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1. In the Italian legal system, freedom of contract is a key principle of contract law, that concurs with other contract principles to the regulation of the field of contracts. The principle in question is indirectly protected under the Italian Constitution (1947), as a way to express the right to develop one’s personality (Cost. it., art. 2), and as manifestation of the freedom to conduct a business, that cannot be in contrast with social utility, or security, liberty and dignity (Cost. it., art. 41). The Italian Constitutional court upheld the principle on a number of occasions, but it has also ruled that the legislature has the power to intervene to regulate freedom of contract under art. 41 of the Italian Constitution, provided that this intervention is within the boundaries of what is properly justified.

In recent years, constitutional provisions have been invoked in a few cases by the Courts to assess the fairness of certain contractual terms (see below, nr. 2). In historical perspective, the drafters of the civil code of 1942 were aware of the problems arising from the asymmetry of the position of the contracting parties on the market. This awareness ex-
plains why the civil code contains a few provisions that should have worked to safeguard contractual freedom against one sided contractual terms (see below, nr. 2). The advent of the republican constitution, the development of consumerism, the introduction of a set of Italian antitrust rules in the 1990’s, and the expanding intersections between the market and the welfare state in the form of liberalisation and regulation, as well as the impact of EU law on the development of the internal market, have all given new impetus to the ripening of new thinking about the contemporary dimensions of freedom of contract and its limits. This has triggered an evolution of contract law that openly tends to align what was considered ‘private’ behaviour – namely the conduct of individuals and firms on markets – with public policy goals, which can be summed up in the formula of ‘regulated autonomy’. This trend extends well beyond the field of consumer contracts. Historically, since the beginning of the twentieth century freedom of contract has been revisited at first with respect to labour contracts. By now, the vast field of contractual relationship in which the parties’ position is asymmetrical is regulated in Italy by laws that tend to control the risk of an abuse of the contractual relationship by one party to the detriment of the other and the efficient functioning of market. Subcontracting, franchising, commercial agency, distribution contracts in the agro-industrial sectors, etc., are all governed by provisions that in one way or another tend to pursue these goals. All these trends are now integrated into the framework of EC law.

When the Italian Constitution entered into force in 1948, neither the European Convention of Human Rights, nor the Treaty establishing the European Economic Community, were yet existing. In the following decade, Italy became a founding member of the Council of Europe and of the European Union. Hence, the above mentioned constitutional prin-

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ciples and Italian law more generally are now implicated in the dynamics relating to the implementation of European fundamental rights law and EU law, which provide, in their own ambit and for their own purposes, protection of the principle of freedom of contract, within certain bound-
aries.

According to art. 1322 CC, the parties to a contract can freely de-
termine its content, within the limits established by law. The first sec-
tion of art. 1322 CC is generally taken to be the consecration of free-
dom of contract as a fundamental principle of private law. A general
limit imposed to freedom of contract is that contracts can constitute,
regulate, or extinguish patrimonial relationships only (art. 1321 CC, see
also art. 1174 CC). This precludes the possibility to contract over non
patrimonial matters. Agreements of this kind fall outside the scope of
the law of contracts, and their validity and enforceability is highly prob-
lematic in Italy.

The wording of art. 1322 CC admits the possibility to limit freedom
of contract by law (legge), and therefore legislative acts may impose such
limits, provided that they are within the boundaries set by Italy’s con-
stitutional norms, EU law, and European fundamental rights law. For
example, the legislature may establish a system of compulsory insurance,
such as that which is presently imposed on motor cars owners, or on
medical doctors since 2017. The second section of the same article pro-
vides that the parties can also enter into contracts that are not governed
by specific provisions of law (innominate contracts), to pursue interests
that are worthy of protection under the law. The qualification of the
rule is a reminder of the fact that the Italian civil code goes back to
1942, and that the economic and political and system prevailing at the

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6 A full discussion of the impact of European Convention of human Rights and of
EU law in this matter is beyond the scope of this paper. The judgment of the ECJ in
C-426/11 Alemo-Herron v Parkwood Leisure Ltd ECLI:EU:C:2013:521 highlights the
weight that the notion of freedom of contract has under the EU Charter of fundamental
rights. For commentary see: M.W. Hesselink, *The Justice Dimensions of the Relationship
between Fundamental Rights and Private Law*, in *European Review of Private
Law*, 2016, 24, p. 425; S. Weatherill, *Use and Abuse of the EU’s Charter of Fundamental
Rights: on the improper veneration of ‘freedom of contract’*, in *European Review

7 For an analysis of this theme: R. Sacco, G. De Nova, cit. fn. 1 above, p. 963 ff.

8 Medical doctors must be insured under the new law that, inter alia, reformed med-
ical liability (art. 10 of the law 2017, n. 24). Compulsory motor car insurance goes back
to the law 990/1969.
time was illiberal. The last part of the provision is usually read in a liberal way, by assuming that any interest that the parties pursue is, in principle, worthy of protection, if the contract does not run against mandatory rules of contract law, which include \textit{ordre public} and good morals (CC art. 1343). In assessing freedom of contract, appropriate weight must also be given to the general prerequisites established by our legislation for contracts to be valid, such as \textit{causa} and form, rescission for grossly unfair transactions as regulated by the civil code\footnote{The point is covered below, nr. 2.}, as well as to obligations of good faith an fair dealing in the negotiation, interpretation and fulfilment of contracts. These requirements fall under the general rules on contract law, and will not be examined in detail here.

Freedom of contract must be protected from its abuse, in the first place. The \textit{codice civile} was one of the first codes to tackle the problem with respect to standard form contracts by introducing for the first time in our law a specific regime governing certain unfair contract terms. Art. 1341 CC provides that unfair contracts terms not specifically approved in writing are not binding upon a contracting party. The rule applies to all kind of contracts, whether concluded by consumers or not, that qualify as standard form contracts. More recently, directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts was implemented in Italy with the enactment of an additional set of rules on unfair contract terms in consumer contracts. These rules are now set out in the Consumer Code (\textit{Codice del consumo}, Legislative Decree no. 206 of 6 September 2005, with amendments), arts. 34-37\footnote{An English translation of the Consumer code is available on the web site of the A\textit{utorità Garante della Concorrenza e del mercato: www.agcm.it/en/list-consumer-protection/1725-legislative-decree-no-206-of-6-september-2005-consumer-code.html.}. Art. 2 of the same Code proclaims with a certain emphasis that the individual and collective rights of consumers include as ‘fundamental rights’ the right to “fairness, transparency and equity in contractual relations”. As explained in the following sections of the paper, more specific provisions come into consideration as well with respect to certain sectors of the economy, or for certain contractual relationships.

Freedom of contract typically includes the right to determine the price that is agreed between the parties. Nonetheless, the legislature can regulate the price of certain goods or services, or the consideration which
is due as the *quid pro quo* for performance, and may also delegate these powers to certain administrative bodies, that act as regulatory agencies, whose functions is considered below. Price control legislation in Italy has a distinguished career: the price of bread, for example, was valorized until a few decades ago, and rent control legislation was applicable to the greatest part of the housing sector up until the 1980’s, as well as to agricultural leases. This landscape has changed with the wave of liberalisations and privatisations that abolished or softened most of these controls in the last decades of the XX century. But in certain sectors of the economy the parties are not free, or completely free, to fix the price over and above certain thresholds prescribed by the law, as it happens with respect to credit agreements (see below), and for several aspects the supply of electricity, or telephone services.

The Italian civil code enacts two provisions that set a general limit on the price that can be agreed in some circumstances. The first deals with unfair contracts concluded in presence of an imminent, serious danger to life or health, if this is known to the other party to the transaction (art. 1447 CC). The second concerns contracts concluded by a person in need, if the consideration paid or promised was grossly disproportionate and the other party knew that the contract was concluded by a person who was under the pressure of the need (art. 1448 CC). For the latter case, the code provides that the relevant gross disproportion is established if the consideration paid or promised to obtain performance exceeds by one half the value of the counter performance at the time of the conclusion of the contract. In both cases, the contract can be rescinded, unless is duly modified to obtain fairness in the exchange (art. 1450 CC). The limitation period established for rescinding the contract is relatively short, namely one year since the conclusion of the contract; a longer period applies only when the extortionate transaction amounts to a crime (art. 1449 CC). These provisions put on the aggrieved party a substantial burden of proof.

In other cases, the legislature limits the power of the parties to determine the price with regard to specific contracts. The consequences of the violation of a mandatory provision of law establishing a certain price for certain goods or services in Italy is established in a general way by the civil code. The Code provides for the automatic insertion in contracts of the price for goods and services set by the law, even though the parties had agreed a different price (art. 1339 CC). This is a clear and remarkable deviation from party autonomy with respect to price control of price related terms in standard form contracts
determination. The origins of this article of the civil code are rather obscure, but despite criticism levelled against it, it is regularly applied by our Courts. There are similar provisions with respect to specific contracts too. For example, if a bank fails to correctly indicate an effective APR in a consumer credit contract the agreed interest rate shall be considered void, and the applicable rate is the interest rate on Italian treasury bond in the last year (Italian banking law, art. 117(7))

Although market competition cannot by itself iron out unfair contract terms, the legislature can use the legal framework regulating market competition as a peg to control the use of unfair contract terms. In Italy the Law no. 287 of 10 October 1990 introduced a first set of national antitrust rules (“The Competition and Fair Trading Act). This law established an independent administrative authority (Autorità Garante della Concorrenza e del mercato – AGCM), governed by a Board composed by the President and two members, that carries out a number of tasks. It is financed by annual allocations through a special chapter of the Ministry of Economic Development’s budget, and it is partly self-financed by firms regulated by the Authority. The Authority is in charge of the antitrust business, as well of the repression of unfair commercial practices, of misleading and unlawful comparative advertising, and of the application of conflict of interests laws to government-office holders. Since 2012, the Authority has also the power to declare that contract clauses in standard form consumer contracts are unfair, and to discourage their use, by making known to the public their unfairness. The legislative decree 24 January 2012 n. 1 (Disposizioni urgenti per la concorrenza, lo sviluppo, delle infrastrutture e la competitività), converted into law with modifications by the law 24 march 2012, n. 27, and eventually consolidated as art. 37 bis of the Consumer Code grants the Authority the power to take action in this matter either on its own motion, or on demand of a number of subjects. The decisions of the Authority that declare certain terms unfair can be challenged before the administrative courts, in the first instance before the Tribunale Amministrativo per il Lazio, and on appeal before the Consiglio di Stato.

The task of inhibiting standard contracts containing unfair contract terms is also entrusted to the Chambers of Commerce, under art. 2 of the legislative decree 15 February 2010, n. 23 (Riforma dell’ordinamento relativo alle camere di commercio, industria, artigianato e agricoltura). This form of control, if does not lead to compliance by firms, may be followed by judicial proceedings instituted under art. 37 of the Consumer Code by the Chambers of Commerce to inhibit by judicial decision the use of unfair standard terms. To facilitate recourse to fair contract clauses the Chambers of Commerce under the same legislation have the power to offer to business and to the public standard form contracts that do not include contract terms. Several Chambers of Commerce in Italy have published these standard terms contracts for certain business sectors on their web sites.

While the AGCM and the Chambers of Commerce have a general competence to promote the use of fair standard terms in consumer contracts, some public entities or agencies are entrusted with more specific tasks in these fields. The Banking law contains several provisions applicable to standard form consumer contracts, which detail their content in terms of form, adequacy and transparency requirements (Banking Law, arts. 115 ff.). Under its statutory powers, the Bank of Italy has recently negotiated with the banks operating in Italy and with the Ministry of the Economy a cost free ‘plain vanilla’ deposit account to be offered to low income clients that are resident in the European Union. This type of contract can be offered also to other clients, provided that its costs are determined on a reasonable basis, and having in mind the purpose of financial inclusion. Other independent Authorities have regulatory powers concerning public utilities (energy and gas contracts fall under the competence of AREARA – Autorità di regolazione per reti

13 Consumer Code, art. 37: “Consumers’ associations pursuant to Article 137, associations representing professionals, and Chambers of Commerce, may bring proceedings against any professional or professional association that uses or recommends the use of contractual terms drawn up for general use, and may request the competent court to grant orders preventing the use of terms that have been found unfair (…). Injunctions may be granted, when there are fair grounds of urgency, pursuant to Articles 669 bis et seq. of the Civil Procedure Code.

The court may direct that the order be published in one or more newspapers, of which at least one is distributed nationwide. For all matters not covered by this Article, the provisions of Article 140 shall apply to applications for injunctions brought by consumers’ associations...”.

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energia e ambiente), and they too issue regulations that are applicable to consumer contracts; some of these regulation contribute to determine the price of the service or the goods to which consumers must have access to, as explained below (section II).

The Italian Consumer code, art. 140 bis, which became effective in 2010, and amended in 2012, introduces a means of collective redress that was initially presented to the public as a kind of class action (azione di classe) by which one could have sought damages resulting from the use of unfair contract terms. The provision turned out be "a blatant debacle"14, because it was introduced without strong political support, and is currently considered to be a largely ineffective means to vindicate consumers’ rights. Part of the problem lies in the chronic inefficiency of the Italian civil justice system, which offer poor incentives to cultivate these claims15. It is too early to know what consequences shall have the transposition in Italy of the directive on actions for damages from competition law infringements (legislative decree n. 3/2017, implementing directive 2014/104/UE), perhaps this will be a more successful effort to provide a remedy against anticompetitive practices. On the other hand, the associations of consumers and “users” that are registered in the list kept by the Ministry of Economic Development (Cons. Code art. 137) can bring actions to protect consumers and users’ collective interests by demanding injunctive or restorative relief (Cons. Code, art. 37, 139-140). They can apply to a Court to obtain: a prohibition order against actions damaging the interests of consumers and users; suitable measures to remedy or eliminate the damaging effects of any breaches; an order to publish measures in national or local newspapers, where such publication measures may contribute to correct or eliminate the effects of any breaches. Recourse to this type of judicial relief by consumers’ association is as well not very frequent, but a few decisions have been

15 G. Pailli, C. Poncibò, In Search of an Effective Enforcement of Consumer Rights: The Italian Case, in H.-W. Micklitz, G. Saumier (edited by), Enforcement and Effectiveness of Consumer Law, 2018. The numbers as reported in this publication are telling: since its introduction in 2010 up to the beginning of 2016, 58 azione di classe were filed, 18 were declared non admissible and were rejected; 10 were declared admissible (3 reached the decision); 30 are pending at the admission stage.
rendered to inhibit the use of unfair contract terms by banks, for example\textsuperscript{16}.

Italy has some alternative dispute resolutions systems that provide cheap and fast means of resolutions of consumer complaints for certain types of litigations, such as those relating to banking services (\textit{arbitro bancario e finanziario}, set up by the Bank of Italy), telecommunications (so called \textit{corecoms- comitato regionale di controllo}- under the surveillance of AGCOM), energy and gas, etc. (supported by ARERA). The most recent of these organism is the \textit{Arbitro per le controversie finanziarie} which operates in the field of financial services and has started its operations in 2017, with the support of the National commission for the supervision of the stock exchange (Consob).

These organisms were created in Italy to implement EU law on alternative dispute resolution mechanisms and are currently regulated by a variety of provisions. Altogether, they handle a high number of individual complaints each year, and effectively provide relief for most consumer cases in the respective sectors\textsuperscript{17}. Although the decisions rendered by these organisms do not have the same dissuasive impact of judicial decisions, consumers who have concluded contract with unfair terms quite often obtain prompt and effective relief by individual recourse to these organisms, and are thus massively presenting their claims to them.

2.a) The control of standard contract terms in Italy is governed in the first place y the provisions of the Civil Code and of the Consumer Code. The first set of rules, contained in the civil code, have a general character, and are in principle applicable to all contracts, whether concluded by consumers or not, with the exception of the rules that are derogated by the legislation on consumer contracts. The second set of rules, applicable to consumer contracts only, is contained in the consumer Code. Other provisions, contained in more specific legislation (or secondary sources) governs contract terms with respect to specific con-


\textsuperscript{17} A complete description of these system goes beyond the scope of this paper. For a first analysis of the \textit{Arbitro bancario e finanziario} that handles thousands of consumer claims every year: M. Pellegrini, \textit{Alternative Dispute Resolution Systems in Italian Banking and Finance: Evolution and Goals}, in D. Siclari (edited by), \textit{Italian Banking and Financial Law}, 2015, p. 131 ff. The website dedicated to this institution is https://www.arbitrobancariofinanziario.it/ provides abundant documentation on its activity.
tracts, such as consumer credit, which is regulated in the Italian Banking law. This is a fragmented field, and therefore it is difficult to provide a complete view of the law in force, for example contracts for water, gas and electricity are also governed by regulations issued by the respective national regulators.

Art. 1341 CC governs the effects of standard form contracts prepared by one party, that are set out in general conditions of contract (namely contractual terms that are usually made accessible by posting them on the business premises). Art. 1341 CC holds that these terms are effective only if at the time of formation of the contract the other party: “knew of them, or should have known of them by using ordinary diligence”. In any case, according the same article:

“some specific types of clauses are not effective unless specifically approved in writing. Such clauses are those which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogations from the competence of courts.”

Art. 1342 CC adds that this rule applies also to contracts concluded with the use of standard contract forms. According to art. 1342 CC terms added to such forms prevail over the original text, if incompatible with it. This rule establishes that individually negotiated terms prevail over standard terms. Lastly, art. 1370 CC enacts a version of the contra proferentem rule: “Terms contained in standard terms contracts or in forms or formularies which have been prepared by one of the contracting parties must be interpreted, in case of doubt, in favour of the other party”.

As mentioned above, these provisions is to provide a set of rules that are applicable to all contracting parties, whether they are consumers or business. These rules govern the incorporation of general conditions of contract into the contract, whether they are unfair or not, and of one-sided, unfair terms, provided that they are specifically approved in writing. In any case, the party preparing the contract has a duty to speak clearly, because contract terms that raise doubts as to their meaning shall be interpreted in the sense that is more favourable to the other party.

A first problem posed by art. 1341 CC is to establish whether the
standard terms that one party intends to incorporate into the contract were known (or ought to have been know) by the contracting party against whom they are invoked, or not. Standard contract terms printed on the back of the ticket issued by an automated parking lot can, for example, be excluded from the contract because the client did not have a reasonable opportunity to consider them when the contract was concluded\textsuperscript{18}.

A second question related to art. 1341 CC is whether the list of unfair terms that it enacts is indicative, or exclusive. The prevailing opinion is that the list contained in this article is exclusive, so that recourse to analogy is not admitted, although the language of the provision should be constructed to cover cases that are liminal\textsuperscript{19}. The requirement of “specific approval in writing” has been interpreted to mean that the unfair terms listed in that article must be specifically recalled in the contractual document, and approved by a signature that is separate from the signature of the contract as a whole (even if, for example, the unfair clauses are in large print in the contract). This requirement is, however, easily satisfied in practice. Therefore, by going through this formality, unfair contract terms are regularly incorporated into the contract, and are thus rendered fully effective under art. 1341 CC. This is why the protective effect of the provision contained in art. 1341 CC. is low. Needless to say, when this formality is omitted, for lack of care of the business, by chance, or for any other reason, the unfair terms not specifically approved in writing are without effect.

The rule set out in art. 1341 CC typically applies to contractual terms that exonerate from liability for to breaches of the contractual obligations. On the other hand, terms that actually define contractual obligations, are not subject to the requirement of specific approval in writing. The line to draw in this respect can be fine, and the Courts have repeatedly been engaged in the exercise of providing an answer to this crucial question, because the efficacy of some terms depend on it\textsuperscript{20}.

Two more specific provisions of the Civil Code limit freedom of contract with respect to all contracts, including standard terms contracts

\textsuperscript{19} Cass. 4 June, n. 14038.
\textsuperscript{20} Cass. Joint Panels 1\textsuperscript{st} July 1994 n. 6225, in \textit{Giur. it.}, 1995, I, 206 (banker’s liability for loss of items contained in a safe deposit box).
as well, whether concluded with consumers or not. These are the rules governing the validity of exemption clauses (art. 1229 CC), and penalty clauses (1382 ff. CC).

According to art. 1229 CC., any agreement that excludes or restricts liability for cases of wilful default (*dolo*) or gross negligence (*colpa grave*), or exempts or limits liability in cases where the act of the debtor or his auxiliaries constitutes a breach of duties arising from rules of public order, is void. This provision cannot be derogated from by the parties. A contract containing such an exemption clause shall have effect without the contractual term that is void under this rule. As a consequence, exemption clauses governing the liability of a bank with respect to clients’ safe deposit boxes are void, if they would exempt the bank for gross negligence or wilful default\(^\text{21}\), and a contract term exonerating a freight forwarder from liability for gross negligence, or wilful default, is void as well\(^\text{22}\).

According to art. 1384 CC penalty clauses that require to pay a disproportionately high sum in for a breach of contract may be subject to equitable reduction by the Court\(^\text{23}\). The power of the Court to reduce the amount due under such clause is currently justified with reference to the need to curb an abuse of contractual freedom that is contrary good faith. It is also claimed that this power would be sanctioned by art. 2 of the Italian constitution, on the duty of solidarity. The provision cannot be derogated from by the parties. The Corte di Cassazione held that its application is not limited to the case of an express request asking for a reduction by the non-performing party. The court may thus manifestly disproportionate amount on its own motion. Whether the agreed sum is ‘manifestly excessive’ is to be evaluated in accordance with good faith. The check occurs when the contract is enforced, instead of when it was concluded to make sure that the clause has a compensatory function, rather than a deterrent function.

The Civil code provides as well special rules for the *caparra confirmatoria*, namely a sum of money, or other fungible things, advanced by one party to the other to both show willingness to fulfil the contract and secure the payment of the balance due. Although in most cases the

\(^{22}\) T. Milano 3.7.2000.
sums agreed as earnest money are not very high, and are given simply to confirm the seriousness of the agreement, in some cases the *caparra confirmatoria* may be a substantial sum, and thus play out as a contractual penalty. If the *caparra* is high, and indeed excessive, does the rule on reduction of penalties applies here as well? The Corte di Cassazione answered the question in the negative with respect to the sale of a building, because the power of the Court to reduce an excessive penalty is exceptional. The question was raised again before the Constitutional court in a subsequent litigation, with reference to a violation of art. 3 Cost, namely the principle of equality. The Court ruled that it is within the remit of the judge to declare that a disproportionate *caparra* is void all or in part, being contrary to a mandatory rule of law, namely art. 2 of the Italian Constitution, which proclaims imperative duties of solidarity, and in light of the principle of good faith, which requires one party to safeguard the interests of the other party (when they do not collide with his or her own). This ruling has been received by mixed reactions, because several scholars have expressed doubts and perplexity about an unstructured judicial control of unfair clauses which could be considered void as being contrary to art. 2 Cost. Nonetheless, the Constitutional Court pointed out one major difference between the current rules on sums agreed as penalties to be paid under art. 1384 CC and the *caparra confirmatoria* govern by art. 1385 CC. As a matter of fact, sums due as earnest money go to the performing party only if the other party’s non-performance is of major importance, while contractual penalties could be established for minor violations as well.

In considering these developments, one should keep in mind that, with respect to consumer contracts, the power of the judge to reduce an excessive penalty has been excluded by the ECJ. The ECJ ruled that such power unduly mitigates the dissuasive effect of the inefficacy of such terms under directive 93/13/EEC. In Italy, this decision requires rethinking current practice. With respect to consumer contracts, contract terms imposing excessive penalties for exercise of certain contractual

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24 Corte Cost., 2 April 2014 n. 77 (ordinanza); Corte Cost., 24 October 2013, n. 248 (ordinanza).
26 C-488/11 – Asbeck Brusse e de Man Garabito, EU:C:2013:341.
rights should be considered void, rather than subject to the power of the judge to conform the contract to requirements of fairness in the exchange by adjusting what is owed under the contract.

2.b) At first, the implementation of directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts in Italy took place through amendments to the civil code. In 2005 this was changed, and eventually the newly enacted Consumer Code became the sedes materiae. Arts. 33-34 of the Consumer Code replicate the key provision of the directive, and the list of ‘grey clauses’ that are accordingly presumed to be unfair, unless the contrary is proved. Art. 36 of the consumer Code added to that first list a few more, that are unfair even when individually negotiated. The clauses contained in this second list overlap with some of those that are in the ‘grey’ list of the Directive. The Italian ‘supplement’ includes the following terms: a) contract terms that exclude or limit the actions or legal rights of the consumer vis-a-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional; b) terms that bind the consumer to terms with which he had no opportunity of becoming acquainted before the conclusion of the contract; c) terms which, even though individually negotiated, have as their object or effect to exclude or limit the liability of the professional in the event of the death or personal injury to the consumer resulting from an act or omission of the professional. From this point of view, the level of protection established under the Italian regime is higher than that provided for by the Directive.

Unfair contract terms governed by these provisions are void (Cons. C. art. 36). This kind of invalidity may be invoked only to protect the consumer, and the judge should indeed proceed on his or her own motion to do so, for the same purpose, according to the jurisprudence of the ECJ.

Consumers associations, as well as other entities, such as Chambers of Commerce and professional associations can initiate judicial proceeding to enjoin the use of unfair contract terms under art. 37 of the consumer Code, or under art. 140 of the Code. As far as Consumer Associations are concerned, only by those associations that are representative of consumers’ interests according to the law, namely who possess some prerequisites established by the legislation, can initiate judicial actions according to this rule. The Court rendering a judgment in these proceeding does not have before itself all the circumstances of the concrete case.
Therefore, although the unfair nature of a term included in a contract with the consumer may have been already judicially recognised, there is the risk that a single contract containing the same term is not actually considered to be unfair, as it happens when that term was individually negotiated\(^\text{27}\). According to EU law Courts are to draw all the consequences provided for by national law to ensure that consumers will not be bound by that term. In Italy this may lead to a Court order that provides that the decision shall be published on one or more newspapers (Cons. Cod., 141 (3),(4)), and to the imposition of a penalty on the defendant for delay in implementing the Court order.

As mentioned above, since 2012, an independent administrative Authority – the AGCM – has the power to control unfair terms in B2C contracts. This independent agency may open proceedings leading to the declaration of unfairness of a specific term or set of terms on its own motion, or under the impulse of a consumer, a consumer association, or a business, either in a preventive way, or ex-post. The decision of the Authority on the matter, after a preliminary phase, is taken after hearing the party concerned. Such party has the duty to collaborate and provide all the relevant information to assess the nature of the clause, including explanations about the reasons and the objectives that motivate its insertion in the contract and the way the clause will be negotiated with individual consumers. The authority has the power to order on site inspections, to check documents and records, as well to order economic assessments of the relevant data, consult experts, conduct statistical analysis etc.\(^\text{28}\). The decision of the Authority on standard terms is merely declaratory, it does not affect the validity/invalidity of the term, and the judiciary is not bound it, but its deterrent effect is enhanced by the obligation to publish it both on the web site of the AGCM, and of the business whose terms are declared unfair. Failure to publish the decision on the web site of the business results in a fine between €5,000 and 50,000. This is not a serious fine, if compared to profits that may be reaped by resorting to unfair contract terms in certain business sectors, but it is a fine that has reputational effects.

Is the Authority a though regulator? It surely aims to be regarded

\(^{27}\) Cass., 21 maggio 2008, n. 13051.

\(^{28}\) Regolamento sulle procedure istruttorie in materia di pubblicità ingannevole e comparativa, pratiche commerciali scorrette, violazione dei diritti dei consumatori nei contratti, violazione del divieto di discriminazioni, clausole vessatorie.
as such. Recently, it declared that the terms of use applied by WhatsApp Messenger to users based in Italy are unfair on a number of counts. WhatsApp “Terms of Use” include a right of withdrawal granted exclusively to the company, the limitation on liability in favour of the company, and the identification of the competent court for disputes resolution (currently only US Courts). All these terms have been considered unfair by the AGCM. The Authority also considered unfair that, in case of a mismatch between the original English version of the Terms of Use and the Italian translation made available to consumer, the first shall prevail. The norm that is infringed by this term is the rule according to which, in case of doubt, the interpretation of the text more favourable to the consumer shall prevail (art. 35 Cons. Code). The Authority published this decision together with another decision sanctioning the same corporation with a fine of € 3.000.000 for aggressive trade practices, consisting in misleading users to subscribe to new terms and conditions, on the sharing of data with Facebook, by making users believe that, otherwise, they would have been cut out of the service.

As mentioned above, the decisions rendered by the AGCM on the unfair nature of certain terms are subject to judicial review. The rule here is judicial deference to the evaluation conducted by the Authority. The judge can therefore only assess whether the facts upon which the decision is premised have been ascertained and check the logical soundness of the motivation given for the adoption of a certain ruling. The circumstance that the authority publishes its decisions relating to unfair terms on its web site helps tracing which clauses can be considered unfair, subject to subsequent judicial control. Italy’s union of the Chambers of commerce manages a similar database, but this seems to be less much less effective in terms of publicity and effects.

3. The Italian implementation of directive 93/13/EEC of 5 April 1993 prevents the possibility to declare that a certain term is unfair because it stipulates a disproportionate price for good or services, if this element is clearly identified in plain, intelligible language, while under the gen-

eral law the rule is that a disproportionate price is not per se the cause of invalidity of the contract. According to art. 34 of the Consumer Code:

“Assessment of the unfair nature of the terms shall relate neither to the definition of the subject matter of the contract nor to the adequacy of the price of the goods or services as long as these elements are identified in plain, intelligible language”.

This means, first of all, that if the price is not set in plain, intelligible terms, the term in question may be considered unfair. The AGCM has ruled that to speak clearly in this context is not a mere matter of using expressions which are linguistically accurate or precise. The consumer must be put in a condition to understand what the effects of the contract are. A similar position has been taken by the Arbitro bancario e finanziario, namely the alternative dispute resolution institution set up by Bank of Italy to promptly resolve dispute relating to banking contracts. According to this rule, for example, a loan contract that is concluded by a consumer in Swiss francs, according to a rather obscure formula does not satisfy the transparency requirement under the Consumer Code. This clearly follows on the ruling of the Court of Justice C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt (ECLI:EU:C:2014:282). In this case, the ECJ held that:

“not only that the relevant term should be grammatically intelligible to the consumer but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it”.

If, on the basis of this test, the language of the contract with respect to remuneration due is not completely clear, the Courts can assess the proportionality of the price on the basis of art. 24 of the Consumer Code. A good example in this respect is a judgment by the Milano

31 Cass. 4 November 2015, n. 22567, in Foro it., 2015, 2505.
32 Collegio di Coordinamento, decision no 7727 (20 November 2014).
Court of Appeal relating to an estate agent’s contract. In this case the principal signed a contract that stipulated a remuneration for the agent which was basically the same whether the transaction with the third party went through, or not. The Court held that, when the transaction does not go through, the agent may still be entitled to a remuneration, but this must be proportionate to the work done by the agent under the contract. Since the term in question did not reflect this approach and was rather ambiguous, the Court held that the term was unfair, and therefore void.\(^{33}\)

On the other hand, so far Italian courts have not explicitly relied on the distinction between terms relating to the principal object of the contract and any ancillary term to check whether, with respect to the latter kind of term, the price was unfair. This statement should, however, be qualified, with respect to the case of a consumer who fails to fulfil his obligation, and who is obliged under the contract “to pay a disproportionately high sum in compensation” (directive 93/13/EEC). As mentioned above, terms of this kind are either subject to judicial review under art. 1384 CC, if inserted in business to business contracts, or they are void, under art. 33 of the Consumer Code.

Why so far Italian courts have not openly embraced the distinction between contractual terms falling within the concept of ‘the main subject-matter of the contract’ according to art. 4(2) of Directive 93/13 and those terms that do not concern it, which is instead en vogue in other European legal systems?\(^{34}\) As mentioned above, the distinction is crucial, because only the first class of terms is excluded from a fairness check under the Directive and the Italian legislation implementing it.

One possible explanation lies in the peculiar wording of the Italian legislation implementing art. 4(2) of the directive 93/13/EEC, namely the text of art. 34(2) of the Italian Consumer Code.

Under Art. 4(2) of the directive: “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 price and remuneration, on the one hand, as against the services or goods supplied in exchange, \(^{33}\) Corte d’Appello Milano, Sezione 1 civile, Sentenza 2 maggio 2016, n. 1694, banca dati Sole 24 ore.

on the other, in so far as these terms are in plain, intelligible language.”

Art. 34 of the Consumer Code, as cited above, at the beginning of this section, omits the crucial qualification ‘main’ with respect to the subject matter of the contract, and thus apparently provides a broader exemption from the fairness check than the original text of the directive warrants. To sum up, the textual support for the distinction between terms covering the main subject matter of the contract and ancillary terms is lacking in Italy. This could be considered an error in the transposition the directive, of course. Still, the Consumer Code is not helpful on this point. On the other hand, when the contract presents a significant imbalance of the rights and obligations of the parties, that goes to the root of the contractual exchange, the Courts may resort to other techniques to provide redress to an aggrieved consumer. For example, the Joint panels of the Court of Cassation have recently held that under certain circumstances a ‘claims made’ insurance term under which both the incident and the damage resulting from must occur during the running of the contract can be void. In certain contexts, the term is the source of: “a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer; the relevant evaluation must be carried out by the Court awarding on the merit [i.e. Tribunals and Courts of Appeal]”. The term in question was assessed with regard to a number of provisions of the Italian of the civil code, including art. 1322 CC, and a few constitutional provisions. The litigation concerned an insurance contract concluded by a public hospital with an insurance company to cover medical malpractice liability to-
wards its clients, and term that was struck out prevented patients from obtaining insurance coverage.

4. It is quite difficult to provide a clear view of what are the different regulatory responses to an increasing difficulty for consumers to avoid the distorting effects of selling techniques that exploit consumers’ cognitive biases, at the centre of much attention in the literature. The current rules against unfair trade practices, resulting from the implementation of EU law (Cons. Code: arts. 21-26) are an important complement to the rules applicable to unfair trade terms. Under these rules, for example, the bundling of credit agreements with a credit protection insurance, or a deposit or current bank account, is forbidden. To the same effect, one should keep in mind the general framework provided by antitrust law to combat anti-competitive behaviour (L. 10 October 1990, n. 287).

A first reaction is simply to take the paternalistic decision by the legislature that certain contracts are simply banned from the (legal) markets, because the price is not fair. The classic case is usurious loans. The current rules on usurious loans go back to the 1990’s. They were enacted as a response to social alarm about an increase in baking operations that were considered at the limits of usury, and also to combat organised crime. They have a substantial impact in practice through the fixing of ceilings on interest rates calculated by public institutions. Charging fees above these ceilings in Italy is deemed to be usury, that is to say a crime punished by our penal code with imprisonment from two to ten years and a fine ranging from EUR 5,000 to EUR 30,000 (art. 644 PC). Since may 2011, the ceilings in question are calculated by us-
ing as a benchmark that is represented by the average overall effective rate practiced on the markets (AOER), increased by one quarter, with a margin of an additional four percentage points. The difference between the ceiling rate and the average rate cannot exceed eight percentage points in total (Law 7 March 1996, n. 108, art. 2, as amended)\(^40\). The AOER is derived from the quarterly survey conducted by the Bank of Italy on behalf of the Ministry of Economy and Finance. The AOER includes fees, remuneration of any sort, and expenses (excluding taxes and duties), and refers to the annual interest rate charged by bank and financial intermediaries on like operations. In exercising supervisory controls, the Bank of Italy checks that banks and financial intermediaries comply with the calculation criteria set out in its instructions and respect the usury ceiling rates. One feature of the system is that default interests enter into the calculation of the rate of interest is considered as usurious according to the jurisprudence of the Corte di Cassazione\(^41\).

A second option is to offer to consumer more transparent deals, by setting up a system of mandatory disclosures that should facilitate the comparison of prices and conditions with respect to the costs related to bank accounts and credit contracts. Although the situation has substantially improved over the years, the expectations of the public are not yet fulfilled by what can be achieved through the Court system and administrative agencies. It thus happens that legislation is mobilized to establish fairer contractual conditions by intervening on the content of certain contract terms. This provides a second model of intervention. A case is point is the legislative provision that has banned the so-called “overdraft facility commission” (commissione di massimo scoperto), by which banks charged clients’ bank accounts a commission for a pos-

\(^{40}\) This calculation method was introduced by the Law Decree 70/2011, which modified Article 2(4) of Law 108/96.

\(^{41}\) Cass. 9 January 2013, n. 350, in Foro it., 2013, I, p. 128. This is criticised by several authors, because the norms against usury are not designed to modify the rules concerning default interests payments: M. Dolmetta, _Su usura e interessi di mora: questioni attuali_, in Banca borsa titoli di credito, 2013, I, p. 501 ff.; A. Barenghi, _Diritto dei consumatori_, pp. 446-447. The Court of Cassation, joint civil panels, n. 24675/17, held that the question whether the interest rate was usurious must be answered with reference to the moment of the formation of the contract.
sible overdraft, even if clients did not actually made use of it. This fee has now been substituted by a new regime (commissione di istruttoria veloce) which makes clear that banks can only charge an all comprehensive sum, calculated on a quarterly basis, which cannot be higher than 0,5 % of the sum that the bank would be willing to loan to the client in case of an overdraft, and must in any case be proportionate to the period for which the loan is granted and to the amount of it (Italian Banking Law, art. 117 bis). Litigation of this and of other similar issues has been intense, showing that judicial control of such fine points of contract law involves substantial investments. On the other hand, before the reform which introduced new rules in this matter, the Italian Competition Authority repeatedly took action to react to the anomalous nature of these bank charges, and instructed banks to avoid this type of remuneration structure.

Regulatory Authorities that have the power to regulate essential facilities such as energy and gas have the power to regulate certain aspects of contract law as well, and this includes the determination of prices as well. AGCOM imposes certain transparency, access, non-discrimination, price control and cost accounting obligations on each of the mobile operators in Italy. AGCOM regulates fixed termination rates (“FTR”) for certain operators, and collection and transit fees for others. Pursuant to EU law, AGCOM, may require an operator with “significant market power” to regularly produce a “reference interconnection offer”, or “RIO”, setting forth the terms and conditions on which such operator will provide access to specified services approved by the regulator. The Energy and Gas authority regulates both terms and conditions of contract, and has established a pricing mechanism by which abatements of prices must be automatically transferred to consumers under the respective contracts. Under the present regulatory regime, the price of consumers have the possibility to opt for contracts that are priced according to the rules set by these authorities if they wish, but this is a temporary regime, that will expire in 2019.

Despite these safeguards, the regulation of consumers’ long term contractual relationships with firms in any of the above mentioned fields remains a problematic tasks for a variety of reasons that need not to be recalled here. To better illustrate how regulatory authorities, the judiciary, and the legislature proceed in this field, it is worth considering the recent so called 28 days telephone billing saga, that ended up with the statutory imposition to telecom operators and other digital services
providers of the duty to bill services per month, as usual, instead of per week, as they were intending to do for the first time in 2016. Four major telecom operators in 2016 decided to switch to a billing system that calculated fees on a weekly, rather than on a monthly basis, with an increase in the number of annual payments (13 vs. 12); and in economic terms the corresponding increase of 8.6% in overall annual costs for telecom clients. The Italian Competition authority reacted to the move by raising the point that consumers had not been duly informed. The Telecom companies challenged the sanctions imposed by the Competition authority before the competent administrative Court. Meanwhile consumers’ associations moved to pass a law that prohibited the new billing system, which was approved in 2017 (law n. 172/2017). Nonetheless, major operators have confirmed that the return to monthly billing will be accompanied by an increase of the fees of 8.6%, which corresponds exactly to the increase that was applied by introducing the weekly billing system.

5. Italy implemented both Directive 98/6/EC on consumer protection in the indication of prices of products, and the consumer credit directive (Directive 2008/48/EC), as well as other directives in the field of consumer contracts and consumer rights. The first measure (Directive 98/6/EC) is now transposed in the Consumer Code, arts. 13 ff., while the second is transposed in the Italian Banking law, arts. 121-126. These instruments intend to facilitate price comparisons across products. As far as access to reasonably priced consumer credit is concerned, this is clearly a crucial problem. The Italian banking law establishes a comprehensive framework that goes in that direction. It mandates disclosure of the APR, regulates advertising relating to it, prohibits, for example any banking charge or commission that is not written in the contract, as well as any reference to trade usages to regulate the relationship with clients. Nonetheless, shopping around for consumers remains an arduous exercise with respect to market sectors that offer complex contracts, and that rely heavily on general conditions of contract, like consumer credit.

With respect to telephone services, art. 1(2) of the law n. 40/2007, on the protection of consumer and the strengthening of competition, provides that: “The commercial offer of the prices of the different telephony operators must highlight all the items that make up the offer, in order to allow individual consumers to make an appropriate com-
parison”, and enacts an entire set of rules that should facilitate price comparisons\(^\text{42}\). This was followed up by a ruling of the Competition authority that further strengthens transparency of the economic and contractual conditions applied to clients of telephone services. This: “required operators to publish, on their websites, summary statements of the prices of each offer, prepared according to a standardized model that is clear and understandable to users, allowing a quick comparison of some items (eg., one-minute call price, two-minute call price, connection fee, withdrawal costs, etc.)”\(^43\). Two further rulings of the same Authority entitle consumers to know their own past usage patterns\(^44\), and establish a system of certification for price comparisons in the field of telecommunications\(^45\). The Italian Authority for gas and energy has set up its own web site to compare prices and contract conditions on the basis of past individual consumption needs.

Empirical research in the field of telecommunications shows that even the relatively simpler world of consumer contracts for phone services is still the source of a good amount of controversies, which show what could be ameliorated. The main sources of consumer complaints with respect to telephone services in 2016 were: incorrect billing (15%); unilateral modifications of the terms of contracts (11.75%); problems with number portability (11.26%); activation of unsolicited services (9.93%); no reply from operators to consumers’ complaints (8.32%); roaming (6.90%); right of withdrawal (6.58%)\(^46\). In addition the regional committees for telecommunications (Corecom), in charge of the alternative dispute resolution system, have handled 90415 disputes between users and operators of electronic communications that in 82% of the cases ended with an agreement between the parties involved. A recent Eurobarometer survey shows that Italian consumers: can easily compare bundle offers (88%, first in EU); find it easier to monitor consumption for

\(^{42}\) The text of the relevant provision is much longer, and clearly sets out to devise a contractual regime that should facilitate price comparisons; it bans several terms and conditions or contractual practices that would hinder an effective price comparison by declaring those terms void.

\(^{43}\) AGCM delibera n. 96/07/CONS.

\(^{44}\) AGCM delibera n. 126/07/CONS.

\(^{45}\) AGCM delibera n. 331/09/CONS. To date, just one web site has obtained this certification.

\(^{46}\) The relevant data are set out in Europe’s Digital Progress Report - 2017 - Telecoms chapter - ITALY, p.7.
mobile (73%, EU average 69%) than for fixed (67%, EU average 71%); and yet they could probably be more satisfied with the information in contracts (21% unsatisfied, EU average 16%)\(^7\).

6. The complex patterns of regulation discussed in the previous pages show a variety of sources of inspiration and trends. In this field the traditional distinction between private and public law has given way to new approaches, in which private and public enforcement of various rules coexist. From a legal process point of view, courts, administrative agencies, the legislature are all implicated in the regulatory process. Administrative agencies in the last decades have acquired new important powers, which may be helpful to obtain timely and effective enforcement of fair contracts. The Italian civil justice system does not deliver in terms of prompt, effective judicial remedies, and yet litigation is still a strategy to make policy makers focus on crucial regulatory issues, including price terms in consumer contracts. Many disputes today are settled through specialised alternative dispute resolution procedures, under the surveillance of quasi-governmental bodies. There is a growing awareness of the need to allow consumers to make more informed decisions, and to work to overcome the cognitive bias that affect their decision making processes, among the regulators and in the literature relating to consumer contracts. Nonetheless, quite often, the political process is mobilised to target at least some of the major problems that arise with respect to the control of price conditions in mass transactions.

Abstract

The control of price related terms in consumer contracts in Italy is governed by a complex pattern of rules and regulations. In this field, the traditional distinction between private and public law has given way to new approaches, spanning the public law/private law divide. The civil code and the consumer code (which implements EU law on unfair contract terms) provides limited assistance in this matter, but special regulations do offer substantial relief against unfair price related terms in certain contractual contexts. The enforcement of rules protecting consumers in this respect is no more the exclusive preserve of Courts; administrative agencies and alternative resolution bodies can also be involved in the same exercise. Nonetheless, at least some of the major problems that arise with respect to the control of price conditions in

\(^7\) Special Eurobarometer 438, October 2017.
mass transactions are still directly dealt by the legislature. The policy in favour of more informed consumer decisions still has to be fully achieved, while the regulators are beginning to react to marketing techniques that tend to exploit consumers’ cognitive biases.

Il controllo sulle clausole contrattuali che stabiliscono il prezzo o il corrispettivo pagato nei contratti con i consumatori in Italia è regolato da un complesso insieme di norme stabilite da una varietà di fonti. In questo campo, la tradizionale distinzione tra diritto pubblico e privato ha lasciato il posto a nuovi approcci, che superano il divario tra diritto pubblico e diritto privato. Il codice civile e il codice del consumo (che attua il diritto dell’UE in materia di clausole contrattuali abusive) forniscono un’assistenza limitata in materia, ma norme settoriali intervengono contro le clausole iniqui riguardanti il corrispettivo in determinati contesti contrattuali. L’applicazione delle norme che proteggono i consumatori a tale riguardo non è più esclusiva riserva dei tribunali; anche le agenzie amministrative e gli organismi di risoluzione alternativa delle controversie sono ormai coinvolti nell’esercizio. Nondimeno, almeno alcuni dei principali problemi che sorgono rispetto al controllo delle condizioni di prezzo nelle transazioni di massa sono ancora trattati direttamente dal legislatore. La politica a favore di decisioni dei consumatori più informate non è del tutto matura, mentre i regolatori stanno cominciando a reagire alle tecniche di marketing che tendono a sfruttare i pregiudizi cognitivi dei consumatori.