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**PROGETTO DI RICERCA**

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**Research Units:**

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**Title:**

Freedom of contract and freedom to set rates in the case law of the European Court of Justice, trends of the European Bodies and National Systems for the fairness of insurance premiums

**Abstract**

The project aims at proposing guidelines for a new concept of the regulation of insurance which should better guarantee competition and protection of the consumers.Proposals for corrective action so far advanced by the actors involved (government, Parliament, ISVAP, antitrust, courts) were not capable to really resolve the crisis, because uncoordinated and aimed at containing a single aspect of the crisis, i.e. rising premium and rates.That being stated, the project aims at reviewing legal courses of action by proposing a balanced settlement of the conflict between different stakeholders from a perspective of free market which is offered by European Union law.Taking into consideration the development lines proposed, with particular emphasis on actions for damages brought against insurers for anticompetitive agreements, unfair trade practices, violation of consumer rights and taking into consideration the renewed interest that these might find as a result of the introduction of the "class action" in art. 140 bis of the Consumer Code, the research will propose an analysis directly usable by economists and actuarials for the development of theoretical models that can highlight the problems inherent to the control of the contract's economic conditions.

**A review of the present state of art**

The issue of contractual justice met for some time the attention of international legal literature (inter alia Canaris, 1997; Mather, 1995; MAZEAUD, 2003, Bridgeman, 2007).In Italy the idea of controls on the contract's economic balance moves from traditional institutes like the resolution for excessive onerousity, the rescission and the integration according to equity (Galgano, 1993; Gazzoni 1970, Perlingieri 2001; Stanzione, 1999; BEARD, 1998), institutes that have found renewal in the occurring problem of imbalance in adjustable rate mortgages (G. Cabras, Interessi a tasso fisso e variabile nei mutui: aspetti economici e giuridici,, Impr. 2001, 925), the contracts' renegotiation (T. Maugeri,Sopravvenienze perturbative e rinegoziazione del contratto., Europa dir. Priv., 2007, 1095; SICCHIERO G., Rinegoziazione, Digesto Civ. agg., UTET, Turin, 2003, 1200; GENTILI A. La replica della stipula: riproduzione, rinnovazione e rinnegoziazione del contratto, CI, 2003, 667), the clause "rebus sic stantibus" typical of international contracts (FERRI GB Dalla clausola rebus sic stantibus alla risoluzione per eccessiva onerosità, Q., 1988, 54), the principle of Gross Disparity in the Unidroit principles (VOLPE, 1999, Timothy, 1997).More recently the doctrine has dealt with contracts with consumers (former Law 52/1996) and with the problem of unfair nature of terms relating to contractual economic conditions. Although art. 1469-ter, II C, (now art. 34 Consumer Code Decree No. 206/2005) precludes review of contractual economic balance, scholars have tried to "open doors" to judicial assessment on this point (G. ALPA Le clausole abusive nei contratti con I consumatori, CG, 1993, 635; BUSNELLI FD, Una traccia per un'analisi sistematica delle clausole abusive, NLGC, 1997, p. 765; BENEDETTI, G., Tutela del consumatore e autonomia contrattuale, RTDPC, 1998, p.17 ss.).

In the literature, in fact, it has been hold that the lack of clarity of the clauses about the object of the contract, may open a control about the fairness of the same[G.VETTORI, La disciplina delle clausole vessatorie (6-2 d.lg.-1996-No. 52), in Materiali e Commenti, Padova, 1999, p. 3 ss. E. MINERVINI , La trasparenza delle condizioni contrattuali (contratti bancari e contratti con i consumatori) in BBTC, 1997, I, 104, S.MONTICELLI, Art. 1469-ter inCommentario al Codice Civile. Clausole vessatorie del contratto con il consumatore (art. 1469 bis ss..), a cura di Cesaro, vol. I, Padova, 1996, p. 396, A.SCARPELLO, I contratti di assicurazione della responsabilità civile, della tutela giudiziaria e di assistenza, in Le clausole Vessatorie nei contratti con il consumatore. Commentario agli artt. 1469 bis- 1469 quater, a cura di G. Alpa e S. Patti, cit. p. 1111; A. BARENGHI, Art. 1469 bis, in La nuova disciplina delle clausole vessatorie , a cura di A. Barenghi, Napoli, 1996, p. 52 ss.; G. SCIANCALEPORE, Clausole vessatorie, tutele individuali e collettive in dispute transfrontaliere, in Europa dir. priv., 1999, p. 1033; M. DE POLI, Libero mercato e controllo legale nei contratti del consumatore, in Riv. dir. civ., 1999, p. 783 ss.]

The theme of contract's economic balance was noticed also because of new interpretative trends concerning the compensation or restitution in the area of consumer's protection in relation to anticompetitive agreements (ALESSI 1994;VETTORI, 2003).The direct reference is to the doctrinal and jurisprudential debate on the voidness of "downstream contracts" in case of anticompetitive agreements and claims for damages / restitution (in part. CASTRONOVO, 2004, LIBERTINI, 2005, VETTORI, 2003).The Italian case law has identified cases of nullity of contracts with consumers in the presence of anticompetitive agreements concluded between the companies dominating the market (A. Brescia, 01.29.2000, T. Torre Annunziata, 07/26/2004. In the literature AFFERNI V., 1994; ALBANESE, 1999; GUIZZO, 1999; MELI, 2001; PERLINGIERI, 2001, D'AMICO G., 2002). There would be an obligation for the restitution of money wrongly paid in excess (G. D'Amico, 2002).

In somewhat different direction it has been identified in favour of the consumer an obligation for the restitution based on anti-trust tort and it was given the quantum of the claim for compensation in an amount equal to the increase in price due to the anticompetitive cartel (Finally Cass. S.U. 4. February 2005, No. 2207. See PALMIERI, 2005; SCODITTI, 2005; LIBONATI, 2005; against FERRO LUZZI, 2004).The theme has found a particular application in third party liability motor insurance with regard to an agreement by a group of corporations composed of 38 companies and sanctioned by the ANTITRUST Authority ( decision 28.07.2000 n.8546.)Among the most recent rulings on the point we can cite the Court of Appeal of Naples, that ordered some insurance companies to pay damages to consumers (decisions May 3, 2005 and July 12, 2007).

The Court has identified the damage caused to the insured in the difference between what they had paid and what they would have paid without the alteration caused by the illegal agreements and it has evaluated it in 20% of the total premium paid in view of what appears to be the premium's increase as an effect of the illegal anticompetitive cartel.This is in fact a problem that has already been studied by American and English literature that have long studied the issue of enterprises' compensation claims over anticompetitive agreements (GENOVESE, 1992; BASTIANONI, 1998, WILS, 2003 ; WOODS, 2004).The significant point is that the jurisprudence of the ECJ has ruled on the issue in relation to violations of Article. 81. (see, inter alia, ECJ, 2001 Courage Ltd). Thus the project will examine the specific impact of European Law on the quantifcation of damages.Significant on this point, especially with regard to the national interventions on rates, is the ECJ decision 59/01 which stated that "violate the principle of freedom to set rates, referred to in Art. 6, 29 and 39 of Directive 92/49/EC, the establishment of a locking system of tariffs applicable to all contracts of insurance against civil liability arising from the use of motor vehicles, covering a risk situated in the territory of a member state. "(For the doctrine of freedom of rates see FRIGESSI RATTALMA, 2003; GABRIELLI, 2002).The control of the contract's economic balance seems to expand in the legal ambit. At the same time, the economic science has long revised the past agnosticism on the prices' formation that had led the economists to say that the price is formed in the market (HAYEK, 1948 and most recently COYNE, 2003) and that it is not possible to find the just/fair price (SRAFFA, 1926, S. ALTUG - LABADIE P., 1994, BOWLES S., 2004;).The Welfare Economy proposes the identification of fair prices through models such as the "Second Best" (LIPSEY, LANCASTER, 1956-57)

**Contents of the Project**

The research moves from the current state of crisis in the insurance market where we can find issues at least apparently irreconcilable: on the one hand, companies have gone in time complaining about the costs' increase, on the other hand they were charged with realizing competition's restrictive agreements that conform premiums to a level which is not corresponding with criteria of fairness to the detriment of consumers. This has led to interventions on the premiums determination by the national legislature (see DL 70/2000), by the Antitrust Authority, who sanctioned anticompetitive agreements that would lead to premiums levelling, by judges who have interfered on insurance contracts concluded with consumers "downstream" of these anticompetitive agreements.Controls on the contract's economic balance move from traditional institutions such as the resolution for excessive onerousity, the rescission and the integration according to equity but also from new trends in interpretation. Just think of the doctrinal and jurisprudential debate about the nullity of the "downstream contract" in cases of anticompetitive agreements and of damages / restitution claims paid by firms that rise to the excess prices paid by consumers, compared to the price that would have been paid in case of a truly competitive market (CASTRONOVO, 2004, LIBERTINI, 2005, VETTORI, 2003, Cass. S:U. 4. February 2005, No 2207, St. Anastasia Judge, 12.09.2003, Milan Judge, 29.01.2004, Laviano Judge, 09.27.2002, Davoli Judge, 13.11.2002, and after the ruling of the Supreme Court that affirmed the exclusive jurisdiction of the Court of Appeal, see the judgments of the Court of Appeal of Naples 03/05/2005, 1310, Court of Appeal of Naples 12/07/2007).These legal principles were applied in the field of third party liability motor insurance contracts, with regard to the restricting competition cartel concluded between 38 companies and sanctioned by decision of the Italian Antitrust dated 28.07.2000 n.8546.The judges, in particular, identified the harm caused to the insured in the difference between what they had paid and what they would have paid without the alteration caused by the illegal agreement and they hold in their discretion to determine in 20% of the total premium paid the damage, identifying it with the supposed premiums' increase during the life of the anticompetitive cartel.

The Association of Insurance Companies (ANIA) has a different position on this point. The insurers observe that the nominal increase in premiums does not match with the real one because of the increased costs imposed on companies (Assicurazione Italiana 2007/2008, edited by Ania).

From such remarks it is clear that, if we would make consideration on contracts' economic balance, an operational dialogue between lawyers and economists also in consideration of the effect of judicial decisions in terms of contractual justice can have on the market is necessary . Just think of the legal costs, costs arising from damages or restitution claims deliberated in courts, and about the effects, in the future of such judgments on rates.The boundaries of the assessment of the contract's economic conditions of contracts will expand, but the judges, perhaps for reasons related to the parties' defensive choices and for judgement's economy reasons, do not employ economical technical advices on the point and fairness is the main judgement instrument.The contribution of economic theories on pricing could instead be effective. The economic science has long revised the past agnosticism on the prices' formation that had led the economists to say that the price is formed in the market (HAYEK, 1948 and most recently COYNE, 2003) and that it is not possible to establish what is the just price (SRAFFA, 1926).The Welfare Economy proposes the identification of fair prices through models such as the "Second Best". It is a theory based on the opportunity to follow second instance (second best)'s solutions when the optimal solution (first best) can not be prosecuted. Where the absolute maximum solution (first best) can not be pursued because of government'S intervention limits, we can assume a solution of second instance (second best) accessible through economical politics' correctives, that, because of these limitations, have as their objective the correction of market's malfunctioning and the income's redistribution.

If we limit ourselves to consider only PREMIUMS, we would risk, though, to not find the various issues that move around the present insurance market's crisis.Proposals for corrective action so far advanced by the actors involved (government, Parliament, ISVAP, antitrust, courts) were not risolutive.That being stated, the project aims to review the legal courses of action with regard to the problem by proposing a settlement of the conflict between different stakeholders from a perspective of free market which is offered by European Union law.

We will consider and coordinate the principles espoused by the Court of Justice of the European Union.

The Court of Justice stated that "the full effectiveness of Article. [81] ,and in particular the effectiveness of the ban set to n. 1 of that article would be put at risk if it were impossible for anyone to claim compensation for damage caused to him by contract or by conduct liable to restrict or distort competition. "The Commission, after the position of the Court of Justice, has conducted a study on the Conditions of Claims for damages in Case of Infringement of EC competition rules.On December 19, 2005, the Commission published a Green Paper on:"Actions for damages for breach of EC antitrust rules" with the aim of developing the private enforcement of antitrust law.Moreover the ECJ decision 59/01 stated that "a violation of the principle of freedom to set rates, referred to in Art. 6, 29 and 39 of Directive 92/49/EC, the establishment of a locking system of tariffs applicable to all contracts of insurance against civil liability arising from the use of motor vehicles, covering a risk situated in the territory of a member state. "Thus, in the market crisis that threatens to become (or maybe already is) structuralthe research aims to check which lines of action are compliant with policies and guidelines expressed at EU level and what scenarios open, also in order to provide to economists and mathematicians elements for the decisions and criteria for making assessments of market fluctuations and models.

The synergy between economics and law is indeed detectable in a perspective not yet sufficiently considered and used by economists, on the slope of the contributions that lawyers can make to economists.

Economists, in fact, must take into account in any determinations on the economic balance of the contract, the effects of court decisions on the economic conditions of the contract.This should lead to an increase in demand when the bargaining moves within a system of freedom of contract.

Consequently, we should have a marginal cost increase or a change in the total costs caused by a unit change in production. An increase in fixed costs from the effects of restitution and compensatory damages judgments of the courts may be expected.These terms import a decrease in economic capacity of the supplier of goods or services and, therefore, also determined a probable reduction in supply from the market.This study proposes, therefore, to analyze the relationship between economics and law in the study of compensatory judgments from the analysis of particularly sensitive issues which concerned the insurance market.

The interest in the research is justified, in addition to the transversality of the problem (between economics and law) and hence the need to adopt a method of juridical and economic approach the issue, considering alos the international nature of the problem.
Wide is the Anglo-American doctrine on Economic Torts and the possibility of using claims for damages by traders affected by anticompetitive agreements as instruments of Private Antitrust Enforcement (WILS Wouter PJ (2003), Wouter PJ, "Should Private Antitrust Enforcement Be Encouraged ? "World Competition 26, p 473-488; WOODS D., D. Ashton and A. SINCLAIR (2004)," Private enforcement of Community competition law: Modernization and the road ahead, at Competition Policy Newsletter, number 2, p. 32-37).The issue is also particularly interesting following the recent Italian legislation concerning collective actions for damages (Article 140 bis cod. Rec.) which, although it has no retroactive effect, could lead to increased litigation in the future.

The research is divided into several phases:

• PHASE OF DEPTH

In the first six months: collection and study of Italian and foreign legal literature, also monitoring conditions in insurance premiums during the period concerned.

• Level of development

It will isolate the main factors, which are able to coordinate seemingly irreconcilable interests: the interest of insurance companies, which found recognition in the European Law principle of freedom to set rates, and consumers' interest to balanced economic conditions.

• PHASE OF DISSEMINATION OF RESULTS
Over the next six months will be conferences and monographic contributions on the subject to disseminate the results.

**The role of single units**

The research unit coordinated by Prof. Frigessi di Rattalma (Uni-Brescia) will examine the European law principles in the light of which we have to consider the present national issues in matters of control of the fairness of insurance premium. In such a perspective it is important to consider both private control system and public control system.One unit will study public control system:1-The Unit coordinated by Prof. Domenichelli (Uni- Padova) on the basis of what has been set out above, the Padua Unit research group, in order to identify the role of the AAI in the sphere of the economic sector, proposes to:1. describe the organization and functioning of the authorities regulating markets (AGCM, Consob, Banca d’Italia and Isvap) briefly giving an account of the other AAIs in being in the Italian panorama as well;2. investigate possible connections between the different authorities3. examine the different powers of the authorities: especially the power of regulation and settlement of disputes;4. analyse the nature and evolution of the typical and atypical measures through which the activity of regulation is expressed. We will take into consideration both measures of an individual nature and those of a general character (which present some peculiarities from the point of view of participation in the proceedings).5. look in depth at the topic of jurisdictional control in particular in connection with atypical acts (legitimization of impugnment and type of control)6. analyze the reflections of the authorities ‘ decision over civil law relations7. understand whether and to what degree the independence and neutrality of the AAI can condition the control of the judge.Two unit will study the private control system.The Unit coordinated by Prof. Corrias (Uni-Cagliari) will study the problem of “contractual justice”, to understand if it’s possible to talk about a “fair price” or if we have to leave the price fixing to the will of the parties. Then, we will examine the impact of insurers’ unfair competition and the legal remedies attemptable by the customers: expecially, the compensation because of agreements in restraint of trade between insurers.In a second moment, we will have to verify the consequences and the impact of legal institutes like “obligation of negotiation”, “direct indemnification system” but also of deregulation in premium price-fixing.The unit of Prof. Corrias will try to find the factors which cause the elevate cost of policies, more higher in Italy than in the other European countries. It will require a complete analysis of legislation, of decisions of courts, of legal literature about this subject. Then, we will do a comparative examination, useful to see how this problem has been resolved in the other countries. The study will lead to several proposals. finalized to advise possible amendments of the law as the variation of legal institutes which will appear detrimental for the commercial competition between insurers, with bad consequences for the policy holders.The unit coordinated by Dott. Landini (Uni-Firenze) intends to consider the problem of the application of distributive justice principles in private law.Judges have considered to be a “fair price”, the market price existing before the agreement in restraint of trade.But we have different results taking in account the exact composition of insurance expenditure and the price actually paid by the insured. Specifically, we shouldconsider:- the policyholder's merit class;- discounts with respect to list price;- switches from one insurer to another for lower premiums.Ania (Association of Italian Insurers) calculates that the average price of liability coverage per vehicle had declined to 1.5% in 2005 and to 0.8% in 2006, and the fall steepened last year to 2.7%. Since 2003 the average nominal cost of liability insurance has fallen to 4.4%; in real terms, i.e. adjusted for Istat's general consumer price index (which rose to 8.3% in the period), the decrease comes to 13%.Is such a view the right one?The research unit intends to consider such result in the perspective of mathematical studies.The calculation of insurance or risk premiums has been also an essential and active topic in actuarial literature, which has attracted the attention of actuaries such as Bühlmann (1970), Goovaerts et al. (1984) and Hürlimann (1997, 1998). Recently, modern theory of risk and economic choice under uncertainty has played an important role in studying insurance premium calculations (Wang et al., 1997, Wang and Young, 1998, Young, 1998).Secondly the research unit intends to consider the economic concequences of a judicial decision of restitution of the excessive price.

**Actual interest to the research**

Lately the Italian Supreme Court with the judgment 10211/2011 and the judgment 8327/2013 ordered to some insurance companies, condemned by Italian Antitrust Authority, to pay damages to consumers for “anticompetitive deal”. According to Supreme Court’s opinion damages could be proved and calculated taking in to account premiums increasing without considering that premium increasing could be caused by other economic factors. As Ania (Association of Italian Insurers) notes “Italy continues to combine one of the highest average claim costs in Europe with equally high claims frequency. The latest CEA survey, with data for 2008 counting claims incurred during the year and excluding those not resulting in compensation, shows that Italian claims frequency (8.6%) was the highest in Europe (Germany had a frequency of 6.6% and France 4.4%). Even with the diminution recorded in 2010, the Italian figure would still be among the highest in Europe. And the cost of claims in Italy was also much higher than in the other main European countries: nearly Euro 4,000 in 2008, compared with Euro 3,300 in Germany and Euro 3,500 in France.” http://www.ania.it/export/sites/default/documenti/d09b826b-0f78-11e1-a0e5-f3c446ddba06\_\_\_ANIA\_Relazione\_inglese\_ultima.pdf