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The Procompetitive interpretation of 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*. All these institutions should be directed not only towards assuring contractual economic balance, but also towards regulating the whole market in which the single contract is done. In this way the interplay between Private and Public interests becomes decisive to make Economy and Freedom of Contract more consonant with the value of Human Person.

J.E.L. codes: K120; K130; K210; K420.

Keywords: private law, contract, obligation, private enforcement of antitrust law, interpretation.

The Procompetitive interpretation of Private Law is a current topic in European doctrine who has recently focused attention on the incidence of Competition Law[1] upon the classic institutions of Private Law, particularly upon contract law[2] and, more generally, upon the law of obligations[3].

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The author reassumes his research presented in earlier papers and in his book «Violazione di norme *antitrust* e disciplina dei rimedi nella contrattazione "a valle"», Edizioni Scientifiche Italiane, Napoli, 2009.
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[1] See, for a more complete analysis, V. Donativi, *Introduzione alla disciplina antitrust nel sistema legislativo italiano* (Milan: Giuffré, 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, G. Olivieri (eds.), *Diritto antitrust* (Turin: Giappichelli, 2012).

[2] This aspect is well underlined by G. Alpa, V. Afferni (eds), *Concorrenza e mercato* (Padua: Cedam, 1994); M.R. Maugeri, A. Zoppini (eds), *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: Il Mulino, 2009); J. Busche, *Privatautonomie und Kontrahierungszwang* (Tübingen: Mohr Siebeck, 1999), 319 ff.; B. Fages, J. Mestre, *L'emprise du droit de la concurrence sur le contrat*, *Revue trimestrielle de droit commercial*, 1998, 51, 1, 75 ff.; B. Montels, *La violence économique, illustration du conflit entre droit commun des contrats et droit de la concurrence*, *Revue trimestrielle de droit commercial*, 2002, 55, 3, 417 ff.

[3] 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*, 1990, 89, 3, 387 ff.

In this prospective Italian doctrine has concentrated particular interest on the phenomenon of *subjugation of the modern contracts to anticompetitive purposes*[4], 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[5].

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 contract to participate in the dynamic competitive dimension. The final result, more or less shared by Italian doctrine, 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*[6] of European Civil Law.

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[7]. 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* [Case C-453/99, Courage Lid. v Bernard Crehan (E.C.J. Sept. 20, 2001)][8], which has undermined the force of the ancient rule *in pari causa turpitudinis melior est condicio possidentis*. 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 article 81 of the EC Treaty. The Court applies the rule in

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[4] These words are by A. Genovese, *Disciplina del rapporto obbligatorio e regole di concorrenza*, in G. Olivieri, A. Zoppini (eds), *Contratto e antitrust* (Bari-Rome: Laterza, 2008), 137 ff.

[5] A. Zoppini, *Autonomia contrattuale, regolazione del mercato, diritto della concorrenza*, in G. Olivieri, A. Zoppini (eds), n 4 above, 22 ff.

[6] This expression is used by C. Osti, *L'obbligo a contrarre: il diritto concorrenziale tra comunicazione privata e comunicazione pubblica*, in G. Olivieri, A. Zoppini (eds), n 4 above, 36 ff.

[7] See M. Libertini, *La causa nei patti limitativi della concorrenza tra imprese*, in G. Olivieri, A. Zoppini (eds), n 4 above, 89 ff.

[8] Cfr E.C.J., 20 September 2001, Case C-453/99, *Courage Ltd. c. Crehan*, *Foro italiano*, 2002, 127, 2, IV, 75 ff.

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 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. 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[9]. This implies that the ancient principle *pacta servanda sunt* is no more strictly essential to the existence of the market but it allows the evolution of the market itself to models of increasing complexity and productivity. At the same time the recent rules of abuse of economic dependence show a strong impact upon ordinary Contract Law.

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)[10], 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, are not contractual obligations but rather legal secondary obligations deriving from Law and Good Faith (so not from Freedom of Contract and Party Autonomy). 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, not to abruptly terminate the contractual relationship, 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,

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[9] See F. Dreifuss-Netter, n 3 above, 387 ff., who emphasizes that «[*i*]*l 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*».

[10] See, in this specific perspective, C-W. Canaris, *Ansprüche wegen «positiver Vertragsverletzung» und «Schutzwirkung für Dritte» bei nichtigen Verträgen*, *Jur. Zeit.*, 1965, 65, 475 ff.; F. Longobucco, *Obblighi di protezione e regole di concorrenza nella contrattazione di (e tra) impresa (e)*, *Contratto impresa/Europa*, 2010, 15, 1, 56 ff.

only indirectly, to protect the weaker party[11]. 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.
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 barriers to entry, the degree of maturity of the market, the nature of the product, etc[12].
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[13].
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[14].
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 *Folgeverträge* or *ancillary contracts* or *tools contracts*). While the single contract stipulated with the 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 favor of the injured consumer who should claim for antitrust damages. In fact the contract is clearly detrimental to the consumer who is a third party with

[11] See M. Chagny, n 3 above 772, ff.
[12] A. Zoppini, *Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza*, *Rivista di diritto civile*, 2008, 54, 5, I, 515 ff.
[13] F. Longobucco, n 10 above, 41 ff.
[14] See, in this specific sense, P. Femia, *Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione*, in G. Gitti, G. Villa (eds), *Il terzo contratto. L’abuso di potere contrattuale nei rapporti tra imprese* (Bologna: Il Mulino, 2008), 215 ff.

respect to the antitrust infringements or cartels[15]. 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).
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[16]. Therefore it is 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[17]. 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).

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[15] See, about this particular problem, 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* (Naples: Jovene, 2008); F. Longobucco, *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione "a valle"* (Naples: Edizioni Scientifiche Italiane, 2009); V. Emmerich, *Kartellrecht*, 7th ed. (München: C.H. Beck, 1994), 91 ff.; E. Langen, H-J. Bunte (eds), *Kommentar zum deutschen und europäischen Kartellrech*, Band. 1, Neuwied, Kriftel (Berlin: Luchterhand, 2001, Rn. 219), 158 ff.; M.S. Gal, *Harmful remedies: optimal reformation of anticompetitive contracts*, *Cardozo Law Rev.*, 2000, 22, 1, 91 ff.; R. Houin (1963), *Les consequences civiles d'une infraction aux regles de concurrence*, *Annales de la Facultè de Droit de Liège*, 28 ff.

[16] For a first introduction see A. Komninos, *Introduction*, in C.D. Ehlermann, I. Atanasiu (eds), *Effective Private Enforcement of EC Antitrust Law, European Competition Law. Annual 2001* (Oxford: Hart Publishing, 2003), XXIV ff.; QC, J. Lewer, *Effective Private Enforcement of EC antitrust rules substantive remedies: the viewpoint of an english lawer*, in C.D. Ehlermann, I. Atanasiu, above n 16, 109 ff.; Mar. Monti, *Effective Private Enforcement of EC antitrust Law*, in C.D. Ehlermann, I. Atanasiu, above n 16, 3 ff.; 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 ff.

[17] See, for an in-depht examination about this recent relevant issue, T. Ascarelli, *Teoria della concorrenza e dei beni immateriali*, 3rd ed. (Milan: Giuffré, 1960); G. Oppo, *Diritto dell'impresa e morale sociale*, *Rivista di diritto civile*, 1992, 38, 1, I 36 ff.; 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*, it. transl. (Milan: Giuffré, 1990); P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, 3rd ed. (Naples: Edizioni Scientifiche Italiane, 2006); N. Irti, *L'ordine giuridico del mercato*, 5th ed. (Rome-Bari: Laterza, 2004); S. Grundmann (ed), *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law, 2008), 3 ff.

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