

UNFAIR PRACTICES IN BUSINESS-TO-CONSUMER AND BUSINESS-TO-BUSINESS CONTRACTS: A PRIVATE ENFORCEMENT PERSPECTIVE*

PRATICHE SCORRETTE NEI CONTRATTI TRA IMPRESE E CONSUMATORI E NEI CONTRATTI TRA IMPRESE: LA PROSPETTIVA DELLA TUTELA CIVILE

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ABSTRACT

Unfair business practices hamper the growth of the European Single Market in both instances of practices directed to consumers and to other businesses. The digital revolution, while generating unprecedented trade opportunities, is amplifying the magnitude of this hazard. Though not tuned yet along the notes of the digital challenge, the EU law has largely contributed to the emergence of a European Private Law aimed at discouraging unfair practices, particularly when they may harm the

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Le pratiche commerciali scorrette compromettono la crescita del Mercato Unico Europeo, sia che siano rivolte a consumatori, sia che siano rivolte ad altre imprese. La rivoluzione digitale, che pure sta generando opportunità prima inesplorate, finisce per potenziare gli effetti dei rischi sottesi a pratiche di mercato scorrette. Sebbene il diritto europeo non si sia ancora del tutto sintonizzato con i ritmi imposti dalla sfida digitale, esso ha largamente contribuito alla nascita di un

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interests of consumers. After briefly comparing some of the main aspects of national regimes on BtoC and BtoB unfair practices, this article addresses the issue of private enforcement of consumers' and businesses' rights when affected by unfair practices.

Progressively eroding the principle of national procedural autonomy, EU law is deeply changing national enforcement systems in the area of fundamental rights. More than providing rules, the EU relies on general principles such as effectiveness, proportionality, dissuasiveness. These three principles, here presented as a triad, help examining the potentials and shortcomings of current enforcement mechanisms as developed at national level, distinctively for BtoC and BtoB relations. Whereas remedial innovation is emerging in the design of civil remedies against BtoC unfair practices, enforcement of business rights still largely relies on the tools provided by general contract, tort or unfair competition law, so heading to results that are not always consistent with the aim of an effective, proportionate and dissuasive protection.

Within a multilevel system of rights' protection, the application of the triad poses a major challenge for which comparative analysis and inter-institutional and inter-professional dialogue are pivotal. Of course, this dialogue shall not be confined within the boundaries of the European Single Market; among other factors, the digital revolution suggests that the need for an effective protection of consumers' and businesses' rights is a global concern.

KEYWORDS: European private law. Unfair practices. Digital revolution. Civil remedies. EU general principles

diritto privato europeo volto a scoraggiare l'uso di pratiche scorrette, specialmente se potenzialmente nocive per i consumatori. Dopo aver brevemente comparato alcuni dei principali aspetti dei regimi nazionali in materia, questo articolo si concentra sul tema della tutela civile dei diritti di consumatori e imprese investiti da pratiche scorrette.

Erodendo progressivamente il principio di autonomia procedurale, il diritto U.E. sta modificando profondamente i sistemi nazionali di tutela nell'area dei diritti fondamentali. Più che definire regole, adotta principi generali, come quelli di effettività, di proporzionalità, di dissuasività. Questi tre principi, qui presentati come una triade, consentono di esaminare le potenzialità e i limiti degli attuali sistemi di tutela sviluppati in ambito nazionale rispetto alle pratiche scorrette poste in essere ai danni dei consumatori o a quelli delle imprese. Laddove in talune aree della tutela civile del consumatore si assiste a una certa innovazione rimediabile, la tutela dei diritti delle imprese fa ancora prevalente affidamento sugli strumenti tradizionalmente offerti dal diritto generale dei contratti, della responsabilità civile, della concorrenza sleale, con risultati non sempre coerenti con le ambizioni di una tutela effettiva, proporzionata, dissuasiva.

Nell'ambito di sistemi multilivello di tutela l'applicazione dei principi pone una sfida importante, per la quale sono decisivi l'analisi comparativa e il dialogo tra istituzioni e professioni. Chiaramente questo dialogo non potrà essere circoscritto entro i confini del Mercato Unico Europeo; tra altri elementi, la rivoluzione digitale persuade del fatto che la protezione effettiva di consumatori e imprese è un problema globale.

PAROLE CHIAVE: Diritto privato europeo. Pratiche scorrette. Rivoluzione digitale. Rimedi privatistici. Principi generali dell'Unione Europea

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1 UNFAIR MARKET PRACTICES AND THE EMERGING CHALLENGES OF EUROPEAN PRIVATE LAW

The last decades have seen a major development of European private law as means for building the European Single Market¹. The need to ensure free movement of goods and services and freedom of establishment has called for a balance between business competitiveness and a high level of protection for market participants, especially consumers². Along the lines of law and economics theories, consumers' weakness, particularly in the area of cognitive vulnerability, has been addressed as an important cause for market failures. Other types of vulnerability have been tackled on the side of business-to-business relations, such as the exposure to unfairly late payments by other businesses and public administration, to the unfair competition driven by misleading or unfair comparative advertisement³ or, more generally, to unfair trading practices⁴. The duties of fairness, professional diligence, honest market practices, good faith have been used with the specific aim to improve the functioning of the European market⁵. Information duties have expanded enormously not only in quantity but also in quality. Many forms of opportunistic behaviour have been banned as a threat against efficient investments and resource allocation.

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- 1 See VOGENAUER, WEATHERILL, 2006, p. 1 seq; McKENDRICK, 2006, p. 14 seq.; MICKLITZ – CAFAGGI, 2010, p. xxxiii; SOMMA, 2010, p. 1 seq.; REICH, 2014, p. 11 seq.; GUTMAN, 2014, p. 313 seq.; SCHULZE – ZOLL, 2016, p. 1 seq.
 - 2 See Communication of 13 March 2007 from the Commission, **EU Consumer Policy Strategy 2007-2013** [COM(2007) 99 final].
 - 3 See Communication from the Commission, **Protecting businesses against misleading marketing practices and ensuring effective enforcement**, Brussels, 27.11.2012 COM(2012) 702 final (hereinafter COMMUNICATION MMP, 2012).
 - 4 See Green Paper on Unfair Trading Practices in the Business-To-Business Food and Non-Food Supply Chain in Europe, Brussels, 31.1.2013 COM(2013) 37 final (hereinafter GREEN PAPER, 2013), part. p. 3: “UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing.”
 - 5 See GRUNDMANN, 2006, p. 141 seq.; TJONG TJIN TAI, 2015, p. 30 seq.

The objectives underlying these policies are very relevant for both businesses and consumers, though for different reasons: for the former, because they influence their ability to access the market, to make investments and to exploit their position within supply chains; for the latter, because they contribute to enlarge the number and increase the quality of comparable options to buy goods and services. By contrast, unfair trade practices materially distort or may materially distort economic agents' behavior and therefore the functioning of a European competitive market. Thence, they affect one of the main dimensions of the EU policy areas (art. 26, TFEU)⁶, calling for approximation of provisions laid down in Member States (art. 114, TFEU) within the limits of the principle of subsidiarity and proportionality (art. 5, TEU). In some instances, unfair practices may also harm consumers' health and safety, possibly leading to further action on different constitutional bases (art. 169, TFEU)⁷.

The emergence of a EU private law on the bedrock of the EU Single Market is an irreversible process. It heads well beyond the traditional boundaries of contract law. Together with the Misleading and Comparative Advertisement Directive, the Unfair Commercial Practices Directive represents the core of a European private law focused on *practices* more than on legal acts and contracts⁸. Many other scattered provisions address various types of practices, and most often information duties and trade communication, with main but not exclusive regard to consumer-to-consumer relations⁹.

6 See art. 2, Dir. 2005/29/EC on BtoC unfair commercial practices; Green Paper on Unfair Trading Practices in the Business-To-Business Food and Non-Food Supply Chain in Europe, Brussels, 31.1.2013 COM(2013) 37 final.

7 The debate on constitutional bases for the EU intervention in the area of contract law is still open and goes beyond the boundaries of this article. The main references to its development may be found in VOGENAUER – WEATHERILL, 2006, p. 105 seq; GUTMAN, 2014, part. p. 277 seq.

8 See DUROVIC, 2015, p. 715 on the impact on contract law of legislation concerning practices.

9 See Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 25.5.2016, SWD(2016) 163 final, p. 17 seq.

Indeed, the contract as a legal act is only one of many targets affected by market failures, whereas the activity of market players, both at the demand and the offer sides, is much more complex. The core is in the *opportunity to make economic choices*¹⁰ based on reasonably adequate information as influenced by *conducts* and *practices* and by an array of very different market players, most of whom are mere intermediaries or so called “market facilitators”. These choices may regard not only the alternative between concluding or not concluding a contract¹¹, its performance or its termination, but also the means of market communication and trading (e.g. distance or face-to-face contracting, on-line or off-line), the exchange business model (e.g. sharing economy v. conventional commercial trading), the use of agents or other intermediaries, the possible reliance on certification, quality assurance services or customers’ evaluation platforms.

Most of these opportunities have been boosted by the rise and development of digital economy, which has significantly increased market complexity and therefore the need for new types of balancing between business competitiveness and *market users’* protection¹².

The reference to “market users” rather than to consumers is itself linked with the changes driven by the digital revolution. Many of the challenges determined by the use of internet technology expose whatever user to the opaqueness of digital networks, where massive information flows with low chance to check its sources and reliability. Furthermore, online distribution platforms do not always distinguish between business-to-consumers and business-to-business trading. Meanwhile, internet technologies have enabled consumers to actively exploit market opportunities as non-professional sellers or suppliers, often through the use of trading platforms or other

10 MICKLITZ, 2009, p. 71 seq.

11 See C-281/12 Trento Sviluppo 2013, where the Court clarifies that the expression “transactional decision”, used in the Unfair Commercial Directive, covers not only the decision whether or not to purchase a product, but also decisions directly related to that decision, in particular the decision to enter the shop.

12 On the relation between the notion of consumer and the one of market user, see REICH, 2009, p. 49.

internet intermediaries and “facilitators”. New players emerge well beyond the too simplistic divide between business-to-business and business-to-consumers trade¹³.

Unlike some of the Members States, the European Union has not totally tuned yet its regulatory instruments along the notes of the digital revolution¹⁴. Though changes are occurring, the core of EU private and business law aimed at enabling a more confident “use” of the Single Market is still related with off-line trade and mostly focused on business-to-consumers (hereinafter also named as BtoC) transactions as distinct from business-to-business (hereinafter also named as BtoB) ones¹⁵.

Exactly in the area of consumer law EU legislation has comprehensively addressed the matter of unfair commercial practices in Directive 2005/29/EC: together with a list of practices which, in any case, shall be considered unfair, this directive includes general clauses that potentially concern any type of relevant unfairness¹⁶. By contrast, in the area of business-to-business relations, unless the unfair practice also qualifies under the umbrella of antitrust law, no general regulatory instrument exists prohibiting unfair trade practices at EU level. Whereas the issue of unfair trading practices in supply chains is well-known among EU policy-makers¹⁷, secondary

13 On these and other paths of legal research linked with the digital revolution, see DE FRANCESCHI, 2016.

14 See Communication from the Commission, *A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses* (SWD(2016) 163 final), Brussels, 25.5.2016, COM(2016) 320 final.

With regard to national legislation, see, e.g., reforms on Consumer law in the UK: Consumer Rights Act 2015, Chapter 15, Part 1, on Consumer Contracts for Goods, Digital Content and Services. At the EU level, see Communication from the Commission, *Digital contracts for Europe - Unleashing the potential of e-commerce*, COM/2015/0633, and related proposals for the adoption of two directives on distance sales of tangible and intangible goods and sales of digital contents (see them published at http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm).

15 For a critical view on this perspective, see STUYCK, 2007, p. 159 seq. favouring a more integrated approach to competition law in the Broad sense, i.e. the law of unfair commercial practices both in BtoC and BtoB relations.

16 See WHITTAKER, 2007, p. 139.

17 See GREEN PAPER, 2013, and, more recently, European Commission Communication, *Tackling UTPs in the B2B food supply chain*, Strasbourg, 15 July

EU legislation only addresses specific matters such as misleading and comparative advertising¹⁸, unfair practices linked with payment terms¹⁹, information duties and other practices in services markets or utilities (e.g. telecommunication, energy and the like)²⁰, these last ones being relevant for both types of customers: consumers and traders. In other sectors, mainly food, a long-standing debate among policy makers, market players and other stakeholders is taking place about the opportunity of the adoption of a regulatory instrument applicable to BtoB unfair practices. So far, private regulatory initiatives have taken the lead, whereas hard law proposals have not found their way yet into the EU legal framework²¹. Not surprisingly, important provisions have been adopted, with special regard to information duties, in the Electronic Commerce Directive as applicable to both BtoC and BtoB forms of trade, though with distinctions between the two²².

2014.

- 18 See Directive 2006/114/EC concerning misleading and comparative advertising.
- 19 See Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, part. art. 7 on unfair contractual terms *and* practices.
- 20 See part. Directive 2006/123/EC of 12 December 2006 on services in the internal market, art. 22 seq.
- 21 This does not imply lack of interest by EU institutions. By contrast, with special regard to the food sector, the matter has been taken in serious consideration. See GREEN PAPER, 2013, and, more recently, European Commission Communication, *Tackling UTPs in the B2B food supply chain*, Strasbourg, 15 July 2014, COM(2014) 472 final: “(...) This Communication does not foresee regulatory action at EU level and does not prescribe a single solution to address the issue of UTPs, but rather encourages stakeholders and Member States to tackle UTPs in an appropriate and proportionate manner, taking into account national circumstances and best practice. It encourages operators in the European food supply chain to participate in voluntary schemes aiming at promoting best practices and reducing UTPs. It also emphasizes the importance of effective redress”. For private regulatory initiatives see, part. Supply Chain Initiative is a joint initiative launched by 7 EU level associations with the aim to increase fairness in commercial relations along the food supply chain and welcomed by the High Level Forum for a Better Functioning Food Supply Chain of the European Commission in November 2011 (see <http://www.supplychaininitiative.eu/about-initiative>).
- 22 See Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information

Only partially the EU approach is mirrored by Member States' legislation. Few national legal systems have implemented the Directive 2005/29/EC extending its scope of application to business-to-business relations²³, whereas in one case the extension has provided protection for microenterprises only²⁴. Moreover, in several national systems, general provisions or principles exist to prevent businesses from committing an abuse of economic dependence *vis à vis* another business, although this conduct does not qualify as abuse of dominant position along the lines of antitrust law²⁵. In other MSs, a part from the implementation of the above mentioned directives, unfair competition law may provide for a partial attempt to police BtoB unfair practices²⁶, whereas general contract law and tort law are sometimes referred to as possible responses against trade unfairness²⁷. In some instances private regulation is relied upon but, if so, it occurs complementarily with concurrent legislation. No regulatory model emerges in which business-to-business unfairness is addressed exclusively or almost exclusively via private regulation. However, cases emerge in which private regulation has played as a driver for hard law and hard law has provided the enforcement structure for substantive rules mostly based on private regulation²⁸.

society services, in particular electronic commerce, in the Internal Market, particularly Section 2 on commercial communications and art. 10 on pre-contractual information.

23 See RENDA, CAFAGGI, PELKMANS, 2014, p. 65, reporting that eight Member States have decided to extend the Unfair Commercial Practices Directive to B2B relationship. Among these, 2 have operated a full extension (including the list of UCPS, Austria and Sweden); 4 have not extended the list of practices contained in the Directive (Denmark, Finland, Germany, Spain); one has done so only limited to misleading practices (France); and one has limited the extension to relationships between businesses and micro-enterprises (Italy). Few other countries have applied or used other types of lists as source of interpretation in B2B relations.

24 See, e.g. the Italian legislation on unfair commercial practices, transposing Directive 2005/29, which has been made applicable to micro-enterprises by the law decree n. 1/2012, art. 7 (VALENTINO, 2013, p.1157 seq.; DE CRISTOFARO, 2014, p. 3 seq.).

25 See RENDA, CAFAGGI, PELKMANS, 2014, p. 43 seq.

26 STUYCK, 2007, p. 166 seq.

27 See RENDA, CAFAGGI, PELKMANS, 2014, p. 70 seq.

28 See, part., in the UK, where the Grocery Code Adjudicator oversees the implementation

The extreme fragmentation of the Member States' legal landscape on tools to police business-to-business unfair trade practices could represent an important barrier against free movement of goods and persons and freedom of establishment²⁹. In a very different way this policy function can be performed by antitrust law, whose scope of application is often too restrictive to cover several and relevant forms of opportunism in business-to-business trade³⁰.

Though considering some of the weaknesses arising from the lack of EU general legislation on business-to-business unfair practices, this article does not aim to address the issue concerning the opportunity to adopt a regulatory instrument at the EU level, neither the choice of this instrument (whether, e.g., in the area of hard or soft law, in the field of legislation or as an encouragement for private regulation, etc.³¹). Moving from a brief overview on MSs' legislation on BtoC and BtoB unfair practices, the analysis

and enforcement of the Grocery Supply Code of Practice ("GSCOP") which came into force in February 2010 and imposes legally binding obligations on the UK's ten largest supermarket retailers. See also for a different experience the case of Italy, whose legislation has directly incorporated the European Principles of Good Practice in Food Supply Chain by way of reference, therefore extending to EU private regulation the enforcement provided by law through the role of the competition authority. See RENDA, CAFAGGI, PELKMANS, 2014, p. 94 seq.

- 29 On fragmentation of Member States' legislation on unfair market practices as cause for «appreciable distortions of competition and obstacles to the smooth functioning of the internal market», see, for consumer law, Dir. 2005/29/EC, rec. 3; for business-to-business law, Dir. 2006/114/EC, rec. 3, and GREEN PAPER, 2013, p. 13.
- 30 GREEN PAPER, 2013, p. 10 seq., part. p. 13; and, more extendedly, RENDA, CAFAGGI, PELKMANS, 2014, p. 17 seq.
- 31 For some recommendations see RENDA, CAFAGGI, PELKMANS, 2014, p. 117 seq. At this moment the EU institutions are not inclined to adopt any legislative measure (European Commission, Report on unfair business-to-business trading practices in the food supply chain, Brussels, 29.1.2016 COM(2016) 32 final). As a matter of fact, the previous commitment in monitoring the evolution of national legislation and private regulatory measures is confirmed with no further action; see Dir. 2005/29/EC, rec. 8: "There are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition."

will be rather focused on the main trends emerging in the private enforcement systems set up at national level. In this context a special attention will be paid to the role played by general principles like effectiveness, proportionality and dissuasiveness, as developed in both national constitutional traditions and EU law and jurisprudence in the area of EU-based rights³².

The analysis below will show that, whereas in most cases national legislation and private regulation provide a relatively comprehensive set of rules prohibiting unfair practices also in BtoB relations, enforcement is still very fragmented and often incapable to offer effective means of protection to harmed businesses.

Moving from this analysis, some spillover effects may be expected from BtoC legislation and case-law towards a more effective, proportionate, dissuasive access to justice by both consumers and businesses as victims of unfair practices. More than by rules and procedures, this process should be driven by general principles. Indeed, more than rules, general principles are able to account for the different dynamics influencing unfair practices along the chain, then guiding law-makers and enforcers in the choice of remedies, sanctions and procedures thereof.

2 UNFAIR MARKET PRACTICES IN MS' LEGISLATION: A BRIEF OVERVIEW COMPARING BTOC AND BTOB REGIMES

In the field of consumer law Member States' legislation on unfair commercial practices is the outcome of a full harmonization policy as driven by the EU through the 2005/29/EC Directive³³.

32 See REICH, 2014, p. 2 seq.; TRIDIMAS, 2006, ...; ADAR – SIRENA, 2013, p. 1 seq.; VETTORI, 2015, p. 1 seq. See also CAFAGGI, 2017, ...; CAFAGGI - IAMICELLI, 2017,

33 See European Court of Justice (Third Chamber), 10 July 2014, Case C-421/12, *European Commission v. Kingdom of Belgium*, declaring that the Kingdom of Belgium has failed to fulfil its obligations by maintaining in force of more restrictive national measures within the field approximated by this Directive (see art. 4). See also Order of the Court (Sixth Chamber), 8 September 2015, Case C-13/15, *Cdiscount SA*, para

All Member States have implemented this directive and both the European Commission and the European Court of Justice have had the chance to instruct national legislators and enforcers on its interpretation and the consistency of national measures with EU law³⁴.

Full harmonization does not imply uniform law as a result. Indeed, national implementation measures differ in many respects, including the nature of legislative instrument, its scope of application and, as we see below, the enforcement mechanisms. With regard to the nature of the legislative instrument, only rarely the directive has been transposed into the civil code³⁵, in few cases within unfair competition statutory acts (Germany, Austria, Denmark, Spain) or within acts dealing with market and trade law more generally (Belgium³⁶, Finland and Sweden), relatively more often in consumer codes (France, Italy, Bulgaria, Czech Republic, Malta). In the majority of cases national legislators have chosen *ad hoc* regulatory legal instruments dealing with unfair commercial practices specifically (UK, Portugal, Romania, Hungary, Cyprus, Poland, Slovenia, Slovakia, Estonia, Ireland, Luxembourg, Latvia, Lithuania and Greece)³⁷.

The choice concerning the statutory setting of the implementation measure is not without consequence, especially when it comes to enforcement mechanisms. For example, where the

34. See also POELZIG, 2014, p. 235 seq.

34 See Guidance on the implementation/application of Directive 2005/29/EC, cit., also with regard to the positions held by the European Court of Justice (p. 169 seq.).

35 So for the Netherlands, where the transposing provisions have been set in the chapter dealing with liability in tort (title 6.3, Book 6, on general law of obligation), where also actions in tort for damaged suffered by traders are dealt with, though in a separate section (6.3.4). See MAK, 2015, pp. 246-47.

36 See for Belgium the adoption of the Code of Economic Law, part. Book VI, Title I.

37 See Report from the Commission, First Report on the application of Directive 2005/29/EC ('Unfair Commercial Practices Directive'), Brussels, 14.3.2013 COM(2013) 139 final (hereinafter REPORT UCPD, 2013). Some of these statutory acts have been recently reformed; see, e.g., on the UK Reform of the Consumer Protection (Amendment) Regulations 1999 (CPAR 2014), DEVENNEY, 2016, p. 101.

approach has focused on unfair competition law and this branch of law has always looked at practices harming groups of victims without considering relevant individual claims, this limitation has been applied to the enforcement of unfair commercial practices legislation as well³⁸.

Only in few cases acts transposing the Directive have been extended to also cover business-to-business³⁹ or business-to-microenterprises relations⁴⁰, whereas in a few more cases competing businesses have been enabled to bring an action against acts harming (also) consumers⁴¹. When occurring this merger between BtoC and BtoB regulatory instruments has often leveled BtoB legislation up to the standards provided for BtoC relations⁴². Out of these choices, as made at national level, the European Court of Justice has often confirmed that unfair practices harming only businesses and not consumers fall outside the scope of the 2005/29/EC Directive⁴³.

38 See for Germany ACKERMANN - FRANCK, 2014, p. 202 seq.; PEIFER, 2015, p. 195; PATTI, 2016, 317.

39 So in Germany, Austria, France and Sweden according to the REPORT UCPD, 2013, p. 10. For a more extended and recent view see RENDA et al., as referred in footnote*above

40 See ...footnote above.

41 See CIVIC CONSULTING, 2011, p. 33 seq.

42 See, for Germany, PEIFER, 2015, p. 195.

43 See Order of the Court (Sixth Chamber), 8 September 2015, Case C-13/15, Cdiscount SA: paras 26, 29: “in accordance with recital 6, the national laws on unfair commercial practices which harm ‘only’ competitors’ economic interests or which relate to transactions between traders are excluded from the scope of the Unfair Commercial Practices Directive (order in INNO, C-126/11, EU:C:2011:851, paragraph 28 and the case-law cited). (...) It is therefore for the national court and not for this Court to establish whether the national provisions at issue in the main proceedings, namely, Articles 1(2) and 2 of the Decree of 31 December 2008 concerning price reduction announcements to consumers, actually pursue objectives relating to consumer protection, in order to determine whether such provisions are liable to fall within the scope of the Unfair Commercial Practices Directive (order in Wamo, C-288/10, EU:C:2011:443, paragraph 28)”. See also C-559/11, Pelckmans Turnhout, where the Court excludes from the Directive’s scope of application also practices affecting the interests of workers rather than consumers.

As seen above, unlike commercial practices in business-to-consumer relations, unfair trade practices (as they are more often referred to in business-to-business relations) are not comprehensively regulated at the EU level. Although some unfair practices harming businesses may be policed through antitrust EU law⁴⁴, many more escape that lens which exclusively focuses on the infringements having an impact on competition⁴⁵. Nor the Misleading and Comparative Advertising Directive or the Late Payments Directive can be more broadly intended as prohibiting unfair practices in general. And so for other directives providing, among others, information duties on trade communications as directed to any customer in the market, this being a business or a consumer.

This framework at the EU level may not suggest that BtoB unfair trade practices are not relevant for EU law⁴⁶, nor that they are not regulated at the national level. By contrast, a recent survey shows that all twenty-eight Member States provide some legislation in this field and that in more than half of the cases private regulation complements legislation, mostly in the area of advertising, business-to-business relations at the retail level or in a specific sector (mostly food and grocery)⁴⁷.

Within this framework, Member States' competition law does play a role in policing BtoB unfair practices, particularly when sanctioning abuse of dominant position, but many unfair practices fall out of the boundaries of this legislation, as defined at EU level. It should be highlighted that, moving from the awareness of these limitations, in more than one third of legal systems competition law goes beyond the reach of art. 102 TFUE, so providing for higher

44 On the relevance of antitrust law for the regulation of unfair practices in general, see STUYCK, 2007, p. 171 seq.

45 See RENDA, CAFAGGI, PELKMANS, 2014, p. 43 seq.

46 See also WADLOW, 2007, p. 175 seq., part. p. 177: "goods, persons, services and information neither know nor care whether legal barriers to their free movement are characterized as measures for consumer protection or come under a law of unfair competition". The Author concludes that regulation in both BtoC and BtoB domains are relevant for the development of the Single Market; however, they should follow separate approaches.

47 RENDA, CAFAGGI, PELKMANS, 2014, p. 68 seq.

coverage of unfair trade practices with special regard to those falling within the concepts of abuse of economic dependence or superior bargaining power⁴⁸. A part from competition law other areas of relevant legislation include unfair competition law, general contract law and laws addressing BtoB practices irrespective of their contractual or extra-contractual nature: the relevance of this latter “functional” approach is increasing in Member States’ recent legislation. Emerging trends include the existence of statutes specifically addressed to BtoB relations (eighteen Member States), or to small or micro-enterprises (eleven Member States), as well as legislation concerning retail trade as a particular segment of the supply chain (five Member States), or some specific sector (particularly food, eight Member States)⁴⁹.

Compared with Member States’ legislation on BtoC unfair trade practices, in BtoB legislation the role of unfair competition law is much more prominent⁵⁰. A common trend, to both the BtoC and BtoB regimes on unfair practices, concerns the cited emergence of a “functional” approach in drafting trade legislation, escaping from the traditional disciplinary boundaries distinguishing between contract law, tort law and other disciplines. Along these lines a forthcoming evolution could be expected at national level heading towards the emergence of broader instruments of “functional” law dealing with the functioning of the market and distinguishing, when relevant, between BtoC and BtoC law⁵¹. A second common element

48 See RENDA, CAFAGGI, PELKMANS, 2014, p., 43 seq.

49 See RENDA, CAFAGGI, PELKMANS, 2014, p. 70.

50 Compare the figures in RENDA, CAFAGGI, PELKMANS, 2014, p. 274 seq. (17 MS out of 28) and in the REPORT UCPD, 2013, p. 3 (4 cases mentioned).

51 This is, e.g., what has happened in Belgium in 2014 with the adoption of the Code of Economic Law addressing in a very broad consolidated act all matters concerning the functioning of the market, including unfair trade practices in both cases of BtoC and BtoB relations. See (TITRE 1er. - Champ d’application), Art. II.1. “Sous réserve de l’application des traités internationaux, du droit de l’Union européenne ou de législations particulières, le présent Code contient les dispositions générales applicables aux matières économiques qui relèvent de la compétence de l’autorité fédérale”. (TITRE 2. – Objectifs), Art. II.2. “Le présent Code vise à garantir la liberté d’entreprendre, la loyauté des transactions économiques et à assurer un niveau élevé de protection des consommateurs.”

is linked with the complementarity between legislation and private regulation, as especially emerging in the field of advertisement law, mostly crossing both BtoC and BtoB law⁵².

The use of “functional” law may facilitate spillover effects from consumer law to business law and *viceversa*⁵³. One vehicle relates to the use of general clauses and open-ended terms like good faith, fairness or reasonableness, largely used in consumer law (both at EU and national levels) and in fact present (or transposed) in Member States’ BtoB legislation and private regulation on unfair practices⁵⁴. A second, less common, element regards the use of black or grey lists of practices, in fact emerging in Member States law also in the area of BtoB trade law⁵⁵. Comparatively, in private regulation lists also include best practices and guidance for prevention of unfair conducts⁵⁶.

Looking at the prohibited practices more differences emerge. Whereas commonalities exist in covered conducts (e.g. misleading pre-contractual information), BtoB tend to differ from BtoC prohibited practices because they relate to a higher extent to the ongoing trade relation and to the post-contractual phase, whereas most of the BtoC prohibited practices tend to occur within a broadly intended pre-contractual phase. Practices like abuse of confidential information, unilateral contract term modification, unfair contract termination (which are among the most addressed practices by current national legislation and private regulation in the field of BtoB law) tend to go far beyond the pre-contractual phase. Indeed, the major risk borne by vulnerable businesses concerns the loss of specific investment and the chance they have to access

52 On complementarity between legislation and private regulation in B2C law see Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29/EC, cit., p. 30; in BtoB law, see RENDA, CAFAGGI, PELKMANS, 2014, p. 90.

53 See for Germany footnote above, n. ---*.

54 See RENDA, CAFAGGI, PELKMANS, 2014, p. 91.

55 See RENDA, CAFAGGI, PELKMANS, 2014, p. 90 seq.

56 See, e.g., in the food sector: Vertical Relationships in the Food Supply Chain: Principles of Good Practice (European Principles), 2011.

or remain within a certain market or value chain: market players' behavior, occurring along a given relation after specific investments have been done, may result extremely prejudicial for the business to which unfair practice is directed. Unfair commercial practices harming consumers after a contract has been concluded are often relevant because they preclude the consumer a balanced decision about switching to another contract, whereas specific investments do not normally represent a major risk⁵⁷.

The highlighted difference suggests also a nuance in respect of the relation between (i) *unfair practices* and (ii) *unfair terms*. In the area of consumer law, the Court of Justice has acknowledged that the two legal concepts do not coincide; however, they are connected to the extent that the existence of an unfair practice may influence the assessment of a term unfairness⁵⁸. By contrast, legislation and private regulation on BtoB unfair practices tend to incorporate unfair terms within the list of possibly unfair practices, focusing on the use of (unfair) terms within the contractual relation more than on their (lack of) negotiation⁵⁹. Although no strict boundaries should be introduced in this respect, the two approaches confirm that the core of unfairness in BtoC practices tend to infringe the phase before contract terms are stipulated, whereas the opposite tends to occur in BtoB relations. It should not be overlooked that, unlike BtoC unfair terms, BtoB unfair terms are not always addressed by national legislation. As a consequence, policing, as an *unfair practice*, the enforcement of an *unfair term* may fill a gap in current legislation.

57 See GREEN PAPER, 2013, p. 6 (referring to retroactive contract changes); see also the examples of post contractual practices in the Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29/EC, cit., p. 38, referring to the decision to withdraw from or terminate a service contract and to the decision to switch to another service provider.

58 Judgment of the Court (First Chamber), 15 March 2012, in Case C 453/10, Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o. See also, more recently, Opinion of Advocate General Kokott delivered on 15 September 2016, Case C-503/15, Ramón Margarit Panicello.

59 See GREEN PAPER, 2013, part. p. 18.

3 THE ENFORCEMENT CHALLENGE AND THE PRINCIPLE OF NATIONAL PROCEDURAL AUTONOMY: A FRAGMENTED LANDSCAPE

In policing both BtoC and BtoB unfair practices, enforcement is the key challenge⁶⁰. This is even more critical in the context of the current digital revolution as generating not only enormous opportunities for trading but also higher risks for trading unfairness and higher opaqueness in trading transactions⁶¹. Moreover, the expansion of digital trading has reinforced the need for cross-border enforcement cooperation, provided that more and more infringements may assume a cross-border dimension⁶².

The definition of enforcement mechanisms mostly occurs at national level⁶³. Also in areas of EU competence, Member States normally enjoy “procedural autonomy”, being therefore due “to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law”⁶⁴. The same applies to the empowerment of administrative authorities in charge of monitoring and sometimes sanctioning business conducts or to the promotion or endorsement of alternative dispute resolution mechanisms, including those mostly based upon private regulatory

60 Communication from the Commission, A European Consumer Agenda, SWD(2012) 132 final; Communication from the Commission, **A comprehensive approach to stimulating cross-border e-Commerce**, cit.; COMMUNICATION MMP, 2012, p. 11.

61 See Communication from the Commission, **A comprehensive approach to stimulating cross-border e-Commerce**, cit., p. 9.

62 See Communication from the Commission, **A comprehensive approach to stimulating cross-border e-Commerce**, cit., p. 9 seq.

63 VAN GERVEN, 2000; DOUGAN, 2004; POELZIG, 2014, p. 237; CARATTA, 2016; ZOPPINI, 2016; CAFAGGI, 2017.

64 Among others, see Judgment of the Court (Fourth Chamber), 18 March 2010, joined Cases C 317/08, C 318/08, C 319/08 and C 320/08, *Rosalba Alassini v Telecom Italia SpA* (C-317/08); among the most recent ones: CJEU (Grand Chamber), 21 December 2016, *Joined Cases C 154/15, C 307/15 and C 308/15, Gutiérrez Naranjo et al.*, para. 66.

initiatives. Although the European Union has more and more contributed to expand the array of possible enforcement avenues, it has been for the Member States to define the national legal frameworks in which these avenues could be built and developed⁶⁵.

How has this national autonomy been used?

As a matter of fact, though with significant national specificities, some converging trends may be observed across Member States. First, both in the BtoC and BtoB contexts, administrative authorities are becoming increasingly relevant as regulators and enforcers⁶⁶. Secondly, especially in the area of consumer protection, progressively higher attention is being paid to collective redress measures, including injunctive relief with “*erga omnes*” effects and collective coordination of individual (homogeneous) compensatory claims⁶⁷. Thirdly, alternative dispute resolution mechanisms (e.g. mediation) are growing, though to a very different

65 For positive legislative action by the EU in the area of enforcement, see, e.g., Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests legislation on injunctions; Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). On the role of ADR mechanisms developed at national level for the implementation of EU legislation on unfair commercial practices, see CIVIC CONSULTING, 2011, p. 36.

66 See CAFAGGI - MICKLITZ, 2008; BALOGH – CSERES, 2013, p. 351; POELZIG, 2014, p. 244 seq.; CHEREDNYCHENKO, 2015, p. 485.

67 This result has also been boosted by EU action. Both the Unfair Commercial Practices Directive and the Misleading and Comparative Advertisement Directive require Member States to vest courts or administrative authorities with the power to order cessation or prohibition of unfair practices whenever this measure is necessary taking into account all involved interests and in particular the public interest (see, respectively, artt. 5 and 11.2, cit. dir.). In a more general perspective, see, for consumer law, Directive 2009/22/EC, cit., and as applicable also out of consumer law, the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the MS concerning violations of rights granted under Union Law. See also European Commission – DG SANCO, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Final Report, Submitted by Civic Consulting (Lead) and Oxford Economics, August 2008 (hereinafter, European Commission – DG SANCO, 2008.

pace across Europe and across sectors; the digitalization of these mechanisms is promising despite the many challenges to be faced⁶⁸. Complementarity among these different approaches to enforcement is more and more considered as an added value⁶⁹.

Zooming in on the types and nature of national enforcement mechanisms, the picture appears by far more fragmented, especially if we compare enforcement mechanisms in BtoC and BtoB relations⁷⁰.

In respect of the former, administrative authorities are in most legal systems vested with some enforcement powers: in the majority of cases they are enabled to directly monitor *and* adopt corrective and/or sanctioning measures⁷¹; in some cases they can only bring actions before courts, that can then adopt enforcement measures⁷². The role of consumer associations is often complementary to the one of administrative authorities with regard to the function of bringing actions before courts for the interest of affected consumers⁷³. In some cases this is the only route for

The implementation of EU law in this field has raised an interesting “judicial dialogue” between the CJEU and national courts. See: CJEU (First Chamber), 14 April 2016, Joint Cases C-381/14 and C-385/14, Sales Sinués; CJEU (First Chamber), 26 April 2012, Case C-472/10, Invitel; CJEU (Fifth Chamber), 21 December 2016, Case C-119/15, Biuro, and, for an analysis in the perspective of principles of effectiveness, dissuasiveness, and proportionality: CAFAGGI – IAMICELI, 2017, ...*.

68 See part. for consumer online dispute resolution (ODR), Regulation (EU) n. 524/2013. See also, on the role of self-regulatory bodies in policing advertisement, art. 6, Misleading and Comparative Advertisement Directive.

69 See CAFAGGI, 2009, p. 517 seq.; POELZIG, 2014, p. 257 seq.; CHEREDNYCHENKO, 2015, p. 487; WEBER – FAURE, 2015, p. 619.

70 It is worth noting that, with regard to enforcement, the Unfair Commercial Practices Directive and the Misleading and Comparative Advertisement Directive are almost identical (see artt. 11 seq. and art. 5 seq., respectively). They both carefully draw the possible avenues of judicial and administrative enforcement, the due outcomes in terms of adequate and effective means to combat unfair practices, the need for injunctive measures not linked with the occurrence of loss and the evidence of negligence, the need for accelerated procedures, leaving to the MS to make adequate choice among the proposed paths.

71 REPORT UCPD, 2013, p. 26; COMMUNICATION MMP, 2012, p. 4.

72 So for the type of enforcement in the UK as regards Misleading Advertising, COMMUNICATION MMP, 2012, p. 4.

73 See CIVIC CONSULTING, 2011, p. 33; POELZIG, 2014, p. 236.

protecting groups of consumers, lacking an enforcement role for an administrative authority⁷⁴. Only in a few countries business organisations can also trigger enforcement mechanisms against unfair commercial practices harming consumers⁷⁵.

In the field of BtoB unfair practices, recent surveys show that, although the enforcement role of administrative authorities is growing, in more than one third of the EU Member States only judicial enforcement is provided⁷⁶. In almost half of the MSs Competition Authorities dispose of monitoring and sanctioning powers over unfair business practices beyond the reach of antitrust law but in some cases this empowerment only occurs in specific sectors (particularly food) or type of businesses (e.g. size-wise)⁷⁷. In the specific field of misleading and comparative advertising in a number of countries administrative authorities have also access to judicial enforcement, whereas in others this access is reserved to business organisations and/or only to individual victims⁷⁸. Moreover, the power to conduct *ex officio* investigation and the confidentiality of individual complaints are granted to a very different extent across EU countries in the field of enforcement of rules on unfair practices harming businesses⁷⁹. In some cases the same administrative authority is competent for infringements occurring in both BtoC and BtoB violations; it could be questioned to what extent this combination of roles may favour learning practices and spillover

74 So for Austria, Germany and Slovenia in the field of unfair commercial practices (CIVIC CONSULTING, 2011, p. 33).

75 So for Austria, Germany, Greece (CIVIC CONSULTING, 2011, p. 35).

76 RENDA, CAFAGGI, PELKMANS, 2014, p. 78. See also, in the field of misleading and comparative advertising, COMMUNICATION MMP, 2012, p. 4.

77 RENDA, CAFAGGI, PELKMANS, 2014, p. 76. See also, in the field of misleading and comparative advertising, COMMUNICATION MMP, 2012, p. 4.

78 COMMUNICATION MMP, 2012, p. 4, showing that in Poland, Czech Republic and Ireland only individual victims can bring actions before the court and the public authorities intervene only in cases where unfair practices constitute an offence under criminal law.

79 RENDA, CAFAGGI, PELKMANS, 2014, p. 78. See also, in the field of misleading and comparative advertising, COMMUNICATION MMP, 2012, p. 4.

effects, e.g. in the assessment of fairness or in the choice of applicable measures⁸⁰.

The expansion of public enforcement mechanisms in the area of business unfair practices (affecting consumers and/or other businesses) is a reality, although with major differences across States and between the BtoC and BtoB domains. The effectiveness of these enforcement mechanisms is hard to be measured and not necessarily linked with the level of rigidity and harshness of sanctions. Some successful experiences emerge relating to public authorities that are able to issue non-binding guidance and recommendations for businesses: these prove to be very effective, being these taken in high considerations by courts in case of disputes⁸¹.

Whereas, particularly in the domain of consumer law, the EU legislation has been by far more active in the expansion of collective redress measures⁸², a much larger autonomy has been preserved in favour of Member States in respect of individual redress measures⁸³. The lack of comprehensive EU legislation on

80 This combination of functions within the same administrative authority may be coupled with the existence of two separate regimes, one for BtoC and one for BtoB practices, or with a single substantive regime which is applied to both types of relations, as occurred in the few cases in which the national legislation implementing the 29/2005/EC Directive has been extended to BtoB relations (see footnote above, n....). This is for example the case of the Italian Competition Authority, in charge of the unfair commercial practices regime in favour of consumers and micro-enterprises.

81 This is the case of France, where the *Commission d'Examen des Pratiques Commerciales* (CEPC) has been established by the law on "pratiques restrictives" and empowered to provide advice and recommendations upon request of private operators, trade associations, public authorities; though lacking sanctioning powers, the CEPC has a strong impact on compliance since its declarations are taken in good consideration before courts; it can investigate ex officio, and receive confidential complaints. See RENDA, CAFAGGI, PELKMANS, 2014, p. 76. For similar examples in the area of unfair commercial practices see CIVIC CONSULTING, 2011, p. 36.

82 One can compare the means adopted by the EU in the area of consumer law (a directive on injunctive collective redress has existed since the late 90's; see now Directive 2009) and in all other fields covered by EU law, where a recommendation has been preferred to address both injunctive and compensatory collective redress.

83 See CIVIC CONSULTING, 2011, p. 34 seq. One exception is represented by the recent Directive 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 (Dir. 2014/104/UE): indeed, it addresses *individual* claims by

unfair business practices in the area of BtoB relations has even more preserved national autonomy in this field with reference to individual redress mechanisms.

The principle of procedural autonomy has somehow favoured States law fragmentation both within consumer law enforcement and in the already less harmonized field of BtoB relations. This principle is not absolute, however, and recent developments have significantly eroded it, particularly in the area of consumer law. Among the main sources of this erosion stands the use of general principles on enforcement of EU rights and freedoms⁸⁴.

Moving from this premise, the below comparative analysis aims at questioning whether the gradual expansion of these principles in the domain of consumer rights as well as in many other fields of protection of EU fundamental rights may have any consequence in the area of BtoB unfair practices. Without here addressing the issue on whether the EU has or should have competence in ruling about BtoB unfair practices, one could ask whether the current development of general principles of effectiveness, proportionality and dissuasiveness of enforcement mechanisms at national and EU levels could help addressing the challenges brought by BtoB unfair practices in the functioning of the EU and global market.

4 THE ROLE OF EU GENERAL PRINCIPLES ON ENFORCEMENT IN POLICING BTOC AND BTOB UNFAIR PRACTICES

General principles play a major role in the formation of EU law⁸⁵. With reference to EU secondary legislation and national legislation falling within the scope of EU law, this role includes an

consumers, undertakings and public authorities while expressly excluding from its effects the requirement for Member States to introduce *collective* redress mechanisms for the enforcement of Articles 101 and 102 TFEU. See Directive 2014/104/EU, recital (13)).

84 See VAN GERVEN, 2000, p. 500 seq; DOUGAN, 2004, p. 14 seq.; FRIEDMANN, 2005, p. 2 seq.; MAK, 2014, p. 236; MICKLITZ, 2015, p. 517; CAFAGGI, 2017, ...

85 TRIDIMAS, 2006, part. p. 17 seq.; REICH, 2014, p. ...

interpretative function, a gap-filling function, an assessment function as regards legality of legislative and administrative acts and a fourth function, standing between gap-filling and correction of existing legislation, aiming at the introduction of new remedies in existing enforcement systems⁸⁶.

Primarily endorsed by the European Court of Justice, these principles have often found their way into EU primary and secondary legislation. In the area of unfair practices, article 11, 2005/29/EC Directive, establishes that Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this directive in the interest of consumers. Art. 13 adds that Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. Moreover, pursuant to the same article, these penalties must be effective, proportionate and dissuasive.

As examined above, a comprehensive body of rules and principles is not provided at the EU level on the matter of unfair business practices affecting the interests of other businesses, being these competitors or contractors, clients, etc. However, in the particular context of misleading and unlawful comparative advertisement, as a possible case of unfair practices in BtoB relations, art. 5, 2006/114/EC, substantially replicates the wording of the above quoted article 11, 2005/29/EC Directive, whereas the equivalent of article 13 is not featured.

These differences cannot induce to firmly discard the application of the EU general principles on protection of fundamental rights and freedoms in the area of BtoB law. In most cases they are part of national constitutional traditions⁸⁷. Moreover,

86 See HARTKAMP, 2016, p. 96; CAFAGGI, 2017, ... Similar functions, though examined in the different perspective of national legal systems, are discussed by current scholars, e.g., in the Italian debate: ALPA, 2014, p. 147 seq.; NAVARRETTA, 2014, p. 547 seq.

87 This does not always necessarily account for explicit acknowledgment of these principles within MSs' Constitutions, if existing. See, e.g., art. 16, French Declaration

as far as policing the use of unfair BtoB practices is considered as an instrument for developing the European Single Market ensuring the freedom of establishment and the free movement of goods and services, and at least within the scope of existing EU regulatory instruments in the field of BtoB relations, one could ask whether this policy shall be considered as a matter covered by Union law pursuant to art. 19.1, TEU and therefore subject to the principle of effective judicial protection and to the related EU general principles applied by the CJEU⁸⁸.

4.1 A VIEW ON A TRIAD: WHERE THE PRINCIPLES OF EFFECTIVENESS, PROPORTIONALITY AND DISSUASIVENESS COME FROM

The application of the “triadic” principles of effectiveness, proportionality and dissuasiveness to the enforcement of EU rights and freedoms is significantly affecting the national law on procedures, remedies and sanctions. The principle of procedural autonomy is more and more confined within a space of judicial review, where the European Court of Justice plays a major role in establishing criteria, limitations, scope of application of existing

of Human and Civic Rights as interpreted by the French Constitutional Court (see, e.g. Décision 2013-314P QPC - 04 avril 2013: “aux termes de l’article 16 de la Déclaration des droits de l’homme et du citoyen de 1789: « Toute société dans laquelle la garantie des droits n’est pas assurée, ni la séparation des pouvoirs déterminée, n’a point de Constitution»; [qu’il ressort de cette disposition qu’il ne doit pas être porté d’atteintes substantielles au droit des personnes intéressées d’exercer un *recours effectif devant une juridiction*”); art. 24, Italian Constitution, on the right to action as interpreted by courts as expression of a more general principle of effective judicial protection (see, e.g., Consiglio di Stato, sez. IV, 02/03/2010, n. 1220); artt. 31(3) and 45(1), Polish Constitution, as regards, respectively, the principle of proportionality and the right to “just judicial protection”; art. 53(2), Romanian Constitution, on restrictions on exercising certain rights and freedoms; Hungarian Constitution, art. 1(3) of the Section on Freedom and Responsibility.

88 See TRIDIMAS, 2006, p. 456, observing that, unlike art. 47, CFREU, which only applies to cases in which MSs implement EU law, the principle of judicial effective protection, as developed by the CJEU, also extends to other cases in which EU law applies. On the restrictive scope of application of the CFREU, in respect of art. 51, see also TIZZANO, 2014, p. 429 seq.

procedures and remedies, eventually due for legislative reform in the light of European principles and jurisprudence⁸⁹.

Within the triad, the *principle of effectiveness* stands for impact on EU and national case law. The European Court of Justice has played a major role in the establishment of this principle long before the right to an effective remedy (*droit à un recours effectif*) entered the Charter of Fundamental Rights of the European Union in art. 47 and well beyond the reach of art. 13, ECHR⁹⁰. Since the *Rewe* and *Comet* cases, the principle has been systematically recalled by the Court as a limitation of the principle of procedural autonomy⁹¹. In this respect it reflects the need for *removing any obstacle* making in practice impossible or excessively difficult to exercise rights recognised by the European Union⁹². Legal scholars have highlighted the “eliminator function” so played by the principle of effectiveness in removing the obstacles posed by national procedural law against effective legal protection⁹³.

A broader impact may be traced in other judgments of the CJEU, showing the “hermeneutical” and “remedial” potentials of the principle of effectiveness when applied with a view to an expansion or upgrading of national remedies that fail to provide adequate protection⁹⁴. Indeed, with a more “positive” view than the one focused on removing procedural obstacles, the Court has held that Member States shall provide *national remedies* in order

89 See VAN GERVEN, 2000, p. 500 seq.; DOUGAN, 2004; GUTMAN, 2014, p. 62 seq.; MAK, 2014, p. 236 ; REICH, 2014, p. 90 seq.; TRIDIMAS, 2006, p. 419; HARTKAMP, 2016, p. 100 seq.; CAFAGGI, 2017; CAFAGGI – IAMICELI, 2017, ...

...

90 See HARTKAMP, 2016, p. 100 seq.; CAFAGGI, 2017; CAFAGGI – IAMICELI, 2017, ...

91 See TRIDIMAS, 2006, p. 420 seq.

92 See ECJ, 16 December 1976, Case C-33/76, *Rewe*; ECJ, 16 December 1976, Case C-45/76, *Comet*.

93 REICH, 2014, p. 91 seq. See also VAN GERVEN, 2000, p. 501 seq., part. p. 529, where this minimum application of the principle of effectiveness is deemed insufficient.

94 REICH, 2014, p. 95 seq.

to “guarantee real and effective judicial protection” of EU rights⁹⁵. The principle has also been extended to the right to *judicial review* and *access to a competent court*⁹⁶ as well as to the *right to a judicial remedy* against any decision of a national authority infringing a particular right⁹⁷.

The Member States’ duty to provide *remedies* sufficient to ensure an effective legal protection in the fields covered by Union law is established by art. 19.1, TEU⁹⁸. Art. 47, CFRUE, even more directly puts forward the *right to an effective remedy* before a tribunal, so explicitly referring effectiveness to the judicial response provided against a given violation of rights and freedoms guaranteed by EU. The potentials of the principle as means for upgrading national remedial systems are then officially acknowledged in the EU primary law in the light of a long standing tradition preceding its more recent wording in the Treaty and the Charter⁹⁹.

The reference to the remedial dimension of the principle of effectiveness cannot be overstated, if examined through the only lenses of EU primary law. Indeed, in the French and Italian texts, among others, the reference to remedies is replaced by the one to the

95 See Case 14/83, *von Colson and Kaman*, para 23.

96 See Johnston, C-222/84, para 17.

97 See CAFAGGI ET AL., 2016, p. 70. See also EU Network of Independent Experts on Fundamental Rights, **Commentary of The Charter of Fundamental Rights of the European Union**, June 2006 (http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf), sub art. 47, p. 359.

98 In the French translation: “Les États membres établissent les *voies de recours* nécessaires pour assurer une *protection juridictionnelle effective* dans les domaines couverts par le droit de l’Union”. See also TRIDIMAS, 2006, ...p. 456*, observing that art. 47, cit., has a more restricted scope of application than art. 19.1, TEU, being confined to cases in which MS implement EU law and not in other cases in which EU law applies.

99 See REICH, 2014, p. 120 seq., where the Authour, looking at the hermeneutical and remedial functions of the principle of effectiveness beyond the “eliminatory” ones, defines art. 47 as a “sleeping beauty” not kissed awake yet despite its explicit references in some ECJ decisions (e.g. in Alassini, ...). On the different scope of art. 47 in respect of the principle of effective judicial protection as developed by the CJEU, see TRIDIMAS, 2006, pp. 455-456.

submission to the court (*recours*)¹⁰⁰. Effectiveness would then more precisely regard the procedure leading to the judicial remedy and its very start in terms of access to justice or submission of a claim. The linguistic hybridization emerging in primary law might suggest that both dimensions (the substantive and the procedural ones) are covered by the principle of effectiveness as stated in EU law.

It is exactly by looking at the procedural dimension of the principle of effectiveness that art. 47, CFREU, has needed to strike a balance between the asserted right to effective remedy/justice and the due process guarantees consisting in the right to a fair hearing, to a reasonable duration of the process, to a tribunal's independence and impartiality, to the right to defense and legal aid when necessary to access effective access to justice. Indeed, the right to effective justice is a fundamental but not an absolute right¹⁰¹.

The *principle of proportionality* has followed a different path. The European Court of Justice has repeatedly considered it as a general principle of EU law¹⁰². In a relatively broad perspective the main function attached to this principle is to limit the scope of public powers when affecting other public powers or, more commonly, private interests underlying rights and freedoms¹⁰³. Along these lines

100 It is notable, under this respect, the parallel wording of the title of art. 47 in the English version (“Right to an effective remedy”) and in the French and Italian ones (“Droit à un recours effectif (...)”; “Diritto a un ricorso effettivo”). The same parallel wording features in the English, French and Italian versions of art. 13, European Convention of Human Rights.

See also the French text of art. 19.1, TEU: “In the French translation: “Les États membres établissent les *voies de recours* nécessaires pour assurer une *protection juridictionnelle effective* dans les domaines couverts par le droit de l’Union”.

101 See the decision rendered by the Polish Supreme Court on 20 November 2015 (Supreme Court III CZP 17/15) limiting, in the light of the principle of effectiveness as balanced against the right to fair trial, the implications deriving the judgement issued by the ECJ, so that only businesses having a chance to defend themselves in the proceedings concerning a certain terms’ unfairness can be affected by the declaration of unfairness.

102 See, among others, Judgment of 16 December 1992, Commission / Greece (C-210/91, ECR 1992 p. I-6735) ECLI:EU:C:1992:525. See also: TRIDIMAS, 2006, p. 136 seq.; REICH, 2014, p. 157, qualifying the principle as a constitutional one.

103 EMILIOU, 1996; ELLIS, 1999; WIMMER, 2014.

the principle of proportionality has been applied as a limitation to the legislative competence of the EU, as a ground for review of EU measures, as a ground for review of national measures affecting fundamental freedoms¹⁰⁴. In this context, the principle is referred to by article 52(1), CFREU, stating that, “[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

In the field of protection of fundamental rights, since the ‘70s, the European Court of Justice has introduced a three-steps assessment due to examine whether: (i) the measure is suitable for the pursued objective; (ii) it is necessary since no less restrictive measure would have been equally adequate; (iii) it is proportionate (*stricto jure*) in the light of the circumstances addressed by the measure¹⁰⁵. In the area of sanctions, as one of the fields of application of the principle of proportionality, the main factor is the gravity of the infringement¹⁰⁶. Other factors complement this assessment, as expressly acknowledged by the Court of Justice and the national

104 See TRIDIMAS, 2006, p. 137; REICH, 2014, p. 22 ; GUTMAN, 2014, p. 305 ; HARTKAMP, 2016, p. 116.

105 The first judgment in which the principle was recognized dates back to 1970. See Judgment of the Court of 17 December 1970, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. For more recent case law see Judgment of the Court (Fifth Chamber), 11 July 2002, Case C-210/00, Käserei Champignon Hofmeister GmbH & Co. KG and Hauptzollamt Hamburg-Jonas, para 59, 67. See also Opinion of Advocate General Kokott, 14 October 2004, Joined Cases C-387/02, C-391/02 and C-403/02, Silvio Berlusconi and Others: “A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued”. All these definitions relate to criminal and administrative measures; however EU case law has acknowledged the relevance of the principle of proportionality as a general principle of EU law in the area of contract law as well (see Trib. EU, 25 May 2004, T-154/01, Distilleria Palma v. Commission). See CAUFFMAN, 2015, p. 69 seq.; GUTMAN, 2014, p. 306.

106 See Judgment of 16 December 1992, Commission / Greece (C-210/91, ECR 1992 p. I-6735) ECLI:EU:C:1992:525: “As the Court has repeatedly held, the administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and the control procedures must not be accompanied by a penalty which is

courts as regards the application of administrative measures against unfair practices¹⁰⁷.

As observed above, the proportionality of measures against violation of EU law is often imposed by EU secondary legislation in the area of consumer law, whereas it does not expressly enter into the mentioned directives affecting BtoB relations. This observation does not reduce the relevance of proportionality as a EU general principle on enforcement of EU-based rights and freedoms. In the national context, its function is often played by alternative legal concepts and doctrines such as the ones of reasonableness, fairness or abuse of rights¹⁰⁸. Where relevant, the principle applies to all types of enforcement chosen at national level, whether public or private, and to all type of measures, whether injunctive, punitive, compensatory, etc.¹⁰⁹.

so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (see, inter alia, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377; and Case 68/88 *Commission v Greece* [1989] ECR 2965).”

107 See Judgment of the Court of Justice (First Chamber) of 16 April 2015, *UPC Magyarország kft v Nemzeti Fogyasztóvédelmi Hatóság*, Case 388/13 [2015], part. para. 58: “it is for the Member States to provide for an appropriate system of sanctions with regard to professionals who employ unfair commercial practices, while ensuring that those sanctions comply, in particular, with the principle of proportionality. It is in this context that due account could be taken of factors such as the frequency of the practice complained of, whether or not it is intentional, and the degree of harm caused to the consumer”.

This approach is mirrored by case law at national level. E.g., when sanctioning unfair commercial practices, the Italian Competition Authority adjusts fines against the following criteria, as provided by Art.11, law 689/81, as referred to by Art.27(13), Consumer Code: the gravity of the violation, the measures taken by the infringer to reduce or eliminate the consequences of the infringement, the position of the acting person, the economic conditions of the infringing enterprise (see, e.g., Provision n. 25701, 25 November 2015, *Eni s.p.a.*; Provision n. 26019, 11 May 2016, *Eni s.p.a.*; Provision n. 26137, 4 August 2016, *Volkswagen s.p.a.*). See also art. 47-48, Hungarian Consumer Protection Act, providing that amount of fine for unfair commercial practices shall be calculated upon the net income of the trader, and it shall also take into account the possibility of harming consumer health and the possible injury of the large public; moreover a discount is applied to SMEs (see *BALOGH - CSERES*, 2013, p. 358).

108 See HARTKAMP, 2016, p. 117; NAVARRETTA, 2012, p. 953.

109 See CAFAGGI – IAMICELI, 2017, p. The application of the principle to different

Though more rarely recalled, the *principle of dissuasiveness* contributes to shape the EU law on enforcement of EU-based rights¹¹⁰. When considering the principle of dissuasiveness, the interpreter mostly looks at the ability of the remedy to discourage future infringements. Indeed, the CJEU has defined dissuasive that penalty which “prevents an individual from infringing the objectives pursued and rules laid down by Community law”, having regard to its nature, its level and the likelihood of its application¹¹¹. In a private law perspective, one could argue that, in order to be dissuasive a remedy must, at least, (tend to) deprive the infringer of the *benefits* obtained (or due to be obtained) from the infringements, taking into account the costs/incentives for the victim(s) to enforce the remedy and the effects of the remedy on a individually harmful or multi-offensive situation¹¹².

types of remedies and enforcement systems is acknowledged by judges and scholars, at least as far as matters of competence of EU law are concerned (see TRIDIMAS, 2006, p. 169).

- 110 In the area of consumer protection, see for example CJEU (Third Chamber), 10 September 2014, Case C-34/13, Kušionová, para. 59-60; CJEU (First Chamber) 30 May 2013, Case C-488/11, Asbeek Brusse, para. 58; CJEU (Fourth Chamber), 27 March 2014, C-565/12, LCL Le Crédit Lyonnais SA, para. 50 seq.; CJEU (Third Chamber), 21 April 2016, Case C-377/14, Radlinger, para. 69.
- 111 Opinion of Advocate General Kokott, 14 October 2004, para 89, concluding that: “(...) Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness”. See also, with regard to the enforcement of the unfair commercial practices Directive, POELZIG, 2014, p. 241.
- 112 See, in the domain of contract law, Judgment of the Court, 27 March 2014, Case C-565/12, Credit Lyonnaise, para 50: “in order to assess the genuinely dissuasive nature of the penalty, it is for the referring court, which alone has jurisdiction to interpret and apply national law, to compare, in the circumstances of the case before it, the amounts which the creditor would have received by way of repayment of the loan if it had complied with its obligation to assess, prior to conclusion of the agreement, the borrower’s creditworthiness by consulting the relevant database, with the amounts which it would receive if the penalty for breach of that prior obligation were applied. In order to determine the latter amounts, it is for that court to take into consideration all the circumstances and, in particular, all the consequences likely to follow from a finding, by that court, that the creditor failed to comply with that prior obligation”.

What impact these principles have or could have on consumers' and businesses' protection in the field of unfair practices is one of the questions addressed below.

4.2 THE ENFORCEMENT OF CIVIL REMEDIES AGAINST UNFAIR PRACTICES HARMING CONSUMERS AND(OR) BUSINESSES IN THE LIGHT OF THE “TRIAD”

The above analysis has shown that in the areas of both BtoC and BtoB unfair practices national enforcement systems tend to combine public and private enforcement through a diversified menu of enforcing authorities (administrative and judicial, public and private) and measures (injunctive, compensatory, penalty-like, etc.)¹¹³. Differences exist across countries and sectors and, more importantly for the present analysis, between BtoC and BtoB enforcement systems. More particularly, whereas in the area of consumer law the complementary role of administrative enforcement authorities is quite spread in all MSs, in the enforcement of BtoB legislation on unfair practices judicial enforcement is the only one provided for more than one third of national legal systems.

With regard to remedies, whereas EU law has imposed the adoption of minimum measures enabling *injunctive collective redress* in the field of consumer protection¹¹⁴, the same has not occurred in BtoB law, where a mere recommendation may influence national legislation and only to the extent that it addresses rights granted under Union law¹¹⁵. In fact, a very fragmentary landscape can be described under this respect. In recent surveys not all Member

113 See par. 3 above.

114 See now Directive 2009/22/EC, repealing the previous Directive 98/27/EC, part. art. 7 setting the level of minimum harmonization. See also KARSTEN, 2011, part. pp. 9 and 29, showing that injunctive procedures are more often used against the use of unfair terms than against the occurrence of unfair practices.

115 See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, therefore not limited to the area of consumer law.

States reported the enforcers' availability of injunctive powers with the scope to protect the community of businesses as potential victims of unfair business practices: these powers are much more diffuse in the area of competition law but, quite unevenly, in the field of unfair competition law and very limitedly in contract law¹¹⁶. A stimulus to a more extended use of injunctions in this area could derive from the application of the general principle of effectiveness, at least in the fields in which unfair practices in BtoB transactions are addressed by EU primary and secondary legislation.

A second critical point concerning civil remedies against unfair practices consists in the availability of *caducatory remedies*, such as invalidity, withdrawal or termination as means for unwinding contracts concluded in relation to pre-contractual unfair practices¹¹⁷. Moving from the pre-contractual phase towards contract execution, a similar issue regards the availability of remedies purporting the non-bindingness of unfair intra-contractual acts such as unilateral withdrawal and termination. As we see in depth in the following sub-section, only recent reforms have created space for such remedies in some EU Member States, so providing a diversified array of measures (nullity, voidability, withdrawal, payment denial) as coupled with different types of restitutionary rights depending on factual circumstances and national specificities. For reasons explained below, the space for caducatory remedies is (even) more limited in the field of BtoB unfair practices.

If caducatory and restitutionary remedies are not always available as a civil response against unfair practices, national legal systems often admit a claim for *damages*, these being awarded under the umbrella of pre-contractual liability, unfair competition law or tort law¹¹⁸. Damages may provide the victim of the unfair

116 See RENDA, CAFAGGI, PELKMANS, 2014, table n. 24 and 23b.

117 The term "caducatory" is hereby used to refer to any measure, either taken by the parties or sought through a court, due to put the contract aside as a consequence of an unfair practice.

118 See, for the Italian system, DE CRISTOFARO, 2015, p. 252 seq.; for the Belgian one, STEENNOT, 2015, p. 192; for the Dutch one, MAK, 2015, p. 247 seq.; for the English one, DEVENNEY, 2016, p. 101; for Germany, PEIFER, 2015, p. 196 seq.

practice with restoration of losses she/he would have not faced and benefits she/he would have obtained if the unfair practice had not occurred. In the area of consumer law, attention should be paid to the consequences of the unfair practice, including those related to the choice of not concluding a contract or concluding it at a significant disadvantage. Damages may also relate to consumer's health or safety. In the field of BtoB transactions, damages could play a major role in cases in which unfair practices (e.g. unfair termination of a long-standing relation) deprive undertakings of business opportunities based on specific investments hard to deploy in alternative transactions. Although the so called reliance damages are not awarded to victims of torts under many legal systems, the principle of effectiveness could shed light in favour of such award when unfair practices cause the definite loss of specific investments.

In the neighbor area of antitrust infringements, the CJEU has repeatedly signaled the complementary function of damages in respect of public enforcement in both BtoB and BtoC cases¹¹⁹. This approach has led to the adoption of the 2014/104/EU Directive, which recognizes the consumers' and businesses' right to full compensation for harm caused by infringements of competition law (see art. 3, Dir.). Moving from the perspective of effectiveness, therein expressly recalled, the Directive provides for presumptions in favour of claimants, so lightening their burden of proof¹²⁰. Specific means of coordination are also established between public and private enforcement mechanisms in cases in which an infringement has already been ascertained through a final decision by the administrative authority or a review court, whose finding is then made binding for the court when adjudicating the case in a cause for damages¹²¹.

119 See ECJ 20 September 2001, Case C-453/99, *Courage*, para. 26 seq.; ECJ (Third Chamber) 13 July 2006, Joined Cases C-295/04 to C-298/04, *Manfredi and others*, para. 60. See also STEFANICKI, 2012, p. 400 seq.

120 See 2014/104/EU Directive, art. 3 (on the principles of equivalence and effectiveness) and recitals 5-6 on the complementarity between private and public enforcement.

121 See 2014/104/EU Directive, art. 9. On the coordination between public and private enforcement mechanisms in the light of the EU general principles of effectiveness,

The possible analogy with the case of damages caused by unfair practices harming consumers and/or other businesses is quite striking and one could question whether, through the lens of effectiveness, courts might be induced to expand the use of damages as an effective remedy against such practices¹²². In the area of consumer law, this is already occurring in some MSs' legislation, when providing for specific provisions on the right to damages occurred as a consequence of unfair practices; some of these provisions foresee the same type of presumptions just explored in the area of antitrust law¹²³.

Some doubts may be raised in respect of the effective and dissuasive effects of individual compensatory claims, due to their frequently low value which makes victims reluctant to sue. Moving from this perspective, a higher impact could be expected, at least in principle, where collective compensatory claims were admitted¹²⁴. This is the case in some MSs' legislation as a general means for consumers' claims¹²⁵. As far as this may be relevant also for claims related with unfair practices, further applications could be expected

proportionality and dissuasiveness, see CAFAGGI – IAMICELI, 2017, ...*.

122 On the “case for more private enforcement” in the area of unfair commercial practices harming consumers, see POELZIG, 2014, p. 247 seq.

123 See, e.g., Article 6:193j (2), Dutch Civil Code, as recently amended, providing that, if the trader has acted tortuously (unlawfully) as meant by Article 6:193b, then he is liable for the damage caused as a result, *unless he proves that this was neither caused through his fault nor that he is accountable for it on another ground*. See also the Consumer Protection (Amendment) Regulations 1999 (CPAR 2014) inserted a new Part 4A into CPUTR 2008, sec. 27J, part. para. (5): “A consumer does not have the right to damages if the trader proves that— (a) the occurrence of the prohibited practice in question was due to— (i) a mistake, (ii) reliance on information supplied to the trader by another person, (iii) the act or default of a person other than the trader, (iv) an accident, or (v) another cause beyond the trader's control, and (b) the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.” The right to claim damages caused by unfair commercial practices is also provided in Greece, Portugal, Poland and Ireland; see POELZIG, 2014, p. 250, where some doubts are expressed in respect of the effectiveness of damages as individual redress due to the often low value of lawsuits.

124 See POELZIG, 2014, p. 250 seq., concluding that this form of collective redress is only necessary in jurisdiction lacking an effective public enforcement.

125 See European Commission – DG SANCO, 2008, part. p. 38 and Annex 8.

from the implementation of the Antitrust Damages Directive¹²⁶. In the framework of the present analysis, it is important to highlight that the existing legislation on compensatory collective redress has been assessed not only against effectiveness but also against proportionality: in this view, though producing high costs for representatives (e.g. consumer organisations), collective redress mechanisms would not raise disproportionate costs for consumers, neither disproportionate burden on businesses in respect of the harm caused¹²⁷.

4.2.1 THE EFFECTIVENESS, PROPORTIONALITY AND DISSUASIVENESS OF CADUCATORY AND RESTITUTIONARY REMEDIES AGAINST UNFAIR BTOC AND BTOC PRACTICES

In the area of consumer law, the availability of caducatory remedies against unfair practices has always been looked at with high caution. At the European level, the 2005/29/EC Directive expressly excludes contract effects and contract validity from its scope of application¹²⁸. This may not amount to say that invalidity shall be out of the menu of available remedies but it is clearly up to Member States to decide whether it may represent a(n effective) remedy or not. As a matter of fact, this Directive has significantly influenced national contract law under this respect¹²⁹.

126 The 2014/104/EU Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU (see expressly recital 13). However, MSs may do so within their procedural autonomy. See, e.g., the legislation under development in Italy providing for such mechanism (see art. 2, L. 114/2015).

127 See European Commission – DG SANCO, 2008, p. 4 seq.

128 See art. 3(2), directive 29/2005/CE: “This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”; Art. 10 (1), Consumer Credit Directive: “(...) This Article shall be without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community law.” See DUROVIC, 2015, p. 716 seq.

129 See DUROVIC, 2015, p. 715 seq.

While acknowledging that an unfair practice may be such to impact on a single contractual relationship without need for being recurrent or concerning more than one consumer¹³⁰, the European Court of Justice has also shown some reluctance in targeting invalidity (of the whole contract) as a sound remedial response. In a case in which a precontractual unfair practice concerning the information about the calculation of interest rates in a credit contract has led to the stipulation of unfair terms, the Court has observed that the existence of an unfair practice may well influence the assessment of a term unfairness; however, non-bindingness of unfair terms shall remain limited to the unfair term itself, whereas the objective of enforcement may not normally consist in cancelling the whole contract from the market, even when it is more advantageous for the consumer¹³¹. It is remarkable that during proceedings the Austrian Government has invoked the principle of proportionality, arguing that invalidity of the whole contract would be a disproportionate remedy in respect of the infringement¹³². Taking (even more) seriously the principle of effectiveness, scholars have occasionally expressed a different view¹³³.

130 See Judgment of the Court of Justice (First Chamber) of 16 April 2015, UPC Magyarország kft v Nemzeti Fogyasztóvédelmi Hatóság, Case 388/13 [2015]. For a comment see DUROVIC, 2016b.

131 Judgment of the Court (First Chamber), 15 March 2012, in Case C 453/10, Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o. See also Opinion of Advocate General Trstenjak, delivered on 29 November 2011, in this case, part. para. 63. On the relation between unfair terms and unfair practices see MICKLITZ, 2014, p. 175 seq.; DUROVIC, 2015, p. 730 seq., and, for a more recent and similar case, Opinion of Advocate General Kokott delivered on 15 September 2016, Case C-503/15, Ramón Margarit Panicello.

132 Opinion of Advocate General Trstenjak, delivered on 29 November 2011, cit., para. 39.

133 See F. CAFAGGI, 2013, p. 311 seq.; having regard to restitutionary rights more than total contract invalidity, MICKLITZ, 2014, p. 193 concluding that “The application of these principles [*the ones concerning effectiveness*] to the interplay between the law on unfair commercial practices and law on unfair contract terms results in the claim that a consumer, who has been the victim of an unfair commercial practice, has to have the right to free himself from any *disadvantageous contractual consequences*. Otherwise there would be no ‘effective legal redress’ in terms of Article 19(1)2 TFEU. Thus it concerns a kind of claim of confiscating unlawful profits”.

At the MSs' level the availability of caducatory remedies in respect of contracts concluded in relation with unfair practices is often addressed through the lens of invalidity for vices of consent¹³⁴. Moving from this perspective, although legal traditions differ, many legal systems pose on the affected party a high burden of proof with regard to the real impact determined by the lack of information, fraud or threaten on her will¹³⁵. This approach may fail to police unfair practices whose real impact on the single consumer's choice is hard to prove¹³⁶. Moving from a different perspective, some scholars highlight the impact possibly generated by the Directive on the traditional national concepts of vices of consent¹³⁷. Being these considerations referred to general contract law, they may equally apply to BtoC and BtoB contracts.

Alternative approaches exist, however, most of them following recent legislative reforms.

For example, since March 2016 the French consumer code has stated that contracts concluded following an aggressive commercial practice or an act of abuse of consumer's weakness (*faiblesse*) are nul and void (*nul et de nul effet*)¹³⁸.

134 See DUROVIC, 2015, p. 742 seq.; PATTI, 2016, 317 seq.

135 See, e.g., in the Italian case law the decision rendered by the Italian Supreme Court (Corte di cassazione) on 20 September 2013, n. 21600, where, despite the claim for voidability was rejected because the investor, who alleged a violation of information duties by a financial intermediary, could not provide precise evidence about the impact of such informative failure upon the formation of his contractual will. For a view on the Italian legislation on vices of consent in the perspective of the European Principles of Contract Law, see IAMICELI, 2005, p. 187 seq.

136 See MICKLITZ, 2014, p. 178; PATTI, 2016, p. 309 seq. See also SCHULZE – ZOLL, 2016, p. 158, highlighting the different approach characterizing, on the one hand, national legal traditions, more focused on the impact of misinformation on individually-negotiated contracts, and, on the other hand, EU law, more focused on mass-contracting, and posing the issue on whether the new EU approach to unfair practices will leave space for the traditional law on defects of consent (ID., p. 163).

137 See DUROVIC, 2015, p. 243; more in a normative than a positive perspective, PATTI, 2016, p. 325 seq.

138 See art. L132-10 and L132-13, French Consumer Code, as introduced by Order of 16 March 2016. The same provision is not included in the section concerning misleading (*trompeuse*) practices. See DUROVIC, 2015, p. 743, observing that in

A recent reform of the Dutch civil code has provided that contracts concluded in relation with an unfair practice are *voidable* (*vernietigbaar*)¹³⁹. Restitutionary effects derive from the annulment of the contract, so that the professional has to return payment (or this is not due if not paid yet) and the consumer has to return goods or service (or their equivalent value) to the professional¹⁴⁰.

Under English law the recent Consumer Protection (Amendment) Regulations 1999 (CPAR 2014) inserted a new Part 4A into CPUTR 2008 giving consumers specific private rights of redress, namely: the unwinding of a contract, the application of a discount (price reduction)¹⁴¹, and damages¹⁴². These remedies are available if the prohibited practice is a “significant factor” in the consumer’s decision to enter into the contract. In particular,

the French legal tradition misleading practices are considered as less harmful.

139 See art. 6:193j(3), Dutch Civil Code. See MAK, 2015, p. 249. For an application see the decision rendered by the Court of Northern Holland [Rechtbank Noord-Holland] 13 November 2014, TvC 2015, nr. 2, p. 89 (with comment by M.B.M. Loos; also available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNHO:2014:12536>). The circumstance that, at the time of the conclusion of the sales agreement with a consumer, a professional car seller has misrepresented himself as a member of FOCWA (a Dutch car and car repair industry group), is a misleading trade practice as meant by Article 6:193c of the Dutch Civil Code. As a result the agreement is voidable pursuant to Article 6:193j, paragraph 3, of the Dutch Civil Code. If the car seller, who had sold the car on 21 August 2013 “as seen and without guarantee”, had been a FOCWA member, a 2-year FOCWA-guarantee would have applied, as well as quality guarantees of FOCWA dealerships and the possibility to present the dispute without high costs to a dispute resolution commission of FOCWA. The sales agreement is dissolved and the car seller condemned to restitution of the paid price, plus interests and costs.

140 See Article 3:53, DDC, Effects of the nullification of a voidable juridical act: “1. The nullification of a voidable juridical act has retroactive effect to the moment on which that act was performed. 2. If it is complicated to undo the already set in results of the nullified voidable juridical act, then the court may deny the effects of the nullification entirely or partially. When a party takes an unreasonably advantage of such a denial, the court may charge him with an obligation to pay a cash benefit to the party for whom this denial is disadvantageous.”

141 Interestingly, for contracts whose value does not exceed 5,000£, discount is proportional to the gravity of the infringement. See DEVENNEY, 2016, p. 100 seq. See also CAFAGGI – IAMICELI, 2016, p.

142 DEVENNEY, 2016, p. 100 seq.

the unwinding of the contract is possible if goods or services may still be rejected and therefore have not been fully consumed or performed¹⁴³; neither the consumer is requested to account for the (partial) use of the product¹⁴⁴. Restitution by the consumer occurs but not necessarily in full.

A fourth example is the one provided by article VI.38 of the Belgian Code of Economic Law, establishing that, when the consumer concludes a contract in relation with an unfair practice, he/she is entitled to claim reimbursement of the amount paid or to refuse payment without a duty to return the goods or compensate the services provided¹⁴⁵. Beyond the caducatory effect of invalidity (which is not mentioned), the remedy has a penalty function aimed at discouraging unfair practices¹⁴⁶. Indeed, if the price has been paid and the goods or services delivered, restitution is only due by the professional. This particular remedy is fully available for seven identified unfair practices, whereas in any other case it is upon the judge to decide whether, depending on circumstances, the price should be returned in full or partially¹⁴⁷. In this respect the principle of proportionality may play a major role in governing judicial discretion¹⁴⁸.

Being quite recent, all these reforms may account for a significant, though still very diversified, change in national private enforcement against unfair commercial practices towards the expansion of caducatory and restitutionary remedies.

The consequences of this change are remarkable if read through the lenses of EU general principles, particularly those of effectiveness and dissuasiveness.

143 Regulation 27E(8) provides: "...a product remains capable of being rejected only if: (a) the goods have not been fully consumed, (b) the service has not been fully performed, (c) the digital content has not been fully consumed, (d) the lease has not expired, or (e) the right has not been fully exercised [...]".

144 DEVENNEY, 2016, p. 101.

145 STEENNOT, 2015, p. 189 seq.; DUROVIC; 2015, p. 743 seq.

146 See also CAFAGGI – IAMICELI, 2016, p. ...

147 STEENNOT, 2015, p. 189.

148 See also CAFAGGI – IAMICELI, 2016, p. ...

Firstly, despite the nature of the caducatory remedy (nullity, voidability, termination, etc.), it falls within the expanding reach of the *ex officio* powers of courts adjudicating consumer cases. Indeed, the Court has recently clarified that, by far beyond the area of unfair contract terms, “effective consumer protection could be achieved only if the national court were required, of its own motion, to examine *compliance with the requirements which flow from EU law on consumer law*”¹⁴⁹ provided that “it has available to it the legal and factual elements necessary for that task”¹⁵⁰; moreover, “where a national court has found an infringement of the obligation to provide information, it must draw *all the consequences* provided for under national law, provided that the penalties laid down therein satisfy the requirements of Article 23” (i.e. are effective, proportionate and dissuasive)¹⁵¹. Addressing a case of breach of information duties, the Court seems to suggest that *ex officio* powers in judicial civil enforcement may regard a wide array of infringements of consumer law and a wide menu of remedies. Future decisions could probably specify whether this approach applies to unfair commercial practices as well, as it seems consistent with current jurisprudence¹⁵².

Secondly, once a caducatory remedy is applied, effectiveness and dissuasiveness require that also restitution will follow, so “restoring the consumer to the legal and factual situation that he would have been in if that term had not existed”¹⁵³. This is what the

149 CJEU (Third Chamber), 21 April 2016, Case C-377/14, Radlinger, para. 66. On the role of effectiveness and dissuasiveness in the enlargement of judicial powers in private enforcement, see CAFAGGI, 2017, ...; CAFAGGI – IAMICELI, 2017, ...

150 And “[t]here can be no doubt that examination by the national courts of compliance with the requirements flowing from that directive is dissuasive” (CJEU (Third Chamber), 21 April 2016, Case C-377/14, Radlinger, para. 69-70.

151 CJEU (Third Chamber), 21 April 2016, Case C-377/14, Radlinger, para. 73. See BARTOLINI, 2016, p. 292 seq.; PAGLIANTINI, 2016, p. 1029 seq.

152 See Opinion of Advocate General Kokott delivered on 15 September 2016, Case C-503/15, Ramón Margarit Panicello, who has “escaped” from this task for lack of necessity; indeed, being the unfair practice at stake linked with the use of unfair terms, *ex officio* powers (duties) would anyway be grounded on art. 7, Dir. 93/13.

153 CJEU (Grand Chamber), 21 December 2016, Joined Cases C 154/15, C 307/15 and C 308/15, Gutiérrez Naranjo et al., para. 61.

Court has concluded having regard to the effects of invalidity as a type of non-bindingness of unfair terms. No apparent reasons exist not to extend the same reasoning to caducatory remedies identified by national legislation for providing effective and dissuasive protection to victims of unfair commercial practices.

The same move towards caducatory remedies has not occurred in the field of BtoB transactions. Why? The triad (effectiveness, proportionality and dissuasiveness) may shed some light on the comparative analysis below.

In abstract terms caducatory remedies may be used in the area of BtoB unfair practices under the national law of many EU Member States¹⁵⁴. In fact, this availability mainly relates to cases in which unfair practices generate unfair terms or vices of consent, being then subject to the same restrictions seen above with regard to partial nullity and voidability. Nor larger impact has been produced so far by specific provisions on nullity of agreements enabling an abuse of economic dependence in BtoB relations¹⁵⁵.

154 See RENDA, CAFAGGI, PELKMANS, 2014, p. 347.... table n. 20

155 See, e.g., art. 420-3, French Code Commerce, sanctioning BtoB prohibited practices, among which abuse of economic dependence stands: “**Est nul tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles L. 420-1, L. 420-2 et L. 420-2-1**”. Due to the definition of abuse of economic dependence and the harshness of burden of proof for the victim, the provision is seldom invoked (see RENDA, CAFAGGI, PELKMANS, 2014, p. 45 seq.). Italian legislation and case law also provide some interesting hints. See art. 9.3, Italian l. 192/98 on subcontracting: “**Il patto attraverso il quale si realizzi l’abuso di dipendenza economica è nullo.**” The provision has been seldom applied; recently it was in a case occurred in the automobile sector, by Trib. Turin, 21/11/2013, Soc. Autoriviera C. Soc. Fiat Group Automobiles, Foro it. 2014, 2, I, 610, in respect of both the invalidity of the distribution contract and the invalidity of the manufacturer’s unfair contract termination. With regard to the former, the judge has rejected the claim for invalidity since insufficiently based on a list of allegedly unfair terms not clearly showing the abuse of economic dependence; in respect of the latter, the judge has admitted that an unfair termination may not produce any legal effect as such whereas, as any other unfair practice occurring during contract execution, it may not make a contract invalid, nor can there be any ineffective termination from an invalid contract as alleged by the plaintiff. Conclusively, both invalidity claims are rejected as well as the claim for damages, being it conceived by the claimant as conditional upon contract invalidity. See also, Trib. Turin, 12.3.2010, Soc. Siai v. Soc. Fiat, Foro it., 2011, 1, I, 271, rejecting the claim launched in urgency proceedings for measures based on the ineffectiveness of an unfair contract termination because these measures would

The legal effects and economic consequences of caducatory remedies may account for the different approach emerging in the field of BtoB transactions¹⁵⁶. In most cases caducatory remedies are claimed in order to get restitution of invested resources. Under this respect BtoC and BtoB operate very differently. Indeed, whereas the main consumer's "investment" is represented by the paid (or due) price, in a BtoB relation a business may have easily invested non-monetary and immaterial resources, which makes restitution very difficult. Moreover, depending on the type of market and sector, it could be very hard for the aggrieved business to replace a given relation though controversial, whereas consumers do face opportunity costs but these are mostly related to alternative bargains that are often (though not always) steadily available in the market. A third aspect to be considered regards the major impact that unfair practices may generate along the supply chains when, e.g., a supplier manages to wrongly claim a certification for an uncertified component due to be irreversibly processed along the chain, or when a client unfairly imposes price changes during contract execution¹⁵⁷. For all these reasons, even more than in BtoC contracts, in BtoB ones major attention should go to remedies that are able to operate *ex ante* or play a corrective function immediately after the infringement, being compatible with contract preservation¹⁵⁸. Moving from this perspective, more sophisticated analyses have proposed a "transactional-based" approach, where the BtoC/BtoB divide is complemented with (and sometimes outdone by) the distinction between standardized and customized transactions:

have implied the cancellation of a concurrent contract already stipulated with a third party.

156 See CAFAGGI, 2013, p. 311, seq., distinguishing further between *standardized* and *customized transactions* as occurring in both cases of BtoB and BtoC contracts.

157 For a case in which the invalidity claim has been rejected by considering the impact otherwise generated on linked contracts along the chain, see the Italian judgment of Trib. Turin, 12.3.2010, described in the footnote above.

158 See, in the context of BtoB contract farming, CAFAGGI – IAMICELI, 2015, p. 135 seq.

indeed, not all BtoB relations display the same features in terms of specific investments, chain interdependence, cooperative strategy¹⁵⁹.

In the light of the above arguments, the application of the principle of effectiveness to the enforcement of BtoB unfair practices legislation should lead to favour injunctions and corrective remedies¹⁶⁰ over caducatory ones. One exception could be related to unfair termination, whose lack of legal effects would indeed enable contract preservation and increase the level of effectiveness of the aggrieved business's protection. Limitations to the availability of such remedy could be based on the principle of proportionality, since the deprivation of legal effect of a unilateral contract termination would represent a major interference in the area of business freedom. Indeed, principles may conflict and it is up to policy makers and courts to strike a balance with a view to the good functioning of the market and the protection of all fundamental rights therein involved.

By contrast, in the area of BtoC contracts, in which investments made by professionals are not normally lost but reusable in alternative transactions, caducatory remedies may provide an effective protection against unfair commercial practices, at least for all those practices (in fact many in the Directive's list) that can normally induce consumers to enter a contract they would have never entered¹⁶¹. In these circumstances the possibility to unwind

159 See CAFAGGI, 2013, p. 311, seq.

160 The expression "corrective remedy" is here intended in broad terms as also including monetary remedies, such as damages or restitution, enabling an adjustment of parties' interest within a persistent contractual relation.

161 See, e.g., from the Annex I to the 2005/29/EC Directive the following practices: 7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice. 12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product. 16. Claiming that products are able to facilitate winning in games of chance. 17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations. 24. Creating the impression that the consumer cannot leave the premises until a contract is formed. 30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

such a contract would neutralize the benefits envisaged by the professional through the unfair practice, therefore discouraging the infringement in the first place. Effectiveness and dissuasiveness would be both attained.

It cannot be denied that caducatory remedies, if massively used, could hamper market stability and generate diffuse uncertainty in respect of contractual commitments also in BtoC contexts. For this reason, in the perspective of the principle of proportionality, caducatory remedies could be limited in time (starting from the time in which unfairness becomes apparent) and/or subject to the consumer's ability to return the product in reasonably good conditions¹⁶². In other words, proportionality could be attained through a balanced combination of the caducatory remedy with restitutionary or compensating measures (e.g. compensating the professional for benefits materially received from a service contract). The principle of proportionality could also support a defense in favour of the professional, based on any measure he/she has taken to boost consumer awareness in the specific circumstances or any other element, including those related with the negotiation process, that would justify the consumer choice a part from (or regardless) the alleged unfair practice¹⁶³.

162 Compare, among the ones presented above, the UK approach with the Belgian one (where the court has a discretionary power). In both cases proportionality seems the inspiring principle.

163 See art. 6:193j(1)(2), Dutch Civil Code, : 1. When a right of action (legal claim) is filed (brought to court), or an application (petition) as meant by Article 3:305d, paragraph 1, lett. a, of Book 3 (of the Dutch Civil Code) pursuant to Articles 6:193b up to and including 6:193i, the burden of proof rests on the trader with regard to the material correctness (accuracy) and completeness of the information he has provided, if that seems to be appropriate, given the circumstances of the case and taken into account the legitimate interests of the trader and of each other party in the proceedings. 2. If the trader has acted tortuously (unlawfully) as meant by Article 6:193b, then he is liable for the damage caused as a result, *unless he proves that this was neither caused through his fault nor that he is accountable for it on another ground* (emphasis added).

5 CONCLUDING REMARKS

Unfair business practices hamper the growth of Single Market in both instances of practices directed to consumers and other businesses. The digital revolution, while generating unprecedented trade opportunities, is amplifying the magnitude of this hazard, sometimes blurring the boundaries between BtoC and BtoB transactions. Major changes gradually occurring in the legislation on digital transactions will, directly or indirectly, benefit all *market participants*, these being businesses or consumers (or *prosumers*, as sometimes defined looking at their increased capacity to engage in complex transactions within the digital markets). So far, EU law has provided a comprehensive set of substantive rules on unfair practices only in the field of BtoC relations, whereas adopting more focused regulatory solutions in the area of BtoB transactions.

A common challenge for policy makers, when addressing BtoC and BtoB unfair practices, regards enforcement. Under this respect the contribution of EU law in the field of consumer law has been remarkable. Progressively moving away from a steady consideration of the principle of national procedural autonomy, EU law has deeply changed national enforcement systems in the area of consumer protection as well as in other areas interested by EU fundamental rights. More than providing rules to be implemented in national legislation, the EU has relied on general principles, namely among others: effectiveness, proportionality, dissuasiveness. Almost systematically recalled in enforcement provisions of consumer-related directives, these three principles may be looked at as a triad characterized by complementary dynamics but also possible tensions¹⁶⁴. Although differences emerge depending on the type of protected rights and freedoms¹⁶⁵, their application is not confined within the boundaries of consumer law, being often part of national constitutional traditions and being expressly recalled by EU secondary law on BtoB relations, when existing.

164 See CAFAGGI - IAMICELI, 2017, p. ...

165 See CAFAGGI, 2017, p. ...

Moving from this perspective, the above analysis has compared some of the main aspects of national enforcement systems in the area of unfair business practices, mostly focusing on private enforcement and herein distinguishing between BtoC and BtoB regimes, these normally being two different pillars of market-related legislation.

Substantive national legislation and private regulation on BtoB unfair practices are on the wave and some spillover effects can be observed with regard to approaches clearly inherited from EU consumer law. A part from this, the design of national enforcement mechanisms operating in favor of business rights affected by unfair practices along the supply chain still shows extreme fragmentation and several weaknesses.

Some of the observed weaknesses should be addressed through the application of general principles of the triad, without necessarily expecting an equivalent outcome to the one that consumer law is producing through its continuous evolution both at EU and national level. So, for example, whereas the application of the principles of effectiveness and dissuasiveness may create a complementary space for caducatory remedies against unfair practices in the area of consumer law, as it has recently occurred in a few MSs, the same principles may better account for a focus on preventive and corrective measures in BtoB transactions, in order to prevent irreparable losses of specific investments and serious impacts on the coordination of supply chains. In different ways in the two contexts, the principle of proportionality may balance the need for discouraging the adoption of unfair practices with the principle of legal certainty of contractual commitments.

National enforcement systems and remedies are going under a process of profound transformation, in which, despite the national specificities or exactly because of them, general principles are due to play a major role. Within a multilevel system of rights' protection, expanding beyond national borders and crossing public and private domains, their interpretation and application pose a major challenge for which comparative analysis, inter-institutional and inter-professional dialogue are pivotal. Of course, for a better outcome, this dialogue shall not be confined within the boundaries

of the European Single Market; among other factors, the digital revolution suggests that the need for an effective protection of consumers' and businesses' rights is a global concern.

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