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Essays

Unfair Contract Terms Before the Italian Competition Authority (ICA)

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Abstract

The newly-introduced Art 37-*bis* of the Consumer Code provided the Italian Competition Authority (ICA) with new powers aimed at scrutinizing – *ex ante* or *ex post* – the unfairness of the terms included in standard contracts between traders and consumers. This paper analyses the legislative provision (as supplemented by secondary regulation) in view of the decisions adopted by the ICA over the past few years in order to shed light on how that administrative body has exercised its prerogatives.

I. Overview of the Powers of Administrative Review of Unfair Terms Granted to the Italian Competition Authority (Art 37-*bis* of the Consumer Code)

So-called 'conformation' of contract (and more generally of freedom of contract) by authorities[1] has found new expression in the wake of the adoption of Art 37-*bis* of the Consumer Code that – embracing a widespread attitude among legal scholars opposed to the setting up of *ad hoc* bodies[2] – tasks the Italian Competition Authority (ICA) with providing 'administrative protection against unfair terms'.

Art 5 of the 'Grow Italy' Decree (decreto legge 24 January 2012 no 1, converted into legge 24 March 2012 no 27), overturning the general decision made at the time of the transposition of Directive 93/13/EEC,[3] has introduced a novel form

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[1] About the function and peculiarities of 'conformative' influences on contracts descending from 'independent' regulation of markets, see M. Imbrenda, 'Il ruolo delle autorità indipendenti nella integrazione e conformazione del contratto', in E. Caterini et eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), I, 922; V. Ricciuto, 'L'integrazione dei contratti di impresa. Dilatazione o estinzione della fattispecie?' *Rivista di diritto dell'impresa*, II, 1903 (2017). For further, M. Zarro, *Poteri indipendenti e rapporti civili. Italia, Germania e diritto europeo* (Napoli: Edizioni Scientifiche Italiane, 2015); M. Angelone, *Autorità indipendenti e eteroregolamentazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 2012), 103.

[2] E. Minervini, *Tutela del consumatore e clausole vessatorie* (Napoli: Edizioni Scientifiche Italiane, 1999), 196 (and further bibliographical references therein); V. Roppo and G. Napolitano, 'Clausole abusive' *Enciclopedia giuridica* (Roma: Treccani, 1994), Agg, VI, 12.

[3] At the time it was decided to renounce a 'mixed' system to the sole benefit of the judicial

of administrative review, both 'advisory before the fact' (*ex ante*) and 'prescriptive after the fact' (*ex post*), aimed at establishing whether terms contained in standard form contracts entered into between traders and consumers are unfair within the meaning of Arts 1341 and 1342 of the Civil Code.

The amendments to the Code have given rise to significant effects at the systemic level, including the superseding of the 'monopoly' enjoyed by the judiciary in tackling unfair terms and associated corollaries. 'Decentralised' judicial protection and legal action before the courts (be it 'individual' or 'collective') under Arts 36 and 37 of the Consumer Code is now flanked by 'centralised' protection afforded by an independent body, thereby contributing to building an 'integrated system of protection'[4] that synergistically combines both 'private enforcement' and 'public enforcement'.[5] Access to differentiated remedies and the possibility of a 'multitasking'[6] approach further translates into an overall improvement in consumer protection, which is elevated to a primary objective of the ever more 'consumer-oriented' institutional mission of the ICA.[7]

Finally, as background to the ICS reforms just described, it is important to note that these reforms reflect two differences from the traditional judicial

protection of consumers, so much so that G. Calvi, 'Art 1469-*sexies*', in E. Cesaro ed, *Clausole vessatorie e contratto del consumatore* (Padova: CEDAM, 1st ed, 1996), 683, had defined as 'maimed' the original discipline which 'undoubtedly represent(ed) a disappointment for the interpreter' (E. Minervini, *Tutela del consumatore e clausole vessatorie* n 2 above, 199). Indeed, the cited directive merely required the adoption of 'adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (Art 7, para 1), without opting for judicial or administrative review (Art 7, para 2) (V. Rizzo, *Le «clausole abusive» nell'esperienza tedesca, francese, italiana e nella prospettiva comunitaria* (Napoli: Edizioni Scientifiche Italiane, 1994), 626; C.M. Bianca, 'Le tecniche di controllo delle clausole vessatorie', in Id and G. Alpa eds, *Le clausole abusive nei contratti stipulati con i consumatori* (Padova: CEDAM, 1996), 359 and 365; A. Orestano, 'I contratti con i consumatori e le clausole abusive nella direttiva comunitaria: prime note' *Rivista critica di diritto privato*, 502 (1992)), thus allowing Member States to 'adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer' (see Art 8 and, with the same wording, the 12th *considerandum*).

[4] E. Battelli, 'L'intervento dell'Autorità *Antitrust* contro le clausole vessatorie e le prospettive di un sistema integrato di protezione dei consumatori' *Europa e diritto privato*, 207 but especially 258 and 266 (2014).

[5] V. Lopilato, 'Tutela pubblica e privata della concorrenza', in G. Pellegrino and A. Sterpa eds, *Giustizia amministrativa e crisi economica. Serve ancora un giudice sul potere?* (Roma: Carocci, 2014), 159; P. Cassinis, '*Antitrust* tra Autorità e giudici: aspetti problematici ed innovativi', in E.A. Raffaelli ed, *Antitrust between EC Law and National Law. Antitrust fra diritto nazionale e diritto comunitario* (Bruxelles-Milano: Bruylant-Giuffré, 2009), 263; G. Bruzzone and M. Boccaccio, 'Il rapporto tra tutela della concorrenza e tutela dei consumatori nel contesto europeo: una prospettiva economica', available at https://tinyurl.com/yd4sbe7a (last visited 30 June 2018).

[6] M. Cerioni, *Diritti dei consumatori e degli utenti* (Napoli: Editoriale Scientifica, 2014), 367.

[7] V. Minervini, 'Autorità garante della concorrenza e del mercato quale autorità di tutela del consumatore: verso una nuova forma di regolazione dei mercati' *Rivista di diritto commerciale*, I, 1149, 1152 and 1173 (2010).

authority over contracts. First, the ICS reforms reflect the so-called 'administrativisation of contract' implying

> 'the progressive extension of the power to govern private initiative (…) from the original private parties (who had a complete say in the matter inasmuch as they enjoyed total 'freedom of contract') to independent authorities vested with supervisory and regulatory functions'.[8]

Second, the reforms reflect the so-called 'dejudicialisation' of the protection of the weaker contracting party,[9] now a matter that falls within the realm of remedies that are removed from the sphere of the courts[10] or that are in any event alternatives to strictly judicial ones.[11]

Having regard to the above principles, this work will analyse the relevant legislative provisions taking account of the functioning of the ICA during the last five year period with a view – within the limits of *interna corporis* – to shedding light on how that body has exercised its powers in connection with unfair terms thus far.

II. Sphere of Application of *Ex Post* Review and 'Ordinary' Proceedings

According to official statistics,[12] since the new provisions entered into force, thirty-nine decisions were issued by the ICA following 'ordinary' proceedings (fourteen in 2013, fifteen in 2014, zero in 2015, three in 2016 and seven in 2017). Crucial for the implementation of the legislative provisions and the exercise of the corresponding functions was the issuance – pursuant to Art 37-*bis*, para 5, of the Consumer Code – of the (single) procedural regulation (hereinafter the Procedural Regulation), approved in September 2012 and amended most recently by Authority resolution April 2015 no 25411 ('Regulation on Procedures for Investigating Misleading and Comparative Advertising, Unfair Commercial Practices, Violation of Consumers' Rights in Contracts, Breaches of the Ban on Discrimination and Unfair Terms').

[8] E. Battelli, 'L'intervento dell'Autorità *Antitrust* contro le clausole vessatorie' n 4 above, 254; C. Camardi, 'La protezione dei consumatori tra diritto civile e regolazione del mercato. A proposito dei recenti interventi sul Codice del consumo' 6 *juscivile.it*, 310 (2013).

[9] See, *amplius*, M. Angelone, 'La «degiurisdizionalizzazione» della tutela del consumatore' *Rassegna di diritto civile*, 723 (2016).

[10] S. Lucattini, *Modelli di giustizia per i mercati* (Torino: Giappichelli, 2013), 6.

[11] Consider only the spreading of consumer ADR and ODR. Relating to the latter, see recently E. Minervini, 'I sistemi di ODR', in E. Minervini ed, *Le online dispute resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), 7; and A. Fachechi, *La giustizia alternativa nel commercio elettronico. Profili civilistici delle* ODR (Napoli: Edizioni Scientifiche Italiane, 2016), passim.

[12] Available at https://tinyurl.com/ybsp9h6n (last visited 30 June 2018).

In these years the Authority adopted a 'sectoral approach',[13] as it mainly dealt with analysing the standard contracts used by traders in the particular markets that were considered from time to time. (Specifically, 'attention' was focused on short-term car hire; real estate agents; the supply of digital content on-line; private security services; the supply and sale of elevators; and fixed and mobile telephony services).

It is worth clarifying immediately that as regards its objective sphere of application, the ICA's review may cover terms contained in 'B2C' contracts concluded by accepting general conditions of contract or by signing forms, models or templates within the meaning of Arts 1341 and 1342 of the Civil Code.[14] Therefore, the sphere of application is narrower than that involved when an individual seeks judicial protection because in that latter case the protection extends to any contract between a trader and a consumer, including those relating to a single business deal with a single contracting party.[15] The dividing line drawn by the legislation would seem to stem mainly from a desire not to 'overburden' the Authority with a painstaking, widespread and indiscriminate review. Rather, the review would be confined to the unfair terms appearing in 'mass contracts', which undoubtedly would have greater ramifications than terms intended to be used just once both because they could be repeated and disseminated more widely and because they are obviously not negotiated but drawn up unilaterally by the 'stronger' contracting party.[16]

This leads to the first point of contact[17] with the injunctions under Art 37 of the Consumer Code,[18] strengthening the conviction – very widespread among

[13] In these words are expressed both the 'Annual Report 2013', available at www.agcm.it, 209, and the 'Annual Report 2014', ibid 235.

[14] A. Barenghi, 'Art 37 *bis*', in V. Cuffaro ed, *Codice del consumo* (Milano: Giuffrè, 4th ed, 2015), 326. In particular, E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' *Le nuove leggi civili commentate*, 568 (2012), cleverly notices how 'more than a doubt raises the notion, rather mysterious, of models' unknown to the lexicon of the recalled articles.

[15] V. Roppo, 'Il contratto', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2001), 912; C.M. Bianca, *Diritto civile*, III, *Il contratto* (Milano: Giuffrè, 2nd ed, 2000), 375.

[16] These are clauses that become part of current-use contracts and also escape to the notary checks when the agreement is made. In relation to the guarantee function performed by the notary who is called to evaluate the unfairness and the iniquity of the agreements, see G. Perlingieri, 'Funzione notarile e clausole vessatorie. A margine dell'Art 28 legge 16 febbraio 1913 no 89' *Rassegna di diritto civile*, 842 (2006); and P. Perlingieri, 'Funzione notarile ed efficienza dei mercati' *Notariato*, 627 (2011).

[17] A. Mirone, 'Verso la despecializzazione dell'Autorità *antitrust*. Prime riflessioni sul controllo delle clausole vessatorie ai sensi dell'Art 37-*bis* Cod. Cons.' *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 306 (2012).

[18] That the widely consolidated opinion includes among the 'general-preventive' review mechanisms: F. Rizzo, 'L'azione inibitoria', in G. Recinto et al eds, *Diritti e tutele dei consumatori* (Napoli: Edizioni Scientifiche Italiane, 2014), 555; E. Capobianco, 'Art 37', in Id and G. Perlingieri eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2009), 208; E. Guerinoni, *I contratti del consumatore. Principi e regole*

initial commentators[19] – of the 'supplementary' (and not just 'additional') value of Art 37-*bis* of the Consumer Code and seeing the new legislative provisions as an opportunity to 'make good' the injunctions' practical shortcomings, which had become apparent.[20]

According to the primary legislation as supplemented by secondary regulation (Art 23, para 2, of the Procedural Regulation), proceedings before the ICA can commence with an application (or 'complaint', to be more precise) of a party or – precisely to make public enforcement more incisive[21] – or with a decision of the ICA of its own motion.

As regards the first route, the Procedural Regulation gives a rather elastic definition of those who have standing, going no further than using the hendiadys expression that ICA action may be triggered by 'any person or organisation having an interest' through a paper or electronic ('web form' or 'certified e-mail') communication.

Leaving aside proceedings initiated by the ICA of its own motion, action has mainly been taken at the behest of consumer associations who have often voiced the concerns or adopted as their own the complaints made by single consumers. (On the other hand, at present, there are no actions triggered by single traders or trade associations).

By contrast, there is no record of any 'complaint to the Authority' having been submitted by Chambers of Commerce (or their regional or national bodies), probably because any such step should – in accordance with Art 23, para 3, of the Procedural Regulation – be taken during the exercise of functions[22]

(Torino: Giappichelli, 2011), 196; E. Minervini, 'Contratti dei consumatori e tutela collettiva nel codice del consumo' *Contratto e impresa*, 635 (2006); S. Patti, 'Le condizioni generali di contratto e i contratti del consumatore', in E. Gabrielli ed, *I contratti in generale* (Torino: UTET, 2nd ed, 2006), 384; F. Tommaseo, 'Art 1469-*sexies*', in G. Alpa and S. Patti eds, *Le clausole vessatorie nei contratti con i consumatori*, in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2003), 1159.

[19] E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 564; L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' *Obbligazioni e contratti*, 492 (2012); E. Battelli, 'La tutela amministrativa contro le clausole vessatorie' *Consumerism 2012. Quinto rapporto annuale*, 61, available at https://tinyurl.com/y8qzju6c (last visited 30 June 2018); V. Pandolfini, 'La tutela amministrativa dei consumatori contro le clausole vessatorie' *Corriere giuridico*, 48 (2012).

[20] During an arc of about twenty years, the injunctions did not produce the expected results (A. Bellelli, 'L'azione inibitoria contro le clausole vessatorie dopo venti anni', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo*, I, n 1 above, 97; E. Minervini, 'Azione inibitoria e contratti dei consumatori' *Rassegna di diritto civile*, 618 (2014)), becoming a 'blunt weapon' on which many factors had a negative impact (T. Rumi, 'Il controllo amministrativo delle clausole vessatorie' *Contratti*, 644 (2012)). However, see Court of Justice of the European Union, Case 472/10 *Nfh* v *Invitel*, Judgment of 26 April 2012, available at www.eur-lex.europa.eu, with commentary by A. Fachechi, 'Azione inibitoria collettiva ed efficacia «*ultra partes*» del giudizio di vessatorietà' *Giusto processo civile*, 785 (2014), which claimed the '*ultra partes*' efficacy of injunctions.

[21] L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' n 19 above, 495.

[22] See on them A. Bucelli, 'Contratti del consumatore e clausole vessatorie. Riflessioni da

relating to either 'the drawing up of standard contracts between enterprises, trade associations and associations protecting the interests of consumers and users' or the 'promotion of checks for the existence of unfair terms inserted into contracts' pursuant to the former diction and contents of Art 2, para 2, letter *h)* and letter *i)*, of legge 29 December 1993 no 580,[23] which have not produced any uniform or significant volumes. This would seem to mirror the basic failure witnessed in relation to the similar power of Chambers of Commerce to seek injunctions pursuant to Art 37 of the Consumer Code[24] that remained unexercised.[25]

III. The 'Pre-Investigative' Stage and Cases of (Early) Closure of Proceedings. The Persuasive Effects of 'Warning Letters' and the Chance for Traders to Have the Case Against Them Dropped by Timely Removing or Amending the Contractual Terms Suspected of Being Unfair by the Italian Competition Authority. Inapplicability of the Rules on 'Commitments' Under Art 14-*ter* of Legge 1990 no 287

Mirroring the approach adopted by the previous rules, the Procedural Regulation makes the taking of administrative action and the opening of an investigation conditional on the ICA first establishing that the factual and legal requirements for considering the reported term as potentially unfair are fulfilled.

This first step filter ('pre-investigative') clearly aims to limit the number of

un'esperienza sul campo', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo*, I, n 1 above, 179; E. Battelli, 'Il controllo "amministrativo" delle clausole inique e la predisposizione di contratti-tipo', in Id, *I contratti-tipo e i pareri sulle clausole inique delle Camere di Commercio*, I, *Settori commercio e turismo* (Roma: Calderini, 2010), 30 and 34; G.F. Cartei and S. Faro, 'Consumatore e utente', in M.P. Chiti and G. Greco eds, *Trattato di diritto amministrativo europeo. Parte speciale* (Milano: Giuffrè, 2nd ed, 2007), II, 952; D. Morana, 'Camera di commercio, industria, artigianato e agricoltura' *Enciclopedia del diritto* (Milano: Giuffrè, 2002), Agg, VI, 216; E. Graziuso, *La tutela dei consumatori contro le clausole abusive. Mezzi rituali ed irrituali* (Milano: Giuffrè, 2002), 112; S. Antonini, 'Le Camere di commercio, il controllo delle clausole «vessatorie» e le clausole «inique» *ex* l. 580/93', in U. Ruffolo ed, *Clausole «vessatorie» e «abusive». Gli artt. 1469*-bis *ss. c.c. e i contratti col consumatore* (Milano: Giuffrè, 1997), 149; G. Alpa, 'Il controllo amministrativo delle clausole abusive', in Id, *Investimento finanziario e contratti dei consumatori. Il controllo delle clausole abusive* (Milano: Giuffrè, 1995), 15.

[23] The article was repealed and replaced by the decreto legge 25 November 2016 no 219, concerning the 'Reorganization of Chambers of commerce, industry, crafts and agriculture'.

[24] In this regard, see E. Battelli, 'L'inibitoria delle Camere di Commercio' *Giurisprudenza italiana*, 2626 (2007); and F. Tommaseo, 'Art 1469-*sexies*' n 18 above, 118.

[25] Probably for this reason, this prerogative has recently been eliminated by Art 5 of the aforementioned decreto legge 25 November 2016 no 219. To fill this gap, it should be granted to the ICA the standing to bring an injunction before the ordinary Court in order to obtain a '*erga omnes*' removal of the unfair term (by analogy with the power already provided by art 21-*bis*, legge 10 October 1990 no 287).

cases investigated so as not to swamp the Authority with applications, complaints and reports that are spurious or plainly groundless.[26] Indeed, should no *prima facie* unfairness be detected in the suspected term or in the absence of facts warranting a further inquiry, the proceedings must be dropped for inapplicability of Arts 33 of the Consumer Code or manifest groundlessness (Arts 5, para 1, letter *b)*, and 5, para 1, letter *c)*, of the Procedural Regulation). From that standpoint, Art 4, para 4 and Art 5, para 1, letter *a)*, of the Procedural Regulation take on a certain importance in that they require the request to take action to be adequately detailed and to contain in particular the minimum information prescribed by the rules, specifically, the details required to identify the complainant, the offending trader and the terms alleged to be unfair. Without that information, the request cannot be acted on, although the Authority has the option to proceed on its own motion to investigate the matter further and the complainant has the option to properly resubmit the request.

The pre-investigative phase is a crucial stage of ordinary proceedings also because the combined provisions of Art 5, para 1, letter *d)*, and Art 23, para 1 and para 4, of the Procedural Regulation grant the Authority – except for very serious (so-called 'hardcore') violations – the option of informing the trader in writing of the unfairness of a given contractual term where well founded reasons exist. The trader may well then decide, in light of the undeniable persuasive force ('moral suasion')[27] of a so-called 'warning letter', to have the case against him dropped without further ado by diligently removing or amending the terms 'pointed to' by the ICA.[28]

In the absence of a specific provision, it would seem that once an investigation has actually commenced a trader cannot 'voluntarily' take corrective action and seek to (avail itself of a '*commodus discessus*' and) have the case against it

[26] M. Libertini, 'Il ruolo necessariamente complementare di «*private*» e «*public enforcement*» in materia *antitrust*', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: il Mulino, 2009), 172.

[27] As regards the 'moral suasion' carried out by independent authorities, see S. Morettini, 'Il *soft law* nelle Autorità indipendenti: procedure oscure e assenza di garanzie?', 5, available at https://tinyurl.com/yc68zdvv (last visited 30 June 2018); with particular reference to ICA, see C. Alvisi, 'La «*Moral suasion*» dell'AGCM nel procedimento sulle pratiche commerciali sleali' *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, II, 837 (2011); and, with particular reference to the Italian Companies and Stock Exchange Commission (CONSOB), see N. Pecchioli, 'Consob e poteri "commendatori" di conformazione e unificazione del mercato' *Diritto processuale amministrativo*, 799 (2017).

[28] During 2013, no 3 actions of 'moral suasion' were successfully completed (see the 'Annual Report 2013' n 13 above, 209), while no 8 were those of 2014 (see the 'Annual Report 2014' n 13 above, 236). Some of these have been reported to consumers on the ICA official website (https://tinyurl.com/y7xdklg6 (last visited 30 June 2018)). In a single case, the investigation was preceded by a 'moral suasion' activity failed because the trader (informed of the probable unfairness of the term pursuant to Art 21, para 4, of the Procedural Regulation) did not adhere spontaneously to the censures formalized in the 'warning letter' (decision 26 June 2013 no 24421 (CV32), available at www.agcm.it, § 8).

dropped.[29] This is confirmed by the fact that in a number of cases in which the trader decided to take remedial steps in relation to terms examined by the Authority, the latter still went ahead with its administrative action[30] and extended its scrutiny to the amended terms (again, after warning the trader),[31] with the praiseworthy intent of providing clarity and certainty to the implicated trader regarding the establishment/continuance of contractual relations with consumers.[32] In practice, the ICA has shown that it is willing, without beginning new and independent ordinary proceedings, to extend already pending proceedings, which, to the extent that the Authority assesses proposals to amend terms not yet used, end up taking the form of a sort of 'ancillary application for an advance ruling'.[33] In that regard the ICA has clarified that the trader's new terms are neither comparable nor equivalent to 'commitments' under Art 14-*ter* of legge 10 October 1990 no 287, which traders are precluded from offering. 'Commitments' are impermissible because the legge is silent on the matter.[34]

The various outcomes of pre-investigative action pursuant to Art 5, para 1, letter *e)* and letter *f)*, of the Procedural Regulation (dropping of the case because the breach is clearly unlikely to materially distort the economic behaviour of the average consumer, or a finding that there is no case to answer because the conduct is an isolated example or not a priority for the Authority due to a need to ensure that administrative action is streamlined, effective and economic) would not seem to strictly pass the 'test of compatibility' laid down in the Procedural Regulation (see Art 23, para 1) since those outcomes hinge on a '*de minimis* rule' that is more suited to 'dynamic' contexts like unfair commercial practices and misleading advertising than to a 'static' context like that of unfair terms. Nonetheless, the aggregate data on action taken by the ICA over the five year period gives one reason to suppose that there has been ample recourse to

[29] See the decision 27 March 2013 no 24288 (CV28), available at www.agcm.it, § 30, in which the ICA declined to drop the case because 'the removal of the profiles of unfairness of the terms in the subject matter of the proceeding was only partially completed'; and because 'the modification of the terms was made after the notice of commencement of the investigation'.

[30] Similarly, as shown in decision 27 March 2013 no 24289 (CV29), available at www.agcm.it, § 26, the continuation of the proceedings is required even when the elimination of the contested contract terms follows only after the notice of commencement of the investigation.

[31] Decision 9 August 2017 no 26729 (CV157), available at www.agcm.it; decisions 19 December 2014 nos 25244 (CV114), 25243 (CV113) and 25242 (CV89) ibid; decision 1 August 2014 no 25052 (CV92), ibid; decision 25 June 2014 no 24997 (CV61), ibid; decision 9 October 2013 no 24546 (CV49), ibid; decision 11 June 2013 no 24401 (CV34), ibid; decision 11 June 2013 no 24399 (CV27), ibid; decision 27 March 2013 no 24288 (CV28).

[32] P. Cassinis, 'The Administrative protection against unfair contract terms in Italy: first-year-enforcement activity' *Italian Antitrust Review*, 99 (2014).

[33] In this sense, are emblematic the decisions 24 February 2016 no 25881 (CV140); of 5 June 2014 no 24958 (CV100); and 11 June 2013 no 24400 (CV33), all available at www.agcm.it, in which the ICA considered unfair the terms both in their original wording and as proposed by the trader and intended to be used after the definition of the ordinary proceedings in progress.

[34] Decision 19 December 2014 no 25242 (CV89), § 113. Further, Art 9 of the Procedural Regulation is not applicable because it is not cited in Art 23, para 1, of the Procedural Regulation.

these further 'escape routes' so as to enable the Authority to more efficiently manage the numerous complaints received and to focus on investigating solely high-impact distortions, thereby pursuing a policy designed to set priorities – even if only temporarily – based on the adverse effect on competition. Moreover, such an approach is in line with the belief that the Authority's action to combat unfair terms must be informed not by the individual interests of (single) consumers but by the public interest in an efficient and transparent functioning of the market.[35]

Finally, in setting out the how long each stage of the proceedings is to last, the Procedural Regulation clarifies that within one hundred and eight days after receipt of the complaint the Authority is obliged to embark on an investigation with the aim of carrying out all of the necessary checks and obtaining any and all elements of use with a view to making a final decision (Art 6, para 1, and Art 23, para 1, of the Procedural Regulation) and to notify the parties and the complainant of the commencement of proceedings (Art 6, para 2, of the Procedural Regulation). Should no steps be taken in those one hundred and eight days, the pre-investigative stage is deemed to be closed with no case to answer.[36] It should be noted that the entire administrative procedure must be completed within a maximum of hundred and fifty days (or two hundred and ten days if the trader is resident or based abroad) running from the date of the aforementioned notice of commencement of the investigation (Art 23, para 5, of the Procedural Regulation).[37]

IV. 'Mandatory' Consultation with National Trade Associations and 'Optional' Consultation with Regulatory or Supervisory Authorities

Art 37-*bis*, para 1, of the Consumer Code provides that prior to making its final decision the ICA must consult with the consumer associations (enrolled in the register maintained pursuant to Art 137 of the Consumer Code), as well as

[35] S. Mezzacapo, 'Illiceità delle clausole "abusive" (tra presidi di "giustizia negoziale" e tutela amministrativa del "mercato")', in F. Capriglione ed, *I contratti dei risparmiatori* (Milano: Giuffrè, 2013), 145, 147 and 152. The opinion resumes the more general conviction that consider the public enforcement granted by the ICA 'as an intervention aimed at protecting the general interests to the correctness of the competition and not an instrument aimed at solving the interindividual conflicts' (G. Guizzi, 'Il divieto delle pratiche commerciali scorrette tra tutela del consumatore, tutela del concorrente e tutela del mercato: nuove prospettive (con qualche inquietudine) nella disciplina della concorrenza sleale' *Rivista di diritto commerciale*, I, 1132 (2010)).

[36] In Art 5, para 2, the Procedural Regulation adds that the ICA retains the power to renew the proceeding and to carry out an in-depth investigation based on occurring facts or on a different assessment of the priorities for intervention.

[37] Otherwise, it is possible to take legal action against the so-called 'silence as refusal', as indirectly confirms Tribunale Amministrativo Regionale-Lazio, 23 June 2015 no 8572, available at www.giustizia-amministrativa.it.

the relevant national trade associations.[38]

The original provisions of the Decree Law introducing Art 37-*bis*, para 1, made the finding of unfairness conditional on 'prior agreement with the trade associations', thereby granting them not merely an advisory role but a veritable power of co-decision. When converting the Decree into a Law, the Parliament was afraid of limiting the Authority's powers and undermining the utility of its remedies. Specifically, it was concerned that involving trade associations at the decision-making stage would lead to the undue influence of corporativist logic where 'the very association that the trader belonged to would be called upon to give a technical assessment reproaching the term'.[39]

As regards how mandatory consultation actually takes place, the Procedural Regulation provides that within thirty days after the commencement of the investigation, the case officer must publish a notice on a dedicated section of the Authority's website setting out the term and stating the economic sector that the investigation concerns, as well as any information of use for the purposes of the consultation itself. Within thirty days after the said notice any persons with standing – subject to first furnishing details of their status and interest in the matter – may submit written comments to the ICA through a dedicated certified e-mail account (Art 23, para 6, of the Procedural Regulation).

In this regard one can only appreciate the constant and systematic participation of the consumer associations that (unlike the trade associations)[40] have always actively participated in online mandatory consultations through submitting written observations.[41] For its part, the ICA has given due consideration and great weight, when stating the reasons for its decisions, to the input from the associations admitted to the consultation process.

By contrast, pursuant to Art 37-*bis*, para 5, of the Consumer Code, consultation with the regulatory or supervisory authorities for the sector that the trader involved belongs to (for example, the Bank of Italy, the Italian Companies and Stock Exchange Commission - CONSOB, the Institute for the Supervision of Insurance - IVASS, the Italian Regulatory Authority for Electricity Gas and Water - AEEGSI, and the Communications Authority) is merely optional

[38] It should be noted that in its original wording Art 37-*bis*, para 1, of the Consumer Code provided that ICA must consult also with the Chambers of Commerce (or their unions) that were 'affected by the terms that the proceedings concern due to their specific experience gained in the sector' (Art 23, para 6, of the Procedural Regulation) or in light of the functions that they could exercise pursuant to the former Art 2 of legge 29 Dicembre 1993 no 580. In fact, Art 5 of the aforementioned decreto legge 25 Novembre 2016 no 219 deleted all the references to Chambers of Commerce (and their unions) originally contained in Art 37-*bis* of the Consumer Code. However, the list of completed proceedings does not show any trace of comments originating from Chambers of Commerce (or their confederations).

[39] M. Mazzeo and S. Branda, 'Una nuova tutela' *Obbligazioni e contratti*, 388 (2012).

[40] Only the decision 30 November 2016 no 26255 (CV144), available at www.agcm.it, §§ 7 and 25, reveals the participation of (three) trade associations.

[41] P. Cassinis, 'The Administrative protection' n 32 above, 99.

inasmuch as they can be invited to express an opinion (to be submitted within thirty days after the request) on the subject matter of the proceedings (Art 23, para 7, of the Procedural Regulation).

Consultations of this type have not yet occurred, but on reflection they should be made mandatory and – until such time as there is a welcome change in the law to that effect – they should be encouraged to the utmost. Such consultations could work to coordinate the new power of enforcement covering unfair terms with, firstly, analogous powers (unless one considers them to have been impliedly repealed) vested in other authorities[42] and, secondly, (and more generally), with the so-called 'conformative' powers that entitle independent sectoral authorities to play a role (*ex ante*) in shaping negotiations[43] and, if need be, mandating the removal or substitution of any unfair contractual content.

V. The Possible Outcomes to 'Ordinary' Proceedings. Publication of the Final Decision and 'Reputational' Consequences of a Finding that a Trader's Terms Are Unfair in the Absence of an Injunction or Declaration of Nullity

Upon completion of the investigation and receipt of the parties' final briefs, the Authority's Board – which makes the final decision, consistent with an organisational model that seeks to ensure an 'internal' separation[44] between

[42] A. Mirone, 'Verso la despecializzazione dell'Autorità *antitrust*. Prime riflessioni sul controllo delle clausole vessatorie ai sensi dell'Art 37-*bis* Cod Cons' *AIDA*, 297 and 320 (2012). With specific regard to the Institute for the Supervision of Insurance (IVASS), the Bank of Italy and the Italian Companies and Stock Exchange Commission (CONSOB), see G. Alpa, 'Il controllo amministrativo delle clausole abusive' *Economia e diritto del terziario*, 16, 19 and 21 (1995). On the Italian Regulatory Authority for Electricity Gas and Water, see Id, 'L'Autorità per i servizi pubblici e i consumatori', in Id et al, *Attività regolatoria e autorità indipendenti. L'Autorità per l'energia elettrica ed il gas (Atti del Convegno di studi tenuto a Roma il 2-3 febbraio 1996)* (Milano: Giuffrè, 1996), 29. More generally, on the issue, F. Macario, 'Autorità indipendenti, regolazione del mercato e controllo di vessatorietà delle condizioni contrattuali', in G. Gitti ed, *Il contratto e le Autorità indipendenti. La metamorfosi dell'autonomia privata* (Bologna: il Mulino, 2006), 191.

[43] See n 1 above.

[44] Indeed, merely internal branches of the same administrative body are not sufficient to ensure the impartiality of the deciding body (according to the standard set in Art 6 of the European Convention on Human Rights), if this amounts to the consecutive exercise of investigative and judicial functions within one body, acting under the authority and supervision of a single chairman (as ruled by the Eur. Court of H.R., *Grande Stevens* v *Italia,* Judgment of 4 March 2014, no 18640, available at www.hudoc.echr.coe.it, with commentary by M. Zarro, 'Il procedimento dinnanzi alla Consob può definirsi «avente carattere penale»? Il procedimento dinnanzi alla Consob è conforme all'Art 6 della Convenzione europea dei diritti dell'Uomo? Il fatto che per una medesima condotta si sia sottoposti ad un duplice procedimento sia penale sia amministrativo non è violativo del principio del *ne bis in idem*?' *Foro napoletano*, 298 (2015); with commentary by M. Manetti, 'Il paradosso della Corte EDU, che promuove la Consob (benché non sia imparziale) e blocca il giudice penale nel perseguimento dei reati di *market abuse*' *Giurisprudenza costituzionale*, 2919 (2014); with commentary by V. Zagrebelsky, 'Le sanzioni Consob, l'equo processo e il *ne bis in idem* nella Cedu' *Giurisprudenza italiana*,

investigative and adjudicatory functions in proceedings[45] – decides whether the investigated term is unfair or fair.

Leaving aside the second hypothesis (overlooked by the *littera legis*), the law provides as the sole and necessary[46] consequence that the decision finding a term to be unfair be communicated to the parties and any intervenors and be published (including just an abstract) within twenty days after its adoption in the current official bulletin on the Authority's website and on the website of the trader that used the term, at the latter's expense. The extreme flexibility and total adaptability of the information requirements to the actual circumstances of a case,[47] enables the ICA both to calibrate the duration of the notice obligation and to publicise its decisions (should certain elements of the facts or law so dictate) by any other means deemed fit and appropriate to fully inform consumers, including through press releases, if helpful in ensuring the widest knowledge of the Authority's action (Arts 17, para 3 and 23, para 8, of the

1196 (2014); with commentary by G. Abbadessa, 'Il caso Fiat-Ifil alla Corte europea dei diritti dell'uomo. Nozione di «pena» e contenuti del principio «*ne bis in idem*»' *Giurisprudenza commerciale*, II, 543 (2014)). Less severe is the opinion expressed by Consiglio di Stato 26 March 2015 no 1596, with commentary by E. Desana, 'Illegittimità del procedimento CONSOB: cronaca di una morte annunciata?' *Giurisprudenza italiana*, 1434 (2015); with commentary by B. Raganelli, 'Sanzioni Consob e tutela del contraddittorio procedimentale' *Giornale di diritto amministrativo*, 512 (2015): 'A real subjective separation between the investigative function and the adjudicatory function (as outlined by the EDU Court) (…) is not practicable *de jure condito* in our legal system. It would require a radical reorganization of the Italian system of Independent Authorities through the creation, for example, of bodies with only investigating functions and the assignment to courts of the power to impose sanctions on the model of the Anglo-American system. However, these alternative solutions, though viable (and, in some cases, perhaps desirable) *de jure condendo*, not only do not correspond to the existing law, but are not imposed or compelled by the supranational obligations deriving from the accesion to the ECHR' (my translation).

[45] It is thus necessary to ensure the neutrality of the decision-making body. See on this M. Clarich, 'Garanzia del contraddittorio nel procedimento amministrativo' *Diritto amministrativo*, 87 (2004); E. Freni, 'Le sanzioni dell'Autorità garante della concorrenza e del mercato (AGCM)', in M. Fratini ed, *Le sanzioni delle autorità amministrative indipendenti* (Padova: CEDAM, 2011), 843. However, according to most, the sectoral rules regarding the sanction proceedings carried out by the Italian Authorities (and by the ICA, in particular) still appear far from the European guarantees, which undermines the accuracy and impartiality of such bodies: see F. Tirio, *Le autorità indipendenti nel sistema misto di* enforcement *della regolazione* (Torino: Giappichelli, 2012), 130; F. Cintioli, 'Giusto processo, Cedu e sanzioni «*antitrust*»' *Diritto processuale amministrativo*, 519 and 523 (2015); M. Allena, *Art 6 CEDU. Procedimento e processo amministrativo* (Napoli: Jovene, 2012), 248, 259 and 324; A. Orecchio, 'Il sindacato di merito sulle sanzioni delle autorità amministrative indipendenti. Il caso dell'*antitrust*' *federalismi.it*, 2, 19 (2016).

[46] According to decision no 25052 of 1 August 2014 (CV92) n 31 above, § 41, the publication is an unavoidable outcome once the investigation has been started. On this basis, was refused the proposal of the trader aimed – in order to avoid a significant damage to its reputation – at replace the publication of the abstract of the decision by sending to all its customers the new contractual form (§ 34). Likewise decision no 24546 of 9 October 2013 (CV49), n 31 above, § 39; decision no 24542 of 9 October 2013 (CV45), available at www.agcm.it, § 38; and decision no 24399 of 11 June 2013 (CV27) n 31 above, § 48.

[47] P. Cassinis, 'The Administrative protection' n 32 above, 96.

Procedural Regulation).[48] For example, learning of the 'unavailability' of the trader's website, an order was issued for publication for a day of an abstract of the decision in a provincial circulation newspaper;[49] on another occasion, publication was ordered in the local edition of a national circulation newspaper.[50]

What immediately stands out is that the ICA has no power to order the removal of unfair terms.[51] Since the ICA has no power to issue injunctions,[52] it does not even have interlocutory power equivalent to those set forth in Art 27, para 3, of the Consumer Code whereby an unfair commercial practice can be provisionally suspended.[53] The sole sanctions that it can impose are pecuniary (ranging from five thousand to fifty thousand euros) and, furthermore, they are 'indirect' because fines are possible solely if the trader does not comply with the Authority's order to publicise in the prescribed manner the unfair nature of the term.

In short, a decision that a term is unfair finds its 'crowning glory' in the mere fact it is made public, with the ensuing adverse consequences that that may have on the trader's reputation.[54] Publication of the Authority's decision is designed to warn consumers who entertain or intend to entertain commercial relations with the trader and hinges on so-called 'moral suasion' aimed at discouraging those who use the unfair terms from continuing to do so. Traders who continue to use unfair terms run the risk of being discredited and ruining their image[55] or

[48] The wideness of the powers allowed to the ICA to give instructions on the type and format of the publication, that must 'fully retrace the structure and appearance of the abstract attached to the (…) decision; the writing and the diffusion mode should not be such as to frustrate the effects of the publication; in particular, on the publishing website page, as well as on the other pages, no messages should be reported that contradict the contents of the abstract or that, however, tend to diminish its scope and meaning' (my translation) (decision no 25881 of 24 February 2016 (CV140) n 33 above; decision no 25244 of 19 December 2014 (CV114) n 31 above; decision nos 24998 (CV62) and 24996 (CV59) of 25 June 2014, both available at https://www.agcm.it; decision nos 24959 (CV101) and 24958 (CV100) of 5 June 2014, ibid). In the cases of publication in the press, the size of the page was also set (decision no 25018 of 9 July 2014 (CV1), ibid; decision no 24540 of 9 October 2013 (CV6), ibid).

[49] '(…) depending on the geographical area where the trader operates' (my translation). So the decision no 24540 of 9 October 2013 (CV6) n 48 above.

[50] Decision no 25018 of 9 July 2014 (CV1) n 48 above.

[51] V. Pandolfini, n 19 above, 57; T. Rumi, 'Il controllo amministrativo delle clausole vessatorie' n 20 above, 644.

[52] As clearly confirmed by Tribunale Amministrativo Regionale-Lazio, 13 July 2017, no 8378, available at www.giustizia-amministrativa.it.

[53] See, on this aspect, A. Ciatti, 'I mezzi di prevenzione e repressione delle pratiche commerciali sleali nella direttiva comunitaria del 2005' *Contratto e impresa/Europa*, 87 (2007); S. Stella, 'Art 27', in V. Cuffaro ed, *Codice del consumo* n 14 above, 253.

[54] E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 569; L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' n 19 above, 494; S. Mezzacapo, 'Illiceità delle clausole "abusive" (tra presidi di "giustizia negoziale" e tutela amministrativa del "mercato")' n 35 above, 147; T. Rumi, 'Il controllo amministrativo delle clausole vessatorie' n 20 above, 644.

[55] M. Mazzeo and S. Branda, 'Una nuova tutela' n 39 above, 388.

facing legal action seeking to set aside the terms and/or obtain damages brought by those emboldened by the Authority's finding.

This author remains of the opinion – previously expressed[56] – that such an approach is tantamount to a violation of the principle of equality (enshrined in Art 3 of the Constitution) when compared to the approach currently adopted in combating unfair commercial practices, in which the ICA enjoys a broad power to prohibit engaging in or continuing to engage in the offending behaviour.[57] That difference could well be unconstitutional on the basis that it amounts to an unreasonable disparity of treatment between consumers, who are afforded a different level of protection in the face of similar needs and expectations, without a convincing rationale for the distinction.

That said, it must be acknowledged that while the approach downplays coercive action, it does undoubtedly bolster the legislative choice (including the proportionality[58] of the 'reputational' consequences compared to the objectives pursued) to foster self-regulation, promote morals in the business world and act as an incentive for ethical business behaviour. In fact, in the 5-year period there was just one case of non-compliance with an order for publication and the ensuing imposition of a fine.[59] In all of the other cases, not only were the orders for publication complied with, but that measure was followed (in cases where steps had not already been taken during the investigation) by a willingness to accept the Authority's observation and the 'voluntary' elimination or amendment by the traders concerned of the terms found to be unfair.

VI. *Ex Ante* Review and 'Limited Effects' of the Italian Competition Authority's Assessment Given in Response to an Application for an 'Advance Ruling'

Pursuant to Art 37-*bis*, para 3, of the Consumer Code, traders – using a

[56] M. Angelone, 'La nuova frontiera del «*public antitrust enforcement*»: il controllo amministrativo dell'Agcm avverso le clausole vessatorie' *Rassegna di diritto civile*, 32 and 38 (2014).

[57] On the peculiarities of this type of injunction, see A. Ciatti, 'Art. 27' n 53 above, 108; S. Stella, 'Art 27' n 53 above, 262; S. Simone, 'Le istruttorie dell'AGCM in materia di pratiche commerciali scorrette: profili procedurali' *Obbligazioni e contratti*, 680 (2011); D. Bonaccorsi di Patti, 'Le pratiche commerciali scorrette: prime note sul procedimento istruttorio innanzi all'Autorità Garante della concorrenza e del mercato' *Diritto ed economia dell'assicurazione*, 676 (2008); V. Falce, 'Emanati i regolamenti su pratiche commerciali scorrette e pubblicità ingannevole' *Diritto industriale*, 61 (2008).

[58] As regards the principle of proportionality (also in the field of legal remedies), see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 124; P. Perlingieri, 'Nuovi profili del contratto', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 429; Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 354.

[59] See the decision no 25368 of 10 March 2015 (IP213).

mandatory paper or electronic form – may seek a ruling in advance from the ICA as to the fairness or unfairness of the terms that they intend to use in future commercial relations with consumers.

This new provision has systemic implications and implies a '(re)configuration of (business negotiations and in particular) standard contracts in the context of freedom of contract'[60] insofar as certain conditions allow the Authority to intervene (even though not with binding force but in a spirit of collaboration and with a view to acting as an incentive)[61] in the drafting of the wording of standard contracts falling within the scope of Arts 1341 and 1342 of the Civil Code. Accordingly, the trader's hitherto unquestioned sole and total power to decide the terms of future contracts has been cabined. The *ex post* conformation of contracts that is a feature of ordinary proceedings is thus flanked by an *ex ante* method of conformation achieved through applying in advance for a ruling.

The mechanism of advance rulings is more circumscribed than ordinary proceedings as regards the sphere of application, since an advance ruling can be sought solely as regards terms included in contracts not yet used. By contrast, there is no express requirement that such terms must appear in general conditions, forms, models and templates but – relying on a general reference in the law 'to the manner set forth in the (procedural) regulation' – it has been decided not to exploit that opening and instead exhibit some self restraint by limiting rulings to just serial terms (Art 24, para 1, of the Procedural Regulation).

In order to obtain an advance ruling from the Authority, the applicant[62]

> 'must specify in detail the reasons and objectives underlying the inclusion of the single term, explain why it is not unfair also in relation to its interaction, if any, with other terms contained in the same contract or in one that the latter is linked to or depends and describe how and the circumstances in which contract will be negotiated and concluded' (Art 24, para 2, of the Procedural Regulation).

It is clear therefore that the mechanism is not intended to be reduced to a mere form of legal advice since it is restricted to solving concrete and personal cases (and not answering general and hypothetical questions) that entail objective uncertainty as to the lawfulness of the terms queried.

[60] C. Camardi, 'La protezione dei consumatori tra diritto civile e regolazione del mercato' n 8 above, 332 (my translation).

[61] On the other hand, 'The advance ruling (…) tends to encourage the transition from regulation to self-regulation' (my translation): L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' n 19 above, 496.

[62] As believes S. Mezzacapo, 'Illiceità delle clausole "abusive" ' n 35 above, 153, the reference to 'undertakings' (rather than to 'traders') is the fruit of a mere 'slip of the pen'. Moreover, in the opinion of E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 566, the application for an advance ruling should be recognized also to trade association.

The Authority – after summoning the applicant to a hearing if necessary (Art 24, para 3, of the Procedural Regulation) – issues its advance ruling within one hundred and twenty days after the date of receipt of the application[63] unless the information furnished in the form proves to be materially inaccurate, incomplete or untrue. In those situations, as well as when it is necessary to expand the scope of the application for an advance ruling, the case officer promptly informs the Authority's Board in charge of making the ruling as well as the party, and the above-mentioned deadline will start to run again from the date of receipt of the additional information or the request to expand the issue to be ruled on (Art 24, para 4, of the Procedural Regulation).

Again in this context the case officer may – in the same way described above (in Section IV) – request the regulatory or supervisory authorities for the sector that the term concerns to express an opinion within thirty days. That power has been exercised in the case of an application for an advance ruling concerning a term intended to be included in a compulsory motor insurance policy: It was decided to consult IVASS 'in view of the complexity of insurance law and the (latter's) experience in overseeing the insurance sector'.[64]

A ruling is made once the investigation is complete. The reply to the application for an advance ruling, whatever it may be, is normally only communicated to the applicant.[65] However, the Procedural Regulation affords ample discretion to the ICA, which – unless the trader concerned adduces compelling reasons for confidentiality – may opt to publish the ruling in a specific section of its website and/or its bulletin (Art 24, para 7, of the Procedural Regulation). The ICA may wish to publish a ruling, for example,

> 'in view of the novelty and importance of the term that the application for an advance ruling concerned and the large number of consumers potentially involved'.[66]

From the fact that the summary information contained in the annual reports to Parliament state that the Authority replied to five applications in 2013 and four in 2014, one can deduce that online publication did not take place in the other cases.

Far more interesting and worthy of attention is the question of the effect of ICA advance rulings. The only legislative indication is that terms not disapproved

[63] Tribunale Amministrativo Regionale-Lazio, 23 June 2015, no 8572 n 37 above, the expiry of that period equates to a decision of unfairness of the term.

[64] See decision no 24268 of 13 March 2013 (CVI3), *Diritto e fiscalità dell'assicurazione*, I, 205 (2013); and the aligned remarks of G. Natali, 'La tutela amministrativa in materia di clausole vessatorie nei contratti tra imprese e consumatori (Art 37-*bis* D. Lgs. n. 206/2005): il caso della clausola limitativa della cessione del credito risarcitorio nel contratto r.c. auto', available at https://tinyurl.com/y7lhvrbh (last visited 30 June 2018).

[65] P. Cassinis, 'The Administrative protection' n 32 above, 97.

[66] Decision no 24268 of 13 March 2013 (CVI3) n 64 above.

of following an application for an advance ruling may not subsequently be attacked pursuant to Art 37-*bis*, para 2, of the Consumer Code, ie, may not be the subject matter of ordinary proceedings[67] given the trouble that that the trader went to in proactively seeking a ruling in advance from the Authority.

In any case a favourable verdict (ie, no unfairness)[68] constitutes a precedent binding solely on the ICA, and though it entails a 'benefit'[69] to the trader who sought the advance ruling, it is certainly not tantamount to a 'safe harbour';[70] it does not exempt the trader from liability towards consumers in that the trader cannot rely on the ICA's (positive) response as proof of its good faith[71] and avoid its commitments.[72] Much less is a favourable advance ruling capable of thwarting independent legal proceedings before the civil courts because that would run contrary to the so-called 'two-pronged approach' that sees administrative and judicial protection as being on different (although complementary) levels.

One rather 'unusual' aspect[73] is that the law (at both primary and secondary levels) fails to specify the effects of a finding of unfairness of the terms that the application for an advance ruling concerns. That omission may be explained by the fact that the procedure in question – in keeping with the preventative nature of the remedy – is designed to assess the validity of terms incorporated into drafts of contract rules not yet used, such that in the event of an unfavourable advance ruling it is reasonable to suppose that the trader will spontaneously and prudently decide (due to '*moral suasion*') not to use the term in question (and remove it from the general conditions or forms, models and templates) or to amend it so as to avoid more damaging consequences at the outcome of ICA 'ordinary' proceedings or a civil lawsuit.

[67] The content of Art 37-*bis*, para 3, of the Consumer Code does not mean that the ICA can not perform ordinary proceedings in relation to terms that have already been assessed at the end of an advance ruling, but only that it is not possible to expose the trader to the 'reputational' consequences provided by para 2 of the aforementioned article (ie, the mandatory publication of the decision) if the new assement led to a divergent outcome.

[68] Aside from the only measure published (decision no 24268 of 13 March 2013 (CVI3) n 64 above), the 'Annual Report 2014' n 13 above, 240, shows that other advance rulings, in the field of long-term car rental (CVI7), of purchase of used vehicles (CVI8) and of lift maintenance contracts (CVI10), have also been concluded with a favourable decision.

[69] E. Posmon, 'La tutela amministrativa contro le clausole vessatorie: luci e ombre di un modello di controllo' *Le nuove leggi civili commentate*, 840 (2013).

[70] S. Mezzacapo, 'Illiceità delle clausole "abusive" ' n 35 above, 155.

[71] The clarification contained in the Art 37-*bis*, para 3, of the Consumer Code – banning insidious exemptions from liability for the trader – performs the same function that traditionally is linked to the locution 'contrary to good faith' placed in the Art 33, para 1, of the Consumer Code (for an overview of the different opinions, see E. Capobianco, 'Art 33', in Id and G. Perlingieri eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* n 58 above, 147).

[72] The ICA itself has pointed out that an advance ruling's finding of fairness is limited: such rulings 'relate solely to the non unfairness of the said term pursuant to Arts 33 to 37-*bis* of the Consumer Code, without affecting its validity and effectiveness on the basis of the same or other legal provisions' (my translation): decision no 24268 of 13 March 2013 (CVI3) n 64 above.

[73] V. Pandolfini, n 19 above, 56.

VII. The 'Abstract' Nature of a Finding of Unfairness Made by the Italian Competition Authority Pursuant to Art 37-*bis* of the Consumer Code

Keeping in mind the fundamental difference in the decision-making methods and approaches of administrative and judicial bodies, it is worth attempting to clarify the parameters that the ICA adheres to when called upon to ascertain whether a term is unfair in the context of ordinary proceedings or an application for an advance ruling.

In both cases, its review develops along 'abstract' lines,[74] displaying many similarities with the approach adopted by ordinary courts when deciding on injunctions under Art 37 of the Consumer Code.[75] That aspect was explicitly confirmed (above all) by the ICA in its initial decisions – probably to publicise how it would handle cases – and on various occasions it has clarified that

> 'in the exercise of its powers under Art 37-*bis* of the Consumer Code, the Authority conducts an abstract evaluation of terms included in contracts between traders and consumers concluded by accepting general conditions of contract or signing forms, models or templates. That evaluation is irrespective of the actual behaviour exhibited when performing the single contracts including where that behaviour differs from what is set out in the term contained in the contractual document being examined'.[76]

It follows in general that not all of the interpretative canons that are normally used when assessing unfairness are compatible with the features of administrative protection. In particular, one must discard on grounds of irrelevance those canons that refer to or presuppose a concrete check, ie, that focus on a specific

[74] E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 571; A. Mirone, 'Verso la despecializzazione dell'Autorità *antitrust*' n 42 above, 308; S. Mezzacapo, 'Illiceità delle clausole "abusive" ' n 35 above, 154 and 156; V. Pandolfini, n 19 above, 52.

[75] L. Rossi Carleo, 'La tutela amministrativa contro le clausole vessatorie' n 19 above, 494; V. Pandolfini, n 19 above, 52; A. Mirone, 'Verso la despecializzazione dell'Autorità *antitrust*' n 42 above, 308.

[76] Decision no 24421 of 26 June 2013 (CV32) n 28 above, § 35 (emphasis added). In the same sense, decision no 25242 of 19 December 2014 (CV89) n 34 above, § 64, further notes that 'the assessment of the single contract and the factual circumstances which accompanied its conclusion is (instead) entrusted to the ordinary Courts' (my translation); decision no 25052 of 1 August 2014 (CV92) n 31 above, § 38; decision no 24999 of 25 June 2014 (CV64), available at www.agcm.it, § 29; decision no 24997 of 25 June 2014 (CV61) n 31 above, § 31; decision no 24995 of 25 June 2014 (CV57), available at www.agcm.it, §§ 29 and 41; decision no 24959 of 5 June 2014 (CV101) n 48 above, § 39; decision no 24957 of 5 June 2014 (CV99), available at www.agcm.it, § 38; decision no 24546 of 9 October 2013 (CV49) n 31 above, § 39; decision no 24544 of 9 October 2013 (CV47), available at www.agcm.it, § 39; decision no 24543 of 9 October 2013 (CV46), ibid, §§ 38 and 39; decision no 24542 of 9 October 2013 (CV45) n 46 above, § 35; decision no 24541 of 9 October 2013 (CV44), available at www.agcm.it, § 26; decision no 24399 of 11 June 2013 (CV27) n 31 above, §§ 55 and 65.

contract[77] because the evaluation – as aforesaid – must concentrate on examining 'standard' documents by definition designed to regulate an indeterminate series of relationships or indeed a '*spes contractus*' not actually used yet. For the same reason the figures of consumer and trader cannot be viewed on an 'individualised' basis but must be treated as (indistinct) 'categories' having regard to the average.[78]

From this standpoint there is no impediment to employing the key criterion of 'significant imbalance' 'despite the good faith'[79] (Art 33, para 1, of the Consumer Code) and the presumptions in connection with the terms grouped together in the ('grey' and 'black') lists set out in Arts 33, para 2, and 36, para 2, of the Consumer Code, which are referenced in all of the ICA measures adopted.

The rules that can be relied on surely include the stipulation that terms reproducing provisions of law[80] or implementing principles contained in international conventions to which all Member States of the European Union or the European Union itself are Contracting Parties are deemed not to be unfair (Art 34, para 3, of the Consumer Code).

Moreover, the Authority has often made repeated reference to the 'principle of transparency',[81] which mandates that contractual terms must be drafted in plain and intelligible language (Art 35, para 1, of the Consumer Code)[82] and

[77] C. Camardi, 'La protezione dei consumatori tra diritto civile e regolazione del mercato' n 8 above, 328.

[78] The characteristics of the 'consumer *eiusdem*' are already outlined within the discipline of unfair commercial practices. See G. Bertani, *Pratiche commerciali scorrette e consumatore medio* (Milano: Giuffrè, 2016), passim; N. Zorzi Galgano, *Il contratto di consumo e la libertà del consumatore* (Padova: CEDAM, 2012), 1.

[79] The decision no 24288 of 27 March 2013 (CV28) n 29 above, § 27, confirms that 'the expression 'despite good faith', excludes the relevance of the psychological attitude of the trader who utilized the term' and deny that the trader can defend himself by arguing that he has acted 'without any unfair intent towards the consumer', on the contrary 'having submitted the terms of the standard contract to the appraisal of law firms before using them', while also aligning its conduct to the 'market practices' (§ 17).

[80] It was not rightly considered as sufficient to exclude the unfairness of the term its approval by a resolution of the Municipal Council (decision no 24421 of 26 June 2013 (CV32) n 28 above, § 32); or likewise 'the duty to observe contractual commitments undertaken with consumer associations' (my translation) (decision no 24547 of 9 October 2013 (CV50), available at www.agcm.it, § 76; and decision no 24542 of 9 October 2013 (CV45) n 46 above, § 78).

[81] See, in general, M. Pennasilico, *Contratto e interpretazione. Lineamenti di ermeneutica contrattuale* (Torino: Giappichelli, 2nd ed, 2015), 59; Id, *Metodo e valori nell'interpretazione dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2011), 278; D. Achille and S. Cherti, 'Le clausole vessatorie nei contratti tra professionista e consumatore', in G. Recinto et al eds, *Diritti e tutele dei consumatori* n 18 above, 138.

[82] L. Rossi Carleo, 'Clausole vessatorie e tipologie di controllo: il controllo amministrativo', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II, 2033. Regarding the burden of '*clare loqui*' for the trader, see the decision no 26596 of 11 May 2017 (CV154), available at www.agcm.it, § 94; decision no 26435 of 1 March 2017 (CV148), ibid, § 20; decision no 26284 of 15 December 2016 (CV142), ibid, § 36; decision no 25244 of 19 December 2014 (CV114) n 31 above, § 61; decision no 25243 of 19 December 2014 (CV113) n 31 above, §§ 39 and 41; decision no 25242 of 19 December 2014 (CV89) n 34 above, §§ 48, 50 and 55; decision no 25020 of 9 July 2014

likewise the subject matter of the contract and the consideration for the goods and services must be clear (Art 34, para 2, of the Consumer Code).[83] This could be the springboard for a welcome – supported by the ICA in the exercise of its advocacy role – strengthening of consumer protection to be achieved by expanding Art 35 of the Consumer Code to include a special provision dedicated to B2C contracts concluded by accepting general conditions of contract or signing forms, models or templates. In those cases, precisely to foster fully informed purchase decisions, it should be clarified that

> 'the terms relating to the subject matter of the contract, the consideration, the duration and possible renewal, the conditions and procedure for withdrawal, the possible existence and the amount of penalties, the content of and procedure for exercising statutory and contractual warranties and venue for legal proceedings must always be summarised in a clear and intelligible manner in an information sheet to be submitted to consumers for their signature and a copy of which must be given to them at that same time. The scope and meaning of the said terms indicated in the information sheet may not be limited nor contradicted by other terms in other parts of the contract or in another contractual document'.[84]

By contrast, judging by Art 34, para 1, of the Consumer Code, it would seem that one cannot take into account 'all the circumstances existing at the time of conclusion' of the contract unless they can somehow be considered prognostically

(CV63), available at www.agcm.it, § 47; decision no 25019 of 9 July 2014 (CV58), ibid, § 34; decision no 25018 of 9 July 2014 (CV1) n 48 above, §§ 33 and 52; decision no 24999 of 25 June 2014 (CV64) n 76 above, § 36; decision no 24998 of 25 June 2014 (CV62) n 48 above, § 33; decision no 24996 of 25 June 2014 (CV59) n 48 above, § 34; decision no 24995 of 25 June 2014 (CV57) n 76 above, § 49; decision no 24959 of 5 June 2014 (CV101) n 48 above, §§ 66 and 67; decision no 24958 of 5 June 2014 (CV100) n 48 above, §§ 64 and 65; decision no 24957 of 5 June 2014 (CV99) n 76 above, §§ 44, 46, 65 and 66. In the decision no 25881 of 24 February 2016 (CV140) n 33 above, § 38, the ICA denounces the confusion and the obscurity of the contractual text and reminds – by echoing the advices of the Luxemburg Court (see, in particular, Court of Justice of the European Union, Case 26/13, Arpad Kasler v Jelzalogbank, Judgment of 30 April 2014, available at www.eur-lex.europa.eu, with commentary by S. Pagliantini, 'L'equilibrio soggettivo dello scambio (e l'integrazione) tra Corte di Giustizia, Corte costituzionale ed ABF: "il mondo di ieri" o un "*trompe l'oeil*" concettuale?' *Contratti*, 853 (2014)) – that the requirement of transparency of contract terms laid down by Directive 93/13 cannot be reduced merely to their being formally and grammatically intelligible, but it 'must be understood in a broad sense so that the consumer can evaluate, on the basis of precise and intelligible provisions, the economic consequences that result from the contract' (my translation). Similarly, the decision no 25052 of 1 August 2014 (CV92) n 31 above, § 36.

[83] Decision no 25243 of 19 December 2014 (CV113) n 31 above, §§ 39 and 41; decision no 25052 of 1 August 2014 (CV92) n 31 above, § 37; decision no 25018 of 9 July 2014 (CV1) n 48 above, § 52; decision no 24995 of 25 June 2014 (CV57) n 76 above, § 49.

[84] See the note AS988 transmitted to Parliament and Government on 2 October 2012 concerning 'Proposals for competitive reform in view of the Annual Market and Competition Law for 2013' (available at www.agcm.it).

in support of the Authority's review. Likewise excluded from consideration are 'the other terms of the same contract or of another contract on which it is dependent' unless the consumer's complaint or the trader's application for an advance ruling is confined to isolated contractual provisions. However, as is often the case, should the complaint or application extend to other terms,[85] other portions of the contract[86] or other contracts expressly referred to or otherwise included on the record of the investigation,[87] the decision-making body may not – unless it gives adequate reasons for so doing – ignore or obliterate the systemic dimension when reaching its decision[88] but must verify whether the unfairness that resides in a given term is warranted and/or is balanced out by the all of the provisions taken together or the overall contractual transaction.[89]

Neither is it tenable to suggest that one can *a priori* rule out reference to 'the nature of the goods or services for which the contract was concluded'[90] but those elements – and the underlying logic is the same – must be already delineated in the contractual terms submitted for assessment by the ICA and are not by contrast destined to remain vague or to be settled solely at the time of conclusion of the single agreement. Perfectly consistent with this approach and more in accord with the abstract nature of the enforcement involved is the ICA's decision not to examine the terms (for example, penalties, notice period for withdrawal, venue for legal action, etc) that are left 'blank' in the forms, without prejudice however to being able to check them from the standpoint of an unfair

[85] The decision no 25881 of 24 February 2016 (CV140) n 33 above, § 48, discusses verbatim 'of an overall interpretation of the group of terms' (my translation); in the concomitant decisions nos 24547 (CV50), 24546 (CV49), 24545 (CV48), 24544 (CV47), 24543 (CV46), 24542 (CV45), 24541 (CV44) and 24540 (CV6) of 9 October 2013, all available at https://www.agcm.it, it is stated that 'for the purposes of the evaluation of unfairness are significant (…) the other terms of the contract' (see, respectively, the §§ 65, 69, 72, 69, 68, 66, 35 and 21); finally, in the decisions nos 25019 (CV58) and 24997 (CV61) of 9 July 2014 n 31 above, the term is unfair also 'in the light of the entire contractual context' (see, respectively, the §§ 34 and 40).

[86] The reference to 'forms, models or templates' includes the documentation requested or to be attached, if this forms 'an integral part of the contract' (my translation): decision no 24421 of 26 June 2013 (CV32) n 28 above, § 29.

[87] A valid argument in support of this solution comes from the cited Art 24, para 2, of the the Procedural Regulation that, regarding the advance ruling, requires the trader to point out the 'reasons' and 'aims' that motivate the insertion of the term in future contracts, in relation to: *a*) its relevance in relation to the other terms contained in the same or other related contract or from which it depends; *b*) the modality and conditions relating to the negotiation and conclusion of the contract.

[88] Art 34, para 1, of the Consumer Code is nothing other than the consumerist version of the general canon of the 'systematic interpretation' enshrined in Art 1363 of the Civil Code (M. Pennasilico, *Contratto e interpretazione* n 81 above, 59).

[89] As stated in the decision no 24288 of 27 March 2013 (CV28) n 29 above, § 32. Afterward, see the decision no 26255 of 30 November 2016 (CV144) n 40 above, § 72.

[90] See the decisions nos 24547 (CV50), 24546 (CV49), 24545 (CV48), 24544 (CV47), 24543 (CV46), 24542 (CV45), 24541 (CV44) and 24540 (CV6) of 9 October 2013 n 48 above, respectively, §§ 65, 69, 72, 69, 68, 66, 35 and 21.

commercial practice.[91]

The only true preclusion relating to interpretation in the context of ICA ordinary proceedings or applications for advance rulings is to be found in the exemption afforded to individual negotiations under Art 34, para 4, and Art 34, para 5, of the Consumer Code, which it is impossible to examine outside the context of a specific contract, requiring the trader to prove that the consumer was actually able to influence the content and/or the drafting of the unfair term.[92]

Finally, it is arguable that the clear similarities between the abstract review conducted by the ICA pursuant to Art 37-*bis* of the Consumer Code and that conducted by the ordinary courts in actions seeking injunctions pursuant to Art 37 of the Consumer Code means that the provision (in Art 35, para 3, of the Consumer Code) forbidding reliance on the '*contra proferentem* rule'[93] is applicable in the case of proceedings before ICA because that rule 'implies a canon of construction that can be (only) adopted in assessing a concrete single relationship':[94] in other words, in case of doubt as to the meaning of a term, the Authority must not simply prefer the interpretation most favourable to the weaker contracting party but must even-handedly opt (with a view to achieving more efficient protection for the consumer understood here as a 'category' and not as a single person who signed a given contract) for a declaration of unfairness of the ambiguous contractual term.[95]

VIII. The 'Two-Pronged Approach' to Protection Introduced by the Amendment to the Consumer Code and the 'Mixed Model' of 'Private' and 'Public Enforcement'

The current legal framework reflects a 'mixed model' of enforcement in which administrative and judicial protections against unfair terms work in

[91] Decision no 25242 of 19 December 2014 (CV89) n 34 above, § 81; decision no 24540 of 9 October 2013 (CV6) n 48 above, § 37. Thus emerges the 'closeness' and the 'circularity' between the discipline of unfair contract terms and that of unfair commercial practices. On this point, L. Rossi Carleo, 'Il comportamento ostativo del professionista tra "ostacoli non contrattuali" e ostacoli contrattuali', in P. Barucci and C. Rabitti Bedogni eds, *20 anni di Antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato* (Torino: Giappichelli, 2010), II, 1216.

[92] Corte di Cassazione 10 July 2013 no 17083, available at www.dejure.it; Tribunale di Milano 25 March 2015 no 3882, ibid; Tribunale di Salerno 6 February 2013 no 355, ibid.

[93] The same opinion is expressed by E. Minervini, 'La tutela amministrativa contro le clausole vessatorie nei contratti del consumatore' n 14 above, 572.

[94] Decision no 25052 of 1 August 2014 (CV92) n 31 above, § 40.

[95] The provision under consideration does not fit with the abstractness of the review conducted by ICA, since it requires the assessment of the concrete interests of the consumer not to declare the nullity of the non-transparent term, but rather to preserve the term with an interpretation more favourable to him (M. Pennasilico, *Contratto e interpretazione. Lineamenti di ermeneutica contrattuale* n 81 above, 60).

parallel[96] and which could well lead to some inconsistent decisions.[97] Indeed, in the absence of coordination,

> 'decisions of the ordinary courts are totally independent of the ICA's scrutiny of unfairness such that a decision by the Authority that certain contractual terms are compliant (or not compliant) does not preclude the ordinary courts from reaching a different decision not only in an individual lawsuit (…) but also in a class action'.[98]

Moreover, contrasts of this type are

> 'to a certain extent facilitated by the law, which on the one hand envisages an ICA evaluation that is abstract and on the other hand a judicial evaluation that is clearly anchored to the circumstances of the actual case'.[99]

Bowing to the fact that recourse to the courts cannot be excluded (see Arts 24 and 113 of the Constitution and Art 47 of the EU Charter of Fundamental Rights), Art 37-*bis*, para 4, of the Consumer Code stresses that Authority decisions adopted under that same article may be challenged before the administrative courts, a provision that is consistent with the criteria for the allocation of jurisdiction laid down in the Administrative Procedure Code granting special exclusive jurisdiction to those courts (at first instance before Tribunale Amministrativo Regionale – Lazio, Roma) over any disputes arising out of decisions made by the main independent authorities including decisions (in that case with power to review the merits pursuant to Art 134, para 1, letter *c)*, of the Administrative Procedure Code) concerning the imposition of pecuniary fines (Art 133, para 1, letter *l)*, of the Administrative Procedure Code). At the same time that codification is without prejudice to the powers of the ordinary courts to decide the validity of the terms and any damages that may be payable. This has led one scholar to opine that

> 'the two-pronged solution (jurisdiction of the administrative courts against ICA decisions and jurisdiction of the ordinary courts on matters

[96] '(…) public enforcement and private enforcement should not be overlapped, since nature and purpose are different. (…) These are two remedies that certainly interfere, but which operate on separate and distinct levels' (my translation): Consiglio di Stato 22 September 2014 no 4773, with commentary by G. Ioannides, 'Alla ricerca del giusto bilanciamento tra "*public*" e "*private enforcement*" nel diritto *antitrust*' *Giornale di diritto amministrativo*, 252 (2015); and with commentary by R. Tremolada and F. Balestra Marini, 'Il rapporto tra "*private*" e "*public enforcement*" del diritto "*antitrust*" nella giurisprudenza amministrativa' *Foro amministrativo*, 781 (2015).

[97] Undoubtedly 'the proliferation of forms of consumer protection entails with it the risk of fragmentation, and thus duplication, or worse, of real conflicts of *res judicata*' (my translation): V. Pandolfini, n 19 above, 59.

[98] A. Barenghi, 'Art 37 *bis*' n 14 above, 327.

[99] E. Posmon, 'La tutela amministrativa contro le clausole vessatorie' n 69 above, 845.

> concerning the validity of unfair terms and awards of damages) adopted in the new legislation is problematic'
>
> because it is not
>
> 'clear how to resolve any conflicts that might arise in cases where the ICA opens an investigation or an application for judicial review of a previous ICA decision is brought before the administrative courts while a civil lawsuit is still pending before the ordinary courts'
>
> or again
>
> 'what happens when the ordinary courts decide that a term is unfair in cases where that same term was held to be totally valid and effective by the ICA or the administrative courts'.[100]

That said, any such scenarios of conflict are likely to occur only rarely in practice if one considers the 'symptomatic' and not easily 'contestable' weight that ordinary courts afford to (positive or negative) ICA decisions.[101] Indeed, although an Authority decision (and perhaps also an administrative court's judgment upholding it after a dispute) may not be binding, it still constitutes a particularly cogent indicator during a civil lawsuit of the unfairness of the disputed term and its unbalanced aspects;[102] an indicator that is ever more persuasive in view of the 'privileged' probative value gained over time by ICA decisions[103] in so-called 'follow on' actions for antitrust damages and destined to take on even greater importance in light of the recent legislative developments.[104]

Any fear of an overlap or interference between contrasting decisions is allayed in practice if one considers the negligible effect that the powers granted by Art 37-*bis* of the Consumer Code have so far played in litigation before the administrative courts: records show that public enforcement against unfair terms – due to its persuasive nature not involving sanctions but merely

[100] S. Mazzamuto, *Il contratto di diritto europeo* (Torino: Giappichelli, 2nd ed, 2015), 200.

[101] V. Pandolfini, n 19 above, 58.

[102] M. Mazzeo and S. Branda, 'Una nuova tutela' n 39 above, 388.

[103] Retraces the scholarly debate, F. Tirio, *Le autorità indipendenti nel sistema misto di* enforcement *della regolazione* n 45 above, 218.

[104] The Art 7 of the decreto legislativo 19 January 2017 no 3 (as the Art 9 of the Directive no 2014/104/UE) states that the infringement of competition law found by a final decision of the ICA is deemed to be an evidence of such infringement for the purposes of an action for damages. On this aspect see, *ex multis*, G. Villa, 'L'attuazione della Direttiva sul risarcimento del danno per violazione delle norme sulla concorrenza' *Corriere giuridico*, 441 (2017); M. Zarro, 'La tutela risarcitoria da danno *antitrust*: nuovi sviluppi per il sistema misto di *enforcement*' *Rivista di diritto dell'impresa*, 669 (2017); G. Alpa, *Illecito e danno* antitrust. *Casi e materiali* (Torino: Giappichelli, 2016), 5; R. Chieppa, 'Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM' *Diritto industriale*, 317 (2016).

reputation repercussions – has not generated any full-blown applications for judicial review or unduly burdened the administrative courts. In fact, the burden has been so light that after five years only a few minor decisions have been issued by the Tribunale Amministrativo Regionale – Lazio, for the most part in interim proceedings (while the Consiglio di Stato has witnessed no appeals at all before it).[105]

Consequently, although the legal framework does not exclude such conflicts or lay down rules for resolving them, it does seem to have managed to avoid them. The framework and actiual practice would appear to embody a sort of 'invisible hand' capable of reducing friction and keeping episodes of potential disharmony to a minimum.[106]

[105] See Tribunale Amministrativo Regionale-Lazio 6 July 2018 no 6321, available at www.giustizia-amministrativa.it, that confirmed the legitimacy of the ICA contested provision; Tribunale Amministrativo Regionale-Lazio, 13 July 2017 no 8378, available at www.giustizia-amministrativa.it, that declared the lack of interest of the applicant trader since the latter, during the proceedings, had already adopted new terms in substitution for those declared to be unfair by the ICA decision now contested before the Court; Tribunale Amministrativo Regionale-Lazio, ordinanza 22 May 2013 no 2011, ibid, that rejected the *interim* application for suspension of the decision by which the ICA declared the unfairness of some clauses; and Tribunale Amministrativo Regionale-Lazio, ordinanza 1 August 2013 no 3145, ibid, that also denied – as not meeting the conditions – the *interim* application for suspension of the opinion of the ICA expressed at the outcome of an advance ruling.

[106] For its part, on several occasions, the ICA decided by referring to the case law of the ordinary courts. See, lastly, the decision no 26661 of 28 June 2017 (CV158), available at www.agcm.it, § 42.