive No. 104, there are other areas in which the application of the rules of private law (nullity, compensation, etc.) can also perform a social function to protect the market in general and not only of the individual market operator who is injured. The term market law regulation refers to all the rules of conduct imposed on market operators: transparency, correct information, correct advertising, and fair commercial practice. Even highly regulated market sectors such as banking and insurance can find a favourable boost in private enforcement. Just think about the rules of disclosure and transparency in banking and insurance contracts and the possibility for customers to activate solutions to the injury of their interests through actions for compensation for damages or for the nullity of the contract or contractual clauses that are drafted in violation of public law rules.

¹⁹ See Nils Abram, “Schützt das neue Recht den Versicherungsnehmer gegen Folgen einer Pflichtverletzung seines Versicherungsvermittlers?”, *VersicherungsRecht* 30 (2008): 724 ff.; Rudolf Gaul, “Zum Abschluss des Versicherungsvertrags – Alternativen zum Antragsmodell?”, *VersicherungsRecht* 29 (2007): 22; Wolfgang Römmer, “Zu den Informationspflichten nach dem neue VVG”, *VersicherungsRecht* 29 (2007): 618 ff.; Manfred Werber, “Information und Beratung des Versicherungsnehmers von und nach Abschluss des Versicherungsvertrags”, *VersicherungsRecht* 29 (2007), 1154; Peter Reiff, “Das Gesetz zur Neuregelung des Versicherungsvermittlerrechts”, *VersicherungsRecht* 29 (2007): 722 ff.; Peter Präve, “Die VVG-Informationspflichtenverordnung”, *VersicherungsRecht* 30 (2008): 151 ff.

²⁰ Hermann Stockmeier, “Das Vertragsabschlussverfahren nach neuem VVG”, *VersicherungsRecht* 30 (2008): 723.

²¹ See Egon Lorenz, *Der Schutz vor dem unerwünschten Vertrag. Eine Untersuchung von Möglichkeiten und Grenzen der Abschlußkontrolle im geltenden Recht* (München: Beck, 1997), 17 and Frank Weiler, *Die beeinflusste Willenserklärung* (Disertation Universitaet von Bielefeld), 5 ff.

Some Conclusions

The considerations made by the European Commission regarding the actions of persons injured by conducts in violation of competition law can be repeated with reference to the remedies mentioned above and in particular with respect to the remedy for injunction. The fact that some States have constraints on the application of this private enforcement instrument can lead to a jeopardy of the effectiveness of legislation in the EU territory.

Given the importance of private enforcement, it is necessary to consider the constraints to the implementation of the various remedies under private law.

Actions to obtain compensation for damages or the declaration of invalidity of the contract find a limit in problems of access to justice. Especially when the damage is minor, the consumer may not have sufficient interest in acting. Even the uncertainty of winning the litigation can represent a disincentive to act in court. In this case, the promotion of tools under private law for resolving disputes and the ease of access to arbitration procedures embedded within national supervisory authorities can provide a solution to the problem.

With regard to access to justice problems, class actions can play an important role, because they allow many people substantially affected by mass civil wrongs to recover compensation that they would otherwise be unable to obtain.²²

²² Burkhard Hess, “Private law enforcement’ und Kollektivklagen”, *Juristenzeitung* 66, no. 2 (2011): 66. In Directive 104/2014, 44 “Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national competition law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context. It is possible for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No. 1215/2012 of the European

With reference to the proceedings for injunctions, a limit to their implementation can be found in their established typicality. If it is true that injunction orders must be normatively and strictly required, such a typicality may not be required for the cases to which they refer. Thus the possibility for the judge to order the cessation of a practice harmful to the market if admitted even outside the assumptions provided by an analogical interpretation of the rules governing the different injunction proceedings could strengthen private enforcement through this tool.²³

Also in the market sectors where there is a strong public regulation (see Insurance Law, Banking Law and Financial Market Law), public enforcement needs to be combined with private enforcement.

As highlighted in Directive 2014/104/EU, “the practical effect of the prohibitions laid down requires that anyone – be they an individual, including consumers and undertakings, or a public authority – can claim compensation before national courts for the harm caused to them by an infringement of those provisions.” For this reason it is important to consider all the different private enforcement tools and try to remove the obstacles to their effective functioning.

Private law is activated on the action of individuals who exercise the rights recognised by the law. Individuals being closer to the emergence of the problem are able to represent the violation of the interests at stake according to the logic proper to the principle of subsidiarity.

The principle of subsidiarity states that a wider and greater body, such as a government, should not exercise functions that can be carried out efficiently by a smaller one, such as an individual or a private group, acting independently.²⁴

Parliament and of the Council (6). Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation”.

²³ Analogy needs to be conducted in a non-syllogistic way. Lloyd L. Weinreb, *Legal reasoning. The Use of Analogy in Legal Argument* (Cambridge: Cambridge University Press, 2005) “shows that analogical reasoning in the law is the same as the reasoning used by all of us routinely in everyday life and that it is a valid form of reasoning derived from the innate human capacity to recognize the general in the particular, on which thought itself depends. The use of analogical reasoning is dictated by the nature of law, which requires the application of rules to particular facts”.

²⁴ See George Gelauff, Isabel Grilo, and Arjan Lejour, *Subsidiarity and Economic Reform in Europe* (New York: Springer, 2008). We have to remember that in EU law the scope of the principle of subsidiarity was to demark Union competence.

The principle of subsidiarity was formally enshrined by the Maastricht Treaty, which included a reference to it in the Treaty establishing the European Community (TEC). The Single European

So individuals or associations, acting independently according to the rules of the private legal system, could active solutions of public interest and the State, regions, metropolitan cities, provinces and municipalities shall promote citizens' autonomous initiatives.

At the moment, the European norms which express the rule for private enforcement are limited, as said, to the competition law. Therefore, it is not possible that these rules contain a general principle that could be used in the interpretation of EU Laws and in the creation of new European laws. The present article wants to express the necessity to implement the normative importance of private enforcement having regard, particularly, to

Act (1987) had already incorporated a subsidiarity criterion into environmental policy, however, albeit without referring to it explicitly as such. In its judgment of 21 February 1995 (T-29/92), the Court of First Instance of the European Communities ruled that the principle of subsidiarity was not a general principle of law, against which the legality of Community action should have been tested, prior to the entry into force of the TEU.

Without changing the wording of the reference to the principle of subsidiarity in the renumbered Article 5, second paragraph, of the EC Treaty, the Treaty of Amsterdam annexed to the EC Treaty a "Protocol on the application of the principles of subsidiarity and proportionality". The overall approach to the application of the principle of subsidiarity agreed at the 1992 European Council in Edinburgh thus became legally binding and subject to judicial review via the protocol on subsidiarity.

The Lisbon Treaty incorporated the principle of subsidiarity into Article 5(3) TEU and repealed the corresponding provision of the TEC while retaining its wording. It also added an explicit reference to the regional and local dimension of the principle of subsidiarity. What is more, the Lisbon Treaty replaced the 1997 protocol on the application of the principles of subsidiarity and proportionality with a new protocol of the same name (Protocol No. 2), the main difference being the new role of the national parliaments in ensuring compliance with the principle of subsidiarity (1.3.5). The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.

When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union's non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.

Under Article 5(3) TEU there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).

procedural safeguards that ensure effective legal protection and the effective enforcement of material claims.

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