Online Unfair Commercial Practices: A European Overview

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Abstract

The supranational economic paradigm considers the weak user a tool for the realization of the market: through his choices (contracts) he rewards companies that contribute to offering products at the best quality-price ratio, thus playing a central and propulsive role in the European common market. To do this, however, he needs correct information and conduct that today we try to guarantee through the integrated regulation, always of European derivation, relating to information obligations in contracts with consumers, that on misleading and comparative advertising, and especially that which governs the phenomenon of unfair commercial practices. The fight against the latter becomes indispensable for the purpose of creating the internal market. Yet, to date there is still no regulation concerning the fact that conflicts with these practices are carried out online. The numerous cases brought to the attention of the antitrust authorities in recent years require to analyze these practices, even when these are subtly perpetrated online. It is necessary to investigate whether the discipline, including the more recent European one, is able to respond to the new way of being of the markets and whether the current binary system of public and private enforcement is suitable to deal with the fight against these practices that are harmful to both the consumer and the internal market.

I. Introduction

A closer scrutiny to the reforms to the Treaty establishing the European Economic Community reveals that the original mercantile prospective has been abandoned in favour of a more attentive and respectful approach towards the protection of human rights.[1] It has been

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[1] See P. Perlingieri, *La tutela del consumatore nella Costituzione e nel Trattato di Amsterdam*, in P. Perlingieri and E. Caterini eds, *Il diritto dei consumi* (Napoli: Edizioni Scientifiche Italiane, 2004) I, 12, emphasising the role of Treaty of Amsterdam in spreading the culture of individual rights and confirming the interest of the European in themes which are not exclusively economic. Such a trend is also visible from the amendments to the Treaty on European Union and, in particular, by the replacement of the existing seventh recital of the Maastricht Treaty with the new text: 'Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields'. Also very important is the amendment of Art F, para 1, with the following provisions: 'The Union is founded on the principles of liberty, democracy, respect for human rights and

> a revenge of our Constitutional lawmaker (and maybe not only of ours) against the founding fathers of the European Union. Once it has been made clear that the market is an instrument for protecting human dignity and the rights associated to it (rather than a value in itself), the original mercantile prospective has been abandoned.[2]

Nevertheless, competition and consumer protection, which are essential instruments for the internal European market, remain core objectives of the European lawmaker.[3] Their paramount importance is stated in in a great number of Directives and Regulations, as well as in Art 38 of the EU Charter of Fundamental Rights, providing that 'Union policies shall ensure a high level of consumer protection'.[4]

fundamental freedoms, and the rule of law, principles which are common to the Member State'. On such themes, see A. Tizzano, *Il Trattato di Amsterdam* (Padova: CEDAM, 1998), 37; S. Negri, 'La tutela dei diritti fondamentali nell'ordinamento comunitario alla luce del Trattato di Amsterdam' *Diritto dell'Unione europea,* 782, 773-793 (1997); A. Adinolfi, 'Le innovazioni previste dal Trattato di Amsterdam in tema di politica sociale' *Diritto dell'Unione europea*, 563-569 (1998).

[2] P. Perlingieri, *Relazione conclusiva*, in P. Perlingieri and L. Ruggeri eds, *Diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2008), 401.

[3] See CaseC-67/96, *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, Judgment of 21 September 1999, available at www.eurlex.europa.eu, whereby it has been highlighted that the 'task of the Community is to promote throughout the Community a harmonious and balanced development of economic activities and a high level of employment and of social protection'. See also S. Giubboni, 'Da Roma a Nizza. Libertà economiche e diritti sociali fondamentali nell'Unione europea' *Quaderni di diritto del lavoro e delle relazioni industriali*, 9-35 (2004); Id, *Diritti sociali e mercato* (Bologna: Il Mulino, 2003); J. Shaw, *Social law and policy in an evolving European Union* (Oxford: Hart Publishing, 2000).

[4] The first ones in chronological order are European Parliament and Council Directive Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17 and European Parliament and Council Directive 85/577/EEC of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 to protect the consumer in respect of contracts negotiated away from business premises. Then there are European Parliament and Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59; European Parliament and Council Directive 92/59/EEC of 29 June 1992 on general product safety [1992] OJ L228/24; European Parliament and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; European Parliament and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [1993] OJ L141/27; European Parliament and Council Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis OJ L 280/83; European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31; European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19; European Parliament and Council Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures [2000] OJ L13/12; European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular

However, despite such a great emphasis, dissatisfaction as to the current status of consumer protection and the effectiveness of the remedies available to that purpose emerges from many sources. This is the case, *inter alia*, of the *Communication from the Commission*, entitled *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, concerning the effectiveness of decentralised enforcement of competition rules by National Competition Authorities.

Pursuant to the study conducted by the European Commission, ten years after the introduction of Council Regulation (EC) No 1/2003, there is still room for a significant improvement in the effectiveness of the enforcement of competition rules. The 2018 Work Program holds that 'the success of the internal market ultimately depends on trust. This trust can easily be lost if consumers feel that remedies are not available in cases of harm'. Accordingly, the Commission considers enhancement of judicial enforcement and out-of-court redress of consumer rights, and a more effective action by national consumer authorities, as crucial elements of its agenda.[5]

electronic commerce, in the Internal Market [2000] OJ L178/1; European Parliament and Council Directive 2001/95/EC of 3 December 2001 on general product safety [2002] OJ L11/4; European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22; European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers, striking to find the right balance between a high level of consumer protection and the competitiveness of businesses[2008] OJ L133/66; European Parliament and Council Directive 2015/2302/EU of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1; European Parliament and Council Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts[2009] OJ L33/10; European Parliament and Council Regulation 261/2004/EC of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91[2004] OJ L146/1 of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 [2009] OJ L35/47introducing a Code of Conduct for computerised reservation systems with common criteria and rules for the fixing of the price within the internal market; European Parliament and Council Directive 2012/27/EU of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1; European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63; European Parliament and Council Regulation 2017/1369/EU of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1.

[5] The same has already been observed in the past, when the growing trust in ADR Procedures spurred the enactment of European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation n. 2006/2004/EC and Directive 2009/22/EC, as well as the related Regulation No 524/2013/EU of the European Parliament and of the Council, adopted on the same date, concerning online dispute resolution for consumer disputes and amending Regulation No 2006/2004/EC and Directive 2009/22/EC (Directive on consumer ADR)[2013] OJ L165/63.

Directive 2019/2161 EU reached the same conclusion,[6] declaring that

> consumer protection law should be applied effectively throughout the Union. Yet, (…) the Commission in 2016 and 2017 (…) concluded that the effectiveness of Union consumer protection law is compromised by a lack of awareness among both traders and consumers and that existing means of redress could be taken advantage of more often.[7]

The failure to achieve the objectives set by the European Commission and the European Parliament may be ascribed to many causes, one of the most relevant being the fast technological development occurred in the last decade, which has led to significant changes in the structure of the markets. In fact, an increased use of social media, along with improvements of information processing systems, reshaped in the last years the very nature of economic transactions. In this context, the fast rate of technological development has made it increasingly clear how statutory rules are often unable to keep up with the speed of an internet-based society, requiring thus, with the utmost urgency, a regulatory reform aimed at enhancing the effectiveness of consumer protection and promoting a fair competition.

In accordance with the idea that the enforcement of consumer regulation is a key element for a well-functioning market, the correctness of the decision-making process has been considered crucial for the consumer to be able to make a rational choice, so to improve the efficiency in the supply chain of products and services. Consequently, as far as an opaque and uncompetitive market does not encourage consumers to make reasonable decisions, accuracy of information and fairness in commercial practices have become crucial for the safeguarding of the proper functioning of the market.[8]

These goals are pursued through a detailed discipline of information requirements, tight rules concerning comparative and misleading information, and the prohibition of unfair commercial practices on the market.[9] Even though

[6] European Parliament and Council Directive 2019/2161/EU of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7. See below, para 3.

[7] Also the Report Procedural Protection of Consumers, published on 26th January 2018 and available at europe.eu, as well as the Study for the Fitness Check of EU consumer and marketing Law – Final report Part 1: Main report, European Commission (REFIT), published on 29th May 2017, available at europa.eu, show some inefficiencies in consumer protection, especially in terms of access to justice.

[8] See C. Biasior, *Pratiche commerciali scorrette*, in F. Casucci and G.A. Benacchio eds, *Temi e istituti di diritto privato dell'Unione europea* (Torino: Giappichelli, 2017), 187.

[9] National European legislation set a detailed discipline about misleading and comparative advertisement, then after European Parlaiment and Council Directive 2005/29/EC, provided for rules against unfair commercial practices, which have been transposed into Italian law with decreto legislativo 2 August 2007 no 146 as 'unfaithful commercial practices'. A. Vanzetti and V. Di Cataldo, *Manuale di diritto industriale* (Milano: Giuffrè, 8th ed, 2018), 132.

the fight against such abusive behaviours is a central element for the improvement of the internal market, strikingly, there is no legislation covering unfair commercial practices on the internet.

The first part of this article analyses the most relevant decisions rendered by National Competition Authorities concerning unfair commercial practices[10] on the internet.[11] The second part is dedicated to the most recent rules enacted by the European Union, with the aim of understanding the possible effects deriving therefrom and improving their transposition into the domestic legal system. More specifically, after some introductory observations, paragraphs 3 and 4 explore cases concerning unfair commercial practices on social media (*Facebook*, *WhatsApp* e *TripAdvisor*); paragraph 5 investigates the recent Directive 2019/2161 UE. The last section conveys conclusive remarks on the expected effectiveness of consumer protection from unfair commercial practices on the internet.

Before digging into the above-mentioned issues, it is worth reminding that the vast majority of business to consumer (B2C) transactions take place on the internet[12] and that the current legal framework on the enforcement of consumer protection is given by Art 18 and et seq of the Consumer's Code. Furthermore, domestic rules on these matters derive from the European legislation, with Directive 2005/29 EC as one of the most important sources. Such a Directive has been transposed into Italian law by the decreto legislativo 2 August 2007 no 145.[13]

[10] See, *ex multis*, M. Clarich, 'Le competenze delle autorità indipendenti in materia di pratiche commerciali scorrette' *Giurisprudenza commerciale*, I, 688-705 (2010); M.R. Raspanti, 'Il nuovo assetto di competenze in materia di pratiche commerciali scorrette: "reddite quae sunt auctoritatis auctoritati" ' *Concorrenza e mercato*, 155-182 (2015); G. Barozzi Reggiani, 'Pratiche commerciali scorrette, regolazione e affidamento delle imprese' *Diritto amministrativo*, 683-718 (2016); A. Fachechi, 'Gli orientamenti dell'Autorità garante della concorrenza e del mercato in materia di pratiche commerciali scorrette (anni 2014-2015)' *Concorrenza e mercato*, 497-523 (2016).

[11] European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22. The Commission Staff working document guidance on the implementation/application of European Parliament and Council Directive 2005/29/EC on unfair commercial practices, accompanying the document communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – a comprehensive approach to stimulating cross-border e-commerce for Europe's citizens and businesses – clarifies that 'On-line platforms work according to many different business models: their behaviours range from merely allowing users to look for information supplied by third parties to facilitating, often against remuneration, contractual transactions between third party traders and consumers or advertising and selling, in their own name, different kinds of products and services including digital content'.

[12] See data on e-commerce by the *Politecnico di Milano*, available at *mark-up.it*.

[13] See, ex multis, E. Minervini, Codice del consumo e pratiche commerciali sleali, in E. Minervini and Rossi Carleo eds, Le pratiche commerciali sleali. Direttiva comunitaria ed ordinamento italiano (Milano: Giuffrè, 2007), 75; R. Di Raimo, 'Note minime sulle implicazioni sostanziali dell'art. 14 della direttiva 2005/29/CE a margine di una proposta per il suo recepimento'

II. Unfair Trade Practices on the Internet. The Most Relevant Cases Dealt with by the Italian Competition Authority and the Phenomenon of Influencer Marketing

The evasive and ever-changing character of unfair trade practices on the internet reflects on the variety of the case-law. Along with cases concerning the usual exchange of goods and services on the internet,[14] there are much more complex situations,[15] such as those regarding influencer marketing.[16] The latter

Contratto e impresa Europa, 91-101 (2007); A. Gentili, 'Pratiche sleali e tutele legali: dal modello economico alla disciplina giuridica' Rivista di diritto privato, 58, 37-67 (2010); A. Fachechi, Pratiche commerciali scorrette e rimedi negoziali (Napoli: Edizioni Scientifiche Italiane, 2012).

[14] In 2016, the Italian Competition Authority has initiated and then concluded several proceedings regarding RG Group, Mobile Store S.r.l, WM S.r.l.s, Aquila S.r.l, Sami S.r.l.s, due to unfair practices perpetrated online. The national Authority established that these companies used to sell technological products, such as televisions, tablets and smartphone, declaring they were immediately available. Consumer bought products but, soon afterwards, difficulties emerged for the delivery of the good or restitution of the price. All these proceedings ended with an administrative sanction against the investigated companies. See ICA, decision 13 April 2016 no 25975; decision 13 April 2016 no 25976; decision 13 April 2016 no 25977; decision 4 August 2016 no 26159; decision no 26163 dated 4 August 2016. All these decisions are available at *agcom.it*. In the same 2016, the competition watchdog has sanctioned Amazon EU Sàrl and Amazon Services Europe Sàrl, which is in charge of the management of the Amazon marketplace, connecting consumers with third party sellers. the Italian Competition Authority found that the two companies had not provided, or had provided inadequately, relevant information during the purchase phase; in particular: mandatory pre-contract information and information concerning conformity legal guarantees provided for by the Consumer Code. More in particular, Amazon Eu Sàrl did not adequately provide users, before contractual obligations and in an easy and accessible way, with a specific pre-contract document offering information concerning rescission and related terms and exclusions, the existence and conditions of a post-sale customer service, besides a remind on legal guarantees. Moreover, Amazon did not adequately inform consumers about the real identity of their counterparts, so that consumers thought they had concluded a contract with Amazon rather than a third party. Accordingly, decision no 25911, dated 9 March 2016, the Competition Authority: *a*) Amazon EU Sàrl and Amazon Services Europe Sàrl had violated Arts 49 and 51 of the Consumer Code and, for that reason, has ordered to cease such an infringement; *b*) levied sanctions for € 80,000 against Amazon EU Sàrl and € 220.000 against Amazon Services Europe Sàrl; *c)* required both the companies to communicate to the Authority the measures adopted to comply with its decision, within thirty days from the summoning.

[15] Somehow more complicated appears the Trenitalia case. The AGCM defined as an unfair commercial practice Trenitalia's omission of regional cheaper trains from the results of online searches, on automatic vending machines and on its app. Investigations ascertained that the algorithm governing the search engine had misleading effects on consumers, who were not informed of alternative and generally less expensive solutions. Decision no 26700, dated 19 July 2017, branded such a commercial practice in contrast with Arts 20 and 21, para 1, lett *b*), of the Consumer Code, levied a € 5 million fine against Trenitalia and ordered the company to immediately stop its conduct.

[16] AGCM, Press release of 24 July 2017; Id, Press release of 6 August 2018, available at *agcm.it*. 'Bloggers or so-called influencers (ie widely followed social media personalities) support or endorse specific brands through photos, videos or comments posted on blogs, vlogs and social media such as Facebook, Instagram, Twitter, YouTube, Snapchat, Myspace, thus generating an advertising effect. This form communication – initially used only by celebrities – is now becoming more and more common on social networks among a considerable number of users who do not have a particularly high number of followers'. For a definition of influencer marketing, see M. Fiocca, 'Il

has recently attention in scholarly writings and in case-law, both at the national and international level.

Influencer marketing involves public figures with a high number of followers, generally active in the show business or in the fashion industry, endorsing products on social media such ad Facebook, Instagram, Twitter, YouTube, Snapchat or Myspace and inducing consumers to choose some brands, rather than others. Difficulties with domestic and European legislation begin when advertising and endorsement disclosure is missing.[17] Such a phenomenon, originally limited to the most-followed figures, is currently expanding so that also persons with a limited number of followers are now involved in the business. The spread of marketing through digital solutions, social media and influencers has posed many sensitive questions as to consumer protection, particularly regarding unfair commercial practices and the protection of privacy on the internet. Due to the contrast between the fast technological development and the length of the law-making process, the effectiveness of consumer protection is under dispute and the further enhancement of social media in the future will increase the importance of the question.[18]

At first, in two occasions, the Italian Competition Authority (the AGCM)[19] has used moral suasion,[20] inviting influencers, undertakings, and their commercial partners to disclose advertisement purposes.[21] Next, the AGCM started investigations[22] against Alitalia S.p.A., Aeffe S.p.A., Alberta Ferretti and other *influencers* for possible hidden advertisement, which were later terminated after the subjects of these proceedings committed themselves to change their behaviour. Investigations concerned the alleged dissemination by various influencers

binomio digitale "influencer story-telling": la nuova pubblicità e la tutela dei consumatori' *Cyberspazio e diritto*, 436, 431-456 (2018), saying that thanks to influencer marketing, brands use the public figures social visibility to prevail over their competitors. In other terms, influencer marketing ends up in brand marketing.

[17] See Art 5 of decreto legislativo no 145 of 2007, transposing into the Italian legal system the rule contained in Art 14 of European Parliament and Council Directive 2005/29/EC, amending Directive 84/450/EEC on misleading advertisement, prescribing that advertisement always need to be easily recognisable.

[18] See M. Fiocca, n 16 above, 432.

[19] Even before the arousal of AGCM's attention, with the enactment of the 2016 code of conduct named 'Digital Chat', the Italian Authority on advertising standards ('IAP' – Istituto dell'Autodisciplina Pubblicitaria) was already well aware of the importance of disciplining the phenomenon of influencer marketing. In fact, the IAP stated that 'whenever comments or opinions regarding some products or brands, expressed by celebrities, influencers or bloggers have a commercial nature, the Code of conduct applies. For example, there is a commercial nature if a celebrity/influencer/blogger has signed an advertisement agreement with the owner of the band (or its commercial partners)'.

[20] On positive effects of moral suasion, see records of the hearing on 4th May 2017, reporting the beneficial outcome in the Amazon case, where the Authority invited the company to provide a more accurate information about the purchase process to its users.

[21] AGCM, 'ICA closes second moral suasion on influencers and brands, yet opens investigation into possible hidden advertising', available at *agcm.it*.

[22] AGCM, decision 22 May 2019 no 27787, available at agcm.it.

(including Alessia Marcuzzi, Chiara Biasi, Martina Colombari, Federica Fontana, Carlo Mengucci, Elena Santarelli, Giulia De Lellis, Cristina Chiabotto) on their Instagram profiles of posts artificially featuring the Alitalia logo printed on Alberta Ferretti clothing, worn in the commercial.

Such a conduct has been considered in violation of Arts 22 and 23, para 1, lett *m)* Consumer Code in that it represented a fraudulent omission with misleading effects on consumers, because of the failure to disclose commercial intent and the hidden advertising.[23] Furthermore, endorsement of products from specific brands was even more deceptive as it emerged from the influencer's apparently normal and relaxed everyday routine.[24] In so doing, for the purpose of the applicability of the rules contained in the Consumer Code, the competition watchdog has implicitly considered influencers as professional traders.[25]

Investigations have been terminated and no sanction has been imposed, for the Italian Competition Authority held commitments submitted by the undertakings subject to the proceedings to be able to meet the concerns expressed to them. More in particular, Alitalia has committed to '1) rigorously abide by the rule prohibiting unfair trade practices, with a specific reference to hidden advertisement, and that the top managers involved with influencer marketing shall issue a strong recommendation to avoid the occurrence of similar circumstances; 2) adopt Guidelines aimed at clarifying the rules of conduct that influencers will need to observe in their relationship with the Company. These Guidelines will be an essential part of the cooperation agreement among the parties so that, in case of violation, Alitalia will be entitled to impose to its counterparty a penalty determined on the basis of the value and characteristics of the contract; 3) introduce a standard clause in the agreements concerning the licensing and co-marketing of the Alitalia trademark, providing that commercial partners shall adopt all the measure and precautions required for preventing hidden advertisement, and remind to influencers the importance of complying in good faith with the requirements of the law'.[26]

Notwithstanding that no sanction has been issued,[27] it is clear how labile

[23] According to scholarly writings, the so-called 'misleading omissions' are voluntary misconducts that could justify annullability of the contract pursuant to Art 1439 of the Civil Code. See M. Nuzzo, 'Pratiche commerciali sleali ed effetti sul contratto: nullità di protezione o annullabilità per vizi del consenso?', in E. Minervini and L. Rossi Carleo eds, *Le pratiche commerciali sleali* (Milano: Giuffrè, 2007), 240, 235-244.

[24] In 2016, the US Federal Trade Commission has published its Endorsement Guides, regulating online advertising and marketing. Pursuant to such a Guide, influencers have to disclose advertisement and commercial purposes.

[25] For a definition of trader see the comment of the Case C-105/17 *Komisia za zashtita na potrebitelite* v *Evelina Kamenova*, Judgement of 4 October 2018 by A. Aiello, 'Nozioni di professionista e di pratiche commerciali nella giurisprudenza della Corte di giustizia dell'Unione europea' *Rivista diritto media*, 282-286 (2019); and by C. Scapinello, 'La nozione di "professionista" nel commercio elettronico' *Giurisprudenza italiana*, 1813-1823 (2019).

[26] See AGCM, n 22 above.

[27] The requirements of manifest misbehaviour and severeness were not met and the ICA

could be the balance between (influencer's) freedom of expression and consumer (as well as market) protection. On one hand, the correctness of consumers' decision-making process needs to be safeguarded from the threats posed by of hidden advertisements. On the other hand, individuals' ability to freely express themselves for non-commercial purposes also needs to be assured.

III. The Facebook and WhatsApp Cases

Since the above-mentioned case concerns the advertisement of goods and services meant for consumers, the consistency of the conduct of the Italian Competition Authority is undeniable. However, in respect of the measures adopted against WhatsApp and Facebook (nos 26596, 26597 and no 27432), the situation is different.

In such cases, the legitimacy of AGCM's decision depends on the possibility of defining the commercialisation of personal data on the social network in terms of a consumer relationship.[28]

With two decisions dated 11 May 2017, the Antitrust Authority ascertained that WhatsApp Inc. *de facto* forced the users of its service to fully accept the new Terms of Use, and specifically the provision to share their personal data with Facebook, since without granting such consent, they could not have been able to use the service anymore. In these decisions, the Provider's conduct has been regarded as a violation of Arts 20, 24 and 25 of Consumer Code and, consequently, a four million euros fine has been levied (then reduced to three, due to the precautionary suspension of data sharing with Facebook). Most importantly, the Italian Competition watchdog has ascertained that personal data, information and contents generated on *social media* have an economic value, and may well be used as consideration, instead of a monetary price, thus constituting part of a consumer relationship.[29]

considered the commitments submitted by influencers and undertakings to be a sufficient countermeasure.

[28] During Auditions in April 2018, Senator Orrin Hatch famously asked to Mark Zuckerberg: 'How do you sustain a business model in which users do not pay for your service?', who in turn replied: 'we run ads'. The Cambridge Analytica scandal unveiled how personal data were disclosed to third parties for profiling 87 million users. See C. Goanta and S. Mulders, 'Move Fast and Break Things: Unfair Commercial Practices and Consent on Social Media' *Journal of European Consumer and Market* Law, 136-146 (2019); C. Langhanke and M. Schmidt-Kessel, 'Consumer Data as Consideration' *Journal of European Consumer and Market Law*, 218-223, 220 (2015).

[29] See F. Bravo, *Il commercio elettronico dei dati personali*, in T. Pasquino et al eds, *Questioni attuali in tema di commercio elettronico* (Napoli: Edizioni Scientifiche Italiane, 2020), 83; G. Giannone Codiglione, 'I dati personali come corrispettivo della fruizione di un servizio di comunicazione elettronica' *Il diritto dell'informazione e dell'informatica*, 419, 390-425 (2017). See also M. Schmidt-Kessel, *Consent for the Processing of Personal Data and its Relationship to Contract*, in A. De Franceschi and R. Schulze eds, *Digital Revolution – New Challenges for Law* (München: Verlag C.H. Beck, 2019), 76, addressing the so-called bunding prohibition and

More recently, in December 2018, the Italian Competition Authority[30] levied a five million euros fine against Facebook for unfair commercial practices. The decision by the AGCM emphasised the deceiving nature of the advertisement 'it's free and will always be',[31] in so far as it failed to disclose to the users that their personal data would be used for commercial purposes. Furthermore, the social network also failed to provide genuine and accurate information on whether personal data would be used for profiling or personalised advertisement purposes.

A second violation consisted in the undue conditioning of users, whose personal data have been made available to third parties without any explicit authorisation. More specifically, through the pre-selection of the 'Active Platform function' Facebook pre-set users' ability to access websites and external apps using their accounts, thus enabling the transmission of their data to websites or apps, without any express consent.

Facebook has challenged the measures enacted by the Italian Competition Authority before the Regional Administrative Tribunal competent for the Region of the Lazio, which held that 'personal data have an economic value and Facebook failed to comply with information and disclosure requirements'. The Administrative Tribunal further specified that 'personal data may well represent a disposable asset, capable of being exchanged in consideration of goods and services within contractual relationships'.[32] The Tribunal, furthermore, held that Facebook 'needs to comply with existing legislation safeguarding accuracy,

highlighting that it concerns the case 'where the object of the consent has nothing to do with the contract but is only of accessory nature'.

[30] Public enforcement in the field of data processing is demanded to the cooperation of the Italian Competition Authority and the Communication Regulatory Authority, which is an independent authority established by legge 31 July 1997 no 249 regulating and controlling audio and video communication, as well as postal services and the press. It is composed of a President, a Commission for networks and infrastructures, a Commission for products and services, and a Council. Commissions are composed of the President and two Commissioners, while the Council is constituted with the presence of the President and all Commissioners. As for the adjudication power by the Italian Communication Regulatory Authority, see P. Rossi, 'Il nuovo Regolamento Agcom per la risoluzione delle dispute fra operatori, nella simbiosi tra regulation e adjudication' *Amministrazione in cammino*, 29 November 2017, 1-17; G. Nava, *Regolamentazione e contenzioso tra operatori nelle comunicazioni elettroniche* (Torino: Giappichelli, 2012), 108; F. Donati, *L'ordinamento amministrativo delle comunicazioni* (Torino: Giappichelli, 2007), 212; G. Della Cananea, 'Regolazione del mercato e tutela della concorrenza nella risoluzione delle controversie in tema di comunicazioni elettroniche' *Diritto pubblico*, 612, 601-618, (2005); see also, *si vis*, M. Zarro, *Le decisioni delle autorità amministrative indipendenti nelle controversie tra utenti e imprese* , in D. Mantucci ed, *Trattato di diritto dell'arbitrato* (Napoli: Edizioni Scientifiche Italiane, 2020), 650.

[31] After the proceedings, the anodyne motto 'Create an account. It's quick and easy' appears.

[32] Tribunale amministrativo regionale Lazio 10 January 2020 no 260, *Diritto e Giustizia* (2020), 13th January 2020. Decision no 261 does not seem to be published. The two decisions have the same content and motivation and also the challenged document is the same: ie decision no 27432 rendered in PS/11112 by the Italian Competition Authority during the hearing on 29 November 2018, notified on 7 December 2018 and published in *Rassegna di diritto Farmaceutico e della salute*, 205 (2019). In Judgment no 260 the challenging party is Facebook Inc., in the following Judgment no 261, the subsidiary Facebook Ireland Limited takes that role.

clearness and the non-deceiving nature of information provided to consumers', qualifying as misleading its advertisement[33] that its services would have been free of charges. Far from being free, in exchange of the services received, users pay a consideration consisting in the transfer of their personal data (such as personal identity, contacts, pictures, geographical address and preferences from previously visited websites).[34] These decisions from the Italian Competition Authority and the Administrative Tribunal are particularly important and deserve to be praised for their rigorousness. Even though, considering that 98% of Facebook's revenue derive from advertisement, similar steps could – and perhaps should – have been taken earlier.

The cases discussed above lead to the conclusion that there is reasonable ground for holding that the lack of a monetary transaction does not necessarily, and in all cases, entail that the product is 'free'. On the contrary, Recital 13 of Proposal for a Directive 634/2015 EU on certain aspects concerning contracts for the supply of digital content establishes that

> in the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied not in exchange for a price but against counter-performance other than money, ie by giving access to personal data or other data.[35]

The final version of Directive 2019/770/UE does not make any reference to the concept of 'consideration', as it would probably have been inappropriate after the European Data Protection Supervisor stressed that

> fundamental rights such as the right to the protection of personal data cannot be reduced to simple consumer interests, and personal data cannot be considered as a mere commodity.[36]

Instead, Art 3 refers to the case in which

> the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer provides or undertakes to provide personal data

and states that such an exchange triggers the applicability of the Directive just

[33] Tribunale amministrativo regionale Lazio 10 January 2020, n 32 above.

[34] See C. Langhanke and M. Schmidt-Kessel, n 28 above, 223: 'A performance promised in exchange for consent to process with personal data is therefore not gratuitous. There is a valuable consideration, which leads to a synallagmatic contract'.

[35] The same conclusion is also reached in Commission's Guidance on the implementation/application of European Parliament and Council Directive 2005/29/EC.

[36] European Data Protection Supervisor, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, 14 May 2017.

like the payment of a price. Consequently, there is an express textual recognition of the economic value of personal data, which imposes to consider the relationship between the users and internet service providers under the light of consumer law. This is the reason why Authorities involved in public enforcement need to investigate the distortive effects on the market of misleading advertisement, alluring consumers with the promise of free services and jeopardizing the functioning of the Internal market. Thus, a synergic approach towards personal data protection, consumer protection and a correct functioning of the market should be implemented, meaning that also the market of personal data should be defined a 'regulated market' due to the penetrating powers of regulatory authorities.[37]

IV. The TripAdvisor Case

Unfair commercial practices are also linked to online reputation.[38]

[37] This is also in line with the German *Bundeskartellamt* 6th February 2019, B6-22/16, available at *bundeskartellamt.de*, with comments by G. Colangelo and M. Maggiolino, 'Antitrust Über Alles. Whither Competition Law after Facebook?' *World Competition*, 355-376 (2019); M. Midiri, 'Privacy e antitrust: una risposta ordinamentale ai Tech Giant', available at *federalismi.it*, 209-234 (2020) sanctioning the abuse of dominant position by Facebook for making the use of its social network by private users, who also use related services such as WhatsApp and Instagram, conditional on the collection of data and the combining of such information with the use's accounts, without an explicit and genuine consent. According to the *Bundeskartellamt* such a conduct would violate § 19 of *Gesetz gegen Wettbewerbsbeschränkungen*, prohibiting the abuse of a dominant position. Facebook's dominant position has been established on the grounds of the high number of daily active users and the low level of supply-side substitutability. Furthermore, thanks to its market position and the inappropriate processing of data, Facebook had access to a large number of further sources, securing its competitive edge over the competitors and increasing market entry barriers. Facebook's market power reflected on end customers. According to *Bundeskartellamt*, users were not in a position to voluntarily give their consent to the treatment of personal data due to Facebook's dominant position. In fact, users would have to refrain from using a variety of services, if they did not want to add any more data to their extensive Facebook database. And such an option greatly reduced their choice. The company has thus violated not only competition law, but also European Parliament and Council Regulation 2016/679/EU of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC [2016] OJ L119/1, since consent was not freely given, for users had no genuine or free choice, being unable to refuse or withdraw consent without detriment. Also the Australian Competition and Consumer Commission, in a preliminary report published in 2018, the Australian Competition and Consumer Commission, *Digital Platforms Inquiry, Preliminary Report*, available at *accc.gov.au* (2018), has expressed its concerns over the collection via social media of a huge amount of personal data with a relevant economic value, through means which go beyond the genuine and unfettered consent of the users. The Australian Competition and Consumer Commission especially highlighted the threats and the complexities hidden in terms of service and wishes for an urgent legislative reform, aimed at providing consumers with a better understanding of their rights and knowledge of the functioning of similar online platforms.

[38] See G. D'Alfonso, 'Recensioni 'diffamatorie' in rete e lesione della reputazione digitale d'impresa. Illecito aquiliano e valutazione comparativa degli interessi dell'impresa e degli internauti, alla luce degli indirizzi giurisprudenziali sui limiti all'esercizio del diritto di critica' *Diritto, mercato, tecnologia*, 2, 1-48 (2019), pointing out that, with the evolution of the internet, business reputation

The starting point of the enquiry regarding online reputation are the features of the contemporary internet-based society, whereby citizens, undertakings, and companies are more and more connected with each other, exchanging information and data nature through social media networks. The enormous amount of information available on the internet, such as reviews, comments, and pictures may have both a positive or a negative effect on consumers' preferences on specific products or services. In such a context, companies do feel the need to exploit the opportunities offered by online markets.[39] Several empirical studies proved that reputation significantly influences the overall value of a company, with economists trying to establish whether there is a biunivocal relationship between online reputation and a company's performance (not only in financial terms). Reputation, as a matter of fact, is a diversifying element from other competitors, and it is non-replicable being, therefore, of the utmost importance for competitive advantage. Consequently, a link between reputation and the economic performance of a company really seems to exist.

A new 'reputation system' has emerged in the current economic and legal scenario.[40] It is a system based on online platforms operated on a peer-to-peer basis, relying on qualitative reviews and numerical ratings from users.[41] Triangular relationships are established between sellers, consumers, and the operator of the platform, aimed at building trust among strangers using a collaborative marketplace. As a result of these triangular transactions, a great deal of information and data is uploaded on the internet and everything becomes capable of being measured:

> hotels and restaurants (*Yelp*, *Tripadvisor*, *Booking*), sellers (*Ebay*, *Amazon*), professionals – starting from lawyers (*Avvo*) and scholars (*RateMyProfessors*) – and private individuals (*Airbnb*, *Uber*) are rated.[42]

has assumed a different meaning. Digital reputation describes the idea of internet users, based on information gathered online. See, *si vis*, M. Zarro, 'La tutela della reputazione digitale quale «intangible asset» dell'impresa' *Rassegna di diritto civile*, 1514, 1504-1531 (2017); A. Ricci, *La reputazione: dal concetto alle declinazioni* (Torino: Giappichelli, 2018), 174; Id, 'Il valore economico della reputazione nel mondo digitale. Prime considerazioni' *Contratto e impresa*, 1298, 1297-1316 (2010); N. Di Stefano and F. Giannone, *Manuale sulla web reputation. Dall'identità digitale all'economia della reputazione*, available at https://tinyurl.com/rrer22w (last visited 30 June 2021); L. Carota, 'Diffusione di informazioni in rete e affidamento sulla reputazione digitale dell'impresa' *Giurisprudenza commerciale*, I, 629, 624-638 (2017); A. Fusaro, *Informazioni economiche e "reputazione d'impresa" nell'orizzonte dell'illecito civile* (Torino: Giappichelli, 2010), 1.

[39] G. Atti et al, La quarta rivoluzione industriale: verso la supply chain digitale: Il futuro degli acquisti pubblici e privati nell'era digitale (Milano: Franco Angeli, 2018).

[40] L. Carota, n 38 above, 624; G. Smorto, 'Reputazione, fiducia e mercati' *Europa e diritto privato*, 199-218 (2016). On digital reputation, see A. Ricci, n 38 above, 168.

[41] C. Busch, Crowdsourcing consumer confidence. How to regulate online rating and review systems in the collaborative economy, in A. De Franceschi ed, *European Contract Law and the Digital Single Market* (Cambridge: Intersentia, 2016), 223.

[42] G. Smorto, *Reputazione, fiducia e mercati*, n 40 above, 169. See also C. Busch, n 41 above, 224.

Even though reputational feedback systems are being carefully studied to increase their reliability, there are still several problems with the reliability of ratings, reviews, and comments that need to be addressed in an effective way.[43]

The most important limit of these reputational feedback systems is the lack of any preliminary control on the accuracy and reliability of the information entered by users. Because of the lack of preventive mechanisms, users of the platform and traders may indulge in abusive conducts with distortive effects on the markets. Instigation may come from many different circumstances: eg, due to the direct relationship between online reputation and earnings, a company may be interested in artificially inflating its ratings, or discrediting a rival undertaking on the platform; the same consumers/users may be positively or negatively biased towards a specific product. However, notwithstanding the different reasons, as a matter of fact, abusive conducts, biased comments and fake feedbacks negatively affect trust among users, dissolving the reputational bonds necessary for the functioning of the marketplace. For this reason, they represent an unfair commercial practice, with misleading effects on consumers relying on the accuracy of information provided by the online platform.

One of the most relevant decision on these issues is the TripAdvisor case, concerning the relationship between business reputation and unfair commercial practices. As widely known, this online platform offers to the public user-generated contents such as tourist information, feedbacks of hotels, restaurants *et alia*. To post a review, users older than 13 years of age simply need to register on the website and accept terms and conditions. Users can even register with more than one account,[44] and are not required to have actually purchased the product they review. This lack of regulation leads to a higher risk that users could provide or be provided themselves with misleading information, so to nullify the positive effects of the collaborative platform.[45]

With decision no 25237, dated 12 December 2014, the Italian Competition Authority levied a € 500,000 fine against *TripAdvisor* LLC and *TripAdvisor Italy* s.r.l. for unfair commercial practices. According to the investigations conducted by the Competition Authority, TripAdvisor was found responsible for the spread of misleading information, because

> while stating that it does not check the facts set out in the reviews, and while aware that (…) on the said website fake reviews, both positive and negative in their judgments, are published by users who have not actually

[43] G. Smorto, n 40 above, 173.

[44] Authentication of personal identity is not a requisite for registration, to the extent that the identity of the review remains secret. See, L. Vizzoni, 'Recensioni non genuine su TripAdvisor' *Responsabilità civile e previdenza*, 710, 706-722 (2018).

[45] ibid 711, recapitulating unfair practices such as: boosting, ie the artificial boost on online platforms of a company's profile; digital vandalism, when a company libels a competitor's product; and optimization, consisting in buying a stock of positive reviews by specialized agencies.

> availed themselves of the services provided by the facilities included in the database, uses particularly assertive information, capable as such of increasing the consumers' trust in the authentic and genuine character of the reviews published by users.[46]

One of the commercials under the scrutiny of the Italian watchdog, still flagged on the website, reads

> it does not matter if you prefer chain hotels or niche resorts: on TripAdvisor you can find many reviews, true and authentic, which you can trust. Millions of travellers have published online their most sincere views on hotels, beds & breakfast, pensions and much more still.

The Competition Authority had no doubts that false information has been provided as investigation proceedings established that many reviews concerned inactive undertakings, or were traceable to a fantasy character, or were related to a period during which the advertised activity happened to be close.

Both TripAdvisor LLC and TripAdvisor Italy s.r.l. challenged the above-mentioned fine before the Administrative Tribunal competent for the Region of Lazio. With judgement no 9355/2015,[47] the Administrative judges reversed the arguments of the Italian Competition Authority, holding that the platform property advertised the functioning of the website, also due to the express warning that the trustworthiness of the reviews could not be certified and that reviews and comments by users were mere opinions.

The Competition Authority appealed the judgement rendered by the Tribunal, and the State Council confirmed the fine levied against TripAdvisor, holding that commercials published on TripAdvisor's website were able to mislead consumers regarding the truthfulness of the ratings and reviews posted by users. However, the Court seated in Palazzo Spada reduced the sanction from € 500,000 to € 100,000.[48]

There is no doubt that TripAdvisor should be considered as a hosting provider for the purposes of decreto legislativo 9 April 2003 no 70,[49] as it administers the platform and earns its profits from pay-per-click advertisement; the price set to its commercial partners is directly proportional to the number of clicks generated from viewers logged into the system. As a hosting provider, according to Art 18, para 1, b, of Consumer Code, TripAdvisor may well be

[46] See, the comments by B. Blasco, 'Falsità delle recensioni in internet, astroturfing e scorrettezza delle pratiche commerciali' *I contratti*, 231-242 (2017).

[47] Tribunale amministrativo regionale Lazio 13 July 2015 no 9355 with note by E. Della Bruna, 'Ingannevolezza della comunicazione commerciale, (in)adeguatezza organizzativa e responsabilità degli internet provider (il caso TripAdvisor)' *Rivista di diritto dell'impresa*, 417-430 (2016). See also L. Vizzoni, n 44 above, 706.

[48] AGCM, 15 July 2019, Decision no 4976, available at *agcm.it*.

[49] E. Della Bruna, n 47 above, 418.

considered as a professional for the purposes of the applicability of consumer protection law.[50]

Technological developments and the rise of social media have changed not only the traditional features of marketplaces, but also the common way of doing business. Social studies have demonstrated the economic significance of reputation. From a legal point of view, it now has to be determined how and in what terms reputation may be considered as an intangible asset, fully protected by the legal system and capable of being transferred.

Being online business reputation an incorporeal factor of production, it may well be considered as an intangible asset, which needs to be protected as

[50] See, Opinion of Advocate General Szpunar, 31st May 2018, C-105/17, available at *europa.eu*. The Advocate proposed to interpret Art 2(b) of European Parliament and Council Directive 2005/29/EC as meaning that a natural person, such as the defendant in the main proceedings, registered on an online platform for the sale of goods cannot be classified as a 'trader' when publishing, on that website, eight advertisements at the same time for the sale of different products. However, added the Advocate, it is for the referring court to assess whether such a person may be defined as a 'trader' and, therefore, whether the activity she carries out constitutes a 'commercial practice' within the meaning of Art 2(d) of the Directive 2005/29 EC. The Advocate has reached such a conclusion based on the argument that the simultaneous publication on an online platform of a total of eight advertisements for the sale of different new and used products does not seem to be sufficient to allow use of the classification of 'trader' within the meaning of EU directives. However, it has been noted that 'the classification of 'trader' requires 'a case-by-case approach' and that it is therefore appropriate, for the referring court to carry out a specific analysis to establish whether a person is covered by the definition of 'trader'. That analysis will seek, in particular, to establish whether the online platform sale was made in an organised manner and for profit; whether that sale occurs over a certain duration and with a certain frequency; whether the seller has a legal status which enables her to engage in commercial transactions, and to what extent the online sale is connected to the seller's commercial activity; whether the seller is subject to VAT; whether the seller, acting in the name of a specific trader or on his behalf or through any other person acting in her name or on her behalf, received remuneration or an incentive; whether the seller purchases new or used goods with a view to selling them on, thus making that a regular, frequent and/or simultaneous activity in relation to her trade; whether the amount of profit generated on the sales confirms that the transaction made falls within the scope of a commercial activity, and/or whether the products for sale are all of the same type or value, in particular, whether the offer is focused on a limited number of products. It should be noted that those criteria are neither exhaustive nor exclusive, and therefore, in principle, meeting one or more of the criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of 'trader'. It will therefore be necessary to make an overall assessment taking account of all the relevant criteria in order to decide on the classification to be used. Those criteria will thus enable the national courts to determine whether a person is carrying out a commercial activity which places him in a stronger position than the consumer and, consequently, whether there is an imbalance between the trader and the consumer. However, it is for the referring court, in view of the foregoing considerations, to assess, on the basis of the facts available to it and based, inter alia, on the criteria set out in the preceding points, whether that person may be classified as a 'trader' within the meaning of those directives». The European Court of Justice, following the arguments laid down by the Advocate General, held that «a natural person who publishes simultaneously on a website a number of advertisements offering new and second-hand goods for sale can be classified as a 'trader', and such an activity can constitute a 'commercial practice', only if that person is acting for purposes relating to his trade, business, craft or profession, this being a matter for the national court to determine, in the light of all relevant circumstances of the individual case'.

such, according to its characteristics and in compliance with the purposes it is deemed to serve. However, from a different point of view, online business reputation has its own peculiarities, so that it cannot be simply equated to that of natural persons. As a personality right, reputation of natural persons cannot be merchandised and may not be considered under any circumstance as a factor of production. This argument implies that the grounds of protection of online business reputation, as well as the remedies for its enforcement, are necessarily different from those of natural persons.

This is even more important, considering the evolution of business models in last decades and that a complex network of relationships based on mutual trust and cooperation has developed against a highly hierarchical and vertically integrated company structure – a twist branded by the German scholars as V*erbund – Verband – Verkehr*.[51]

The spread of a business network based on a cooperative approach, whereby every interaction allows the members to add a valuable contribution to the overall efficiency of the system, significantly increases the importance of trust, the lack of which determines the collapse of the whole structure. Furthermore, trade libel or unfair commercial practices not only affect a company's position in the complex web of interactions of which markets are made but, due to the way communication flows on the internet and its rapidity, also makes it almost impossible a restore the *status quo ante*. This being so, it would prove ineffective to search a remedy against such violations by subsuming the specific case under a general rule, instead of adopting a case-by-case approach able to properly evaluate the specific circumstances of the case. Holding the contrary would mean to inadmissibly conceive the issue of online business reputation, personal data and know how protection as an *ius singularis*, confined in their own compartments.

A discipline based on general rules and detailed technical regulation would not only be inadmissible, as it would bureaucratise the protection of fundamental values for society, but it would also be inadequate. In fact, due to the fast development of new technologies, a technical and excessively detailed regulation would soon become obsolescent.[52] An example in this sense is given by the decreto legislativo no 70/2003,[53] transposing into the national legal system Directive 2000/31/EC on certain legal aspects of information society services. This legal instrument provides for a limitation of the liability of intermediary

[51] G. Teubner, "Verbund', 'Verband' oder 'Verkehr'?: zur Außenhaftung von Franchising-Systemen' *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* , 154 (1990); transl in Id, 'Beyond Contract and Organization? The External Liability of Franchising Systems in German Law'*,* in C. Joerges ed, *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden: Nomos, 1991), 105.

[52] P. Perlingieri, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Il Foro napoletano*, 483, 481-488 (2018).

[53] Regarding hosting providers' liability see M. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018), 24.

service providers, unless they have actual knowledge of the illegality of the activity or information stored at the request of a recipient of the service. Such a Decree is now obsolete,[54] as it is unable to prevent potential risks coming from users, traders and marketers. As seen in the TripAdvisor case, social media and other kinds of online cooperative platforms indiscriminately make it possible for anyone to publish reviews and comments, even if containing false, misleading or deceptive statements. For this reason, judges called to solve similar cases struggled to ground service provider's liability on the above-mentioned legislation. Instead, to oblige information society service providers to remove manifestly wrong or defamatory information, judges availed themselves of the ordinary causes of action, especially Art 700 of the Code of Civil Procedure, which, however, requires the applicant to establish that the risk of an imminent and irreparable harm.

V. Consumer Protection from the Unfair Trade Practices on the Internet. A Recent European Legislative Measure

The cases discussed in the previous sections show how evasive unfair commercial practices and misleading advertisement could be and how hard it may be, even for the most prepared and up-to-date consumer, to recognise similar phenomena when they occur. It is thus clear that private enforcement of consumer law risks to be ineffective, in as much as no one could ever enforce rights and redress wrongs of which he is not aware. Such a gap between consumers and traders cannot be filled by the internet, and requires an intervention by the State so to create valid tools for consumer law enforcement in the era of digital marketplaces and avoid distortions.[55]

[54] See European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, which has been transposed into the Italian legal system with decreto legislativo 9 April 2003 no 70. See also, C-18/18, *Eva Glawischnig Piesczek* v *Facebook Ireland Limited*, Judgement of 3 October 2019, available at www.eur-lex.europa.it At the national level, case-law focuses on the definition of provider and the scope of its responsibility, see Corte d'Appello di Roma 29 April 2017 no 2833 with comments by G. Cassano, 'Nozione di provider e delimitazione della responsabilità: la giurisprudenza prende una direzione' *Il diritto industriale* 181, 185-187 (2018); Tribunale di Torino 7 April 2017 no 1928 commented by V. Vozza, 'La responsabilità civile degli Internet Service Provider tra interpretazione giurisprudenziale e dettato normative' *Danno e responsabilità*, 78-86 (2018). The author highlights the urgent need of a legislative reform, due to the spread of online platforms offering the opportunity to upload potential illicit materials. In such a context, European Parliament and Council Directive 2000/31/EC shows all its limits, which are only in part due to the quick developments of an internet-based society. See also Art 13 of European Parliament and Council Directive 2016/0280/UE on copyright in the Digital Single Market, concerning the use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.

[55] See A. Quarta, 'Il diritto dei consumatori ai tempi della peer economy. Prestatori di servizi e *prosumers*: primi spunti' *Europa e Diritto Privato*, 667-681 (2017). The Author agrees with the

This new approach, aimed at promoting the proper functioning of the market through the instruments of contract law, is exemplified by the allocation to national competition authorities of supervisory powers over unfair clauses in contracts concluded with consumers and unfair commercial practices.[56] Due to the interdependency of competition and consumer law, strategies for the protection of consumers and marketplaces cannot be compartmentalised. A synergistic approach should instead be preferred, so to modulate interventions in an efficient way using the limited resources available.[57]

For this purpose, public enforcement of consumer law has been further improved by the EU legislation. National Authorities have the power to ascertain, prohibit – also in the form of an interim measure – and levy sanctions, once limited to unfair commercial practices (Art 27 Consumer Code), has also become available in cases involving contracts negotiated away from business premises (Art 66, para 1, Consumer Code), as well as timeshare and long-term holiday contracts (Art 79 Consumer Code).[58]

The latest steps taken in this direction are Directive 2019/1/EU [59] and

solution suggested in the text highlighting, however, that 'collaborative markets could suffer from information asymmetry, being thus a public intervention strongly recommended'.

[56] Decreto legislativo 6 September 2005 no 206, introducing Art 37 bis of the Consumer Code, has given to AGCM the power to evaluate unfairness of clauses put into terms and conditions of standard contracts. See, L. Rossi Carleo, Sub *art. 37* bis, in E. Capobianco et al eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli, Edizioni Scientifiche Italiane, 2nd ed, 2019), 240; A. Barenghi, , Sub *art. 37* bis, in V. Cuffaro ed, *Codice del consumo* (Milano: Giuffrè, 5th ed, 2019), 364.; E. Minervini, *Dei contratti del consumatore in generale* (Torino: Giappichelli, 3rd ed, 2014), 147; 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* (Napoli: Edizioni Scientifiche Italiane, 2014), 96; M. Angelone, 'La tutela amministrativa contro le clausole vessatorie alla luce dell'attività provvedimentale condotta dall'AGCM nel triennio 2013-2015' *Concorrenza e mercato*, 525-551 (2016); Id, 'La nuova frontiera del «public antitrust enforcement»: il controllo amministrativo dell'Agcm avverso le clausole vessatorie' *Rassegna di dritto civile,* 9-40 (2014)

[57] See AGCM, Relazione annuale sull'attività svolta nel 2017, available at agcm.it, 221.

[58] M. Angelone, 'La «degiurisdizionalizzazione» della tutela del consumatore' *Rassegna di diritto civile,* 723-728 (2016); Id, 'Diritto privato «regolatorio», conformazione dell'autonomia negoziale e controllo sulle discipline eteronome dettate dalle authorities' *Nuove autonomie*, 453, 441-461 (2017); A. Tucci, 'Strumenti amministrativi e mezzi di tutela civilistica: verso un superamento della contrapposizione?' *Rivista di diritto bancario*, 84, 75-100 (2020), highlighting the European trend towards public enforcement through Independent Authorities.

[59] European Parliament and Council Directive 2019/1/EU of 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3. Such a new Directive counts sixty-seven recitals and is aimed to increase independence, autonomy of National Authorities, as well as the effectiveness of investigations and sanctions. Independence is defined by Art 4 as the lack of any conditioning by Governments, politicians, which could influence the decisions of National Authorities. Fort this purpose, Art 4, para 4, states that 'members of the decision-making body of national administrative competition authorities are selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law'; they should not 'take any instructions from government or any other public or private entity'» (Art 4, para 2, lett. b, Directive 1/2019). Furthermore, independence is guaranteed through the strengthening of competition authorities' financial, technical, infrastructural, and human resources, so to be able to properly serve

2019/2161/EU,[60] pursuing the modernisation of the existing consumer protection rules, by filling the gaps in national legislations regarding the deterrence and sanctioning of intra-Union infringements.[61] They also point out some more effective remedies against unfair commercial practices and make up for the shortages of injunctive reliefs in consumer protection, trying to go beyond the limits of Directive 2009/22/EC.[62]

It is thus necessary to evaluate whether the promise for stronger public and private enforcement tools and better redress opportunities,[63] made by the Commission with its 2018 Communication titled 'A new deal for consumers', are kept.

Reading the Recitals of the Directive, especially no 17 and followings, a specific focus on unfair commercial practices in online marketplaces emerges therefrom. Due to the need of more effective consumer protection measures, the Directive adapts the law to fit the developments of a digital economy and the increasing economic importance of personal data.[64]

More specifically, Recital 18 states that a

> higher ranking or any prominent placement of commercial offers within online search results by the providers of online search functionality

their statutory purposes. Moreover, Art 10 gives to National Competition Authorities the power to impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. For a comment on the text of the Directive, see, F. Ghezzi and B. Marchetti, 'La proposta di direttiva in materia di rete europea della concorrenza e la necessità di un giusto equilibrio tra efficienza e garanzie' *Rivista italiana di diritto pubblico comunitario*, 1015-1075 (2017), European Parliament and Council Directive 2019/1/EU needs to be examined together with European Parliament and Council Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1, trying to promote a closer cooperation among National Authorities from different Member States.

[60] European Parliament and Council Directive 2019/2161/EU n 6 above. For a comment of the newly enacted Directive, see A. Cilento, '"New deal" per i consumatori: risultati all'altezza delle ambizioni?' *Contratto e impresa*, 1195-1216 (2019); R. Caponi, 'Ultime dall'Europa sull'azione di classe' *Il Foro italiano*, 332 (2019); M. Loos, 'The Modernization of European Consumer Law (Continued): More Meat on the Bone After All' *European Review of Private Law*, 407-423 (2020); B. Duivenvoorde, 'The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?' *Journal of European Consumer and Market Law,* 219-228 (2019); J. Van Duin,' The Real (New) Deal: Levelling the Odds for Consumer Litigants: On the Need for a Modernization' *European Review of Private Law*, 1227-1249 (2019).

[61] The issue has already been dealt with by the European lawmaker with European Parliament and Council Regulation (EU) 2017/2394, regarding cooperation between national authorities responsible for the enforcement of consumer protection laws.

[62] Recital 3, European Parliament and Council Directive 2019/2161/EU n 6 above.

[63] Cfr Communication from the Commission, 11 April 2018, addressed to the Parliament and to the Council [COM (2018) 183 final].

[64] See, Z. Efroni, 'Gaps and Opportunities: The Rudimentary Protection to 'Data-Paying Consumers' under New EU Consumer Protection Law" *Common Market Law Review*, 799-830 (2020).

has an important impact on consumers.[65]

Whereby,

> ranking refers to the relative prominence of the offers of traders or the relevance given to search results as presented, organised or communicated by providers of online search functionality, including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof.[66]

According to the new Directive, therefore, it should be clearly stated that

> practices where a trader provides information to a consumer in the form of search results in response to the consumer's online search query without clearly disclosing any paid advertising or payment specifically for achieving higher ranking of products within the search results should be prohibited.

In other words, the duty to disclose relevant information to consumers and transparency should be enhanced, so that online platforms will be required to declare whether search results contain any paid advertisement. Accordingly, the query result will still appear in the online search, but consumers will be advised that the reason why that query search appears is not because it is more or less fit to their preferences, but because it is a paid advertisement.

As per Recital 22,

> traders enabling consumers to search for goods and services, such as travel, accommodation and leisure activities, offered by different traders or by consumers should inform consumers about the default main parameters determining the ranking of offers presented to the consumer as a result of the search query and their relative importance as opposed to other parameters. That information should be succinct and made easily, prominently and directly available.

The law also weighed the need to improve the efficiency of consumer protection with business trade secrets, providing that 'the information requirement regarding the main parameters determining the ranking is without prejudice to Directive (EU) 2016/943'.[67] As a result, traders should not be required to disclose

[65] Recital 18, European Parliament and Council Directive 2019/2161/EU n 6 above.

[66] Recital 19, European Parliament and Council Directive 2019/2161/EU n 6 above.

[67] European Parliament and Council Directive 2016/943/EU of 8 June 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1. See, G. Chiappetta, 'La proposta di direttiva e le linee di evoluzione della disciplina del Know-how *rectius* delle informazioni aziendali riservate' *Il diritto industriale*, 169-188 (2016); V. Falce, 'Tecniche di protezione delle informazioni riservate.

the detailed functioning of their ranking mechanisms, including algorithms.

A great deal of attention is dedicated to fake reviews and endorsements and, therefore, it is provided that

> when traders provide access to consumer reviews of products, they should inform consumers whether processes or procedures are in place to ensure that the published reviews originate from consumers who have actually used or purchased the products.

As a consequence, stating that reviews were submitted by consumers who actually used or purchased a product, when no reasonable and proportionate steps were taken to ensure that they originate from such consumers, shall constitute an unfair commercial practice because of its misleading effects on consumers.[68]

Recommending to Member States to strengthen private enforcement of consumer law, the Directive provides that consumers should be able to avail themselves of several remedies to seek redress for unfair commercial practices. Member States are encouraged to make available remedies for consumers so to ask for compensation of damages and, where appropriate, a price reduction or termination of the contract, in a proportionate and effective manner. Furthermore, Member States are not prevented from maintaining or introducing rights to other remedies, such as repair or replacement in order to ensure full removal of the effects of unfair commercial practices.[69]

The question to be answered is whether it will be really possible to deliver the level of effectiveness envisaged by the Commission in the launching a new deal for consumers.[70] The objective is to overcome the limits of the previous Directive

Dagli accordi TRIPs alla direttiva sul segreto industriale' *Il Diritto Industriale*, I, 129- 157 (2016); D. Mastrelia, 'La tutela del know-how, delle informazioni e dei segreti commerciali fra novità normative, teoria e prassi' *Il Diritto Industriale*, 519, 513-523 (2019). *See* also, *si vis*, M. Zarro, 'Notazioni in tema di possesso degli «intangibles»: il caso del «know how»' *Il Foro napoletano*, 183-204 (2018), regarding the differences among Member States as to the protection of know how. The common law of Confidence protected all kind of confidential information, either they were commercial, technical or personal. Remedies against violation of trade secrets were even more staggered. European Parliament and Council Directive 2016/943/EU has been transposed into the Italian legal system with decreto legislative 11 May 2018 no 63, which significantly amended the Code of Industrial Property. The current Art 98 C.I.P., as recently amended, defines the meaning of "trade secret" requiring that all the following elements should be met: corporate and technical information, which is not disclosed to the public, have an economic value, are object of protection.

[68] Recital 47, European Parliament and Council Directive 2019/2161/EU n 6 above

[69] Recital 16, European Parliament and Council Directive 2019/2161/EU n 6 above.

[70] See, G. Vettori, 'Effettività delle tutele (diritto civile)' *Enciclopedia del diritto*, (Milano: Giuffrè, 2017), Annali X, 381; Id, 'L'attuazione del principio di effettività. Chi e come' *Rivista trimestrale di diritto e procedura civile*, 939-959 (2018); Id, 'Il diritto ad un rimedio effettivo nel diritto privato europeo' *Rivista di diritto civile*, 666-694 (2017); Id, 'Controllo giudiziale del contratto ed effettività delle tutele. Una premessa' *Nuova giurisprudenza civile commentata*, 151-160 (2015); Id, 'Contratto giusto e rimedi effettivi' *Rivista trimestrale di diritto e procedura civile*, 787-815 (2015); M. Libertini, 'Le nuove declinazioni del principio di effettività' *Europa e Diritto Privato*, 1071-1096 (2018); G. Carapezza Figlia and S. Sajeva, 'Responsabilità civile e tutela

2005/29/EC , which failed to address the issue of remedies available against unfair commercial practices, and leaved the matter entirely to public enforcement.[71] At the same, it is also questionable whether the European lawmaker will succeed in harmonising procedural aspects of consumer protection, since the magnitude of the effects of online unfair commercial practices would suggest the adoption of a common frame of rules and principles.[72]

As for the first question raised, it is clear that over-reliance upon compensation for damages shows that the European lawmaker is far from having a clear scenario of what needs to be done to improve consumer protection enforcement. To be precise, the Commission's new deal for consumers needs to be assessed in the Dieselgate context, whereby a compensatory remedy seemed to be the more appropriate remedy to redress the harm suffered by consumers.[73] However, not every case has the same characteristics and compensatory relief is not always the best remedy available. Another example in this direction is given by unfair clauses in loan agreements, where the most appropriate remedies is relative nullity, possibly with retroactive effects, as recently recognised by the Court of Justice of the European Union.[74]

Regarding the second question, the efforts put into the Directive do not appear sufficient for a real harmonisation of procedural rules on consumer protection. Member States being free to choose whether to provide consumers with the option for repair or replacement of the product, in addition to the remedies already available, does not really militate in favour of a harmonisation of the remedial framework, nor of an improvement of private enforcement.

Regarding public enforcement, the Directive mandates Member States to provide for effective, proportionate and dissuasive penalties to contrast infringements of the principles enshrined into it. While remedies for the private enforcement of consumer protection envisage unfair commercial practices,

ragionevole ed effettiva degli interessi', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza e proporzionalità nel diritto contemporaneo* (Napoli: Edizioni Scientifiche Italiane, 2017), I, 161.

[71] A. Fachechi, *Pratiche commerciali scorrette e rimedi negoziali* (Napoli: Edizioni Scientifiche Italiane, 2012), 31.

[72] See, J. Van Duin and C. Leone, 'The Real (New) Deal: Levelling the Odds for Consumer Litigants: On the Need for a Modernization', Part II *European Review of Private Law,* 1230, 1227-1249 (2019), H.W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive' *Common Market Law Review*, 771-808 (2014).

[73] See I. Garaci, 'Il dieselgate. Riflessioni sul private e public enforcement nella disciplina delle pratiche commerciali scorrette' *Il diritto industriale*, 61-76 (2018).

[74] Joined Cases C-154/15, C-307/15 and C-308/15 Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irles López and Teresa Torres Andreu, Judgement of 21 December 2016, with comments by S. Pagliantini, 'La non vincolatività delle clausole abusive e l'interpretazione autentica della Corte di giustizia' *I contratti*, 11-25 (2017), 11. See also G. D'Amico, Mancanza di trasparenza di clausole relative all'oggetto principale del contratto e giudizio di vessatorietà (Variazione sul tema dell'armonizzazione minima), in G. D'Amico and S. Pagliantini eds, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi* (Torino: Giappichelli, 2018), 89.

remedies available for public enforcement apply also in respect of Directive 2011/83/EU on consumer rights, Directive 93/13/EEC on unfair terms in consumer contracts, and Directive 98/6/EC, on consumer protection in the indication of the prices of products offered to consumers. Furthermore, to ensure the deterrent effect of these remedies, Directive 2019/2161/EU provides that Member States should set in their national law the maximum fine for widespread infringements at a level that is at least four percent of the trader's annual turnover in the Member State or Member States concerned. However, proportionality principle shall always be guaranteed.

With specific reference to unfair commercial clauses, Member States may set sanctions when companies put in standard contracts clauses, which are in the so-called 'black-list' or have already been declared abusive. On the other hand, however, Member States may also attribute to National Authorities the power to ascertain whether a specific clause is unfair and, consequently, to sanction the violation. Moreover, the strengthening and modernization of class actions,[75] which may be filed before jurisdictional as well as administrative Courts, also need to be credited.[76]

The Directive sets forth class action proceedings able to provide injunctive and compensatory relief, so to protect consumers interests in fields where the unfair conduct of market players could cause them more harm. Reliefs encompass injunctive measures, requiring the addresses to perform or to refrain from performing a specific action, as well as specific performance or *restitutio in integrum*, if the circumstances so allow. The variety of remedies discourages moral hazard by companies as they are able to tackle many different situations, skimming off profits from unfair and abusive conducts.

VI. Conclusive Remarks

In light of the above, it emerges how the new Directive insists on the importance of a coordinated private and public enforcement of consumer protection and devotes a great deal of attention to the modernisation of the discipline concerning the digital market, which currently appears at least laconic.[77]

[75] The importance of class actions in unfair commercial practices has already emerged in the so-called *Dieselgate* case, which pointed out the importance for European Union Law of a collective remedy against the harms caused by widespread unfair commercial practices. See A. Cilento, n 60 above, 1199.

[76] See R. Caponi, 'Ultime dall'Europa sull'azione di classe (con sguardo finale sugli Stati uniti e il "Dieselgate")' *Il Foro italiano*, 332-340 (2019); A. Palmieri, 'Perdite seriali dei consumatori e tutela collettiva risarcitoria: dove si dirige l'Europa?' *Il Foro italiano*, 205-210 (2018); L. Serafinelli, 'Ancora sulla tutela del consumatore, anche in forma collettiva' *Nuova giurisprudenza Civile commentata*, II, 612-620 (2019) concerning the introduction of a European framework for class actions.

[77] See, U. Von Der Leyen, *A Union that Strives for More. My Agenda for Europe*, Political

It is undeniable that the Directive addresses a vast number of issues, showing to be aware of the many implications deriving from misleading advertisement and unfair commercial practices, which are not merely confined to e-commerce. More precisely, the Directive gives a clear picture of what should be considered as an unfair commercial practice, and further describes what is misleading information and provides for stricter controls on social networks and online service providers, such as the duty to disclose commercial and advertisement purposes when providing their services. In this direction, the Directive extends its scope so to encompass also digital services, apparently rendered on a free of charge basis.[78] The Commission's new deal announced that consumers would enjoy rights, in respect of pre-contractual information and withdrawal, both in the case of paid and free online services. This promise has been transposed into the Directive, providing that it will be applicable to online trade in all circumstances when a monetary price is paid, or even when personal data are exchanged in return of online services. The idea of 'price' is thus widened, so to include also personal data.[79]

Some doubts about profiling of consumers are legitimate. Recital 45 provides that 'traders may personalise the price of their offers for specific consumers or specific categories of consumer based on automated decision-making and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power'. In such a case, 'consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decision-making, so that they can take into account the potential risks in their purchasing decision'. Compelling questions may arise should price be personalised based on grounds other than a consumer's purchasing power, such as nationality, religion or sexual orientation. Only time will show what the future may bring.

In general, the Directive is expected to deliver a better and more modern discipline of consumer law, repressing unfair commercial practices and improving the effectiveness of the right deriving therefrom. This is true even if the previous paragraph has shown that something more could be done in terms of private enforcement.

That being said, there are other parts of the European Union law that remain obscure. It is, for instance, hard to explain why some countries prohibit to put terms and conditions in online transactions, making it impossible for big corporations like Facebook, Google, Amazon or TripAdvisor to define a common

Guidelines for the next European Commission 2019-2024, 2019, 13, available at https://tinyurl.com/5fyjmypa (last visited 30 June 2021). The newly appointed President of the European Commission stresses the importance of Digital Markets of the purposes of her political agenda.

[78] See, A. De Franceschi, *La vendita con elementi digitali* (Napoli: Edizioni Scientifiche Italiane, 2020), 15.

[79] Art 4(2)(b), European Parliament and Council Directive 2019/2161/UE n 6 above.

approach valid throughout the European Union. A better harmonisation of the contractual and remedial framework of consumer protection is therefore due.

With all probability, the same directive on unfair clause after being into force for more than twenty-five years needs to be revised and updated.[80] In the meanwhile, national lawmakers and legal professionals need to provide consumers with effective individual remedies and, possibly, enhance the synergy between public and private enforcement. In other words, decisions by National Competition Authorities should be recognised as binding in civil proceedings files by consumers, harmed by unfair commercial practices. After all, this is what Art 9 of Directive 104/2014/EU provides in respect of infringements of competition law provisions by stating that 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts'.[81] Furthermore, due to the fact that many online commercial practices produce their effects in more than one Member State, it is necessary to consider decisions rendered by Competition Authorities of other States, and the Commission itself, at least as a *prima facie* evidence of the fact that an infringement of competition law has occurred. This would immensely help consumers in fulfilling the burden of the proof and would probably also contribute to the harmonisation of the procedural framework of consumer law among Member States.

[80] See, M. Loos, n 60 above, 423, who expresses a similar point of view.

[81] Reference is made to Art 9 European Parliament and of the Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1, transposed into Italy by Art 7 decreto legislativo 19 January 2017 no 3. See, *si vis*, M. Zarro, 'La tutela risarcitoria da danno antitrust: nuovi sviluppi per il sistema misto di enforcement' *Rivista di diritto dell'impresa*, 669, 657-677 (2017); G. Villa, 'L'attuazione della Direttiva sul risarcimento del danno per violazione delle norme sulla concorrenza' *Corriere giuridico*, 445, 441-449 (2017); G. Bruzzone and A. Saija, '"Private e public enforcement" dopo il recepimento della direttiva. Più di un aggiustamento al margine?' *Mercato Concorrenza Regole*, 29, 9-36 (2017); P. Fabbio, 'Note sull'efficacia nel giudizio civile delle decisioni delle Autorità della concorrenza nazionali dopo il "Decreto enforcement" (d.lgs. 19 gennaio 2017, n. 3)' *Analisi Giuridica dell'Economia* 367, 367-390 (2017); L. Miccoli, 'Tra "public and private enforcement": il valore probatorio dei provvedimenti dell'AGCM alla luce della nuova Direttiva 104/14 e del d.lg. 3/2017' *Jucivile*, 348-368 (2017); E.A. Raffaelli and A. Croci, 'La prova nel private antitrust enforcement', in M.C. Malaguti et al eds, *Politiche antitrust ieri, oggi e domani* (Torino: Giappichelli, 2017), 153; 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' *Il diritto industriale*, 319, 314-321 (2016); F. Pasquarelli, 'Da prova privilegiata a prova vincolante: il valore probatorio del provvedimento dell'AGCM a seguito della direttiva 2014/104/UE' *Il diritto industriale*, 252-264 (2016). See also for more detailed analysis of the relationship between Independent Authorities and Judges, M. Angelone, 'Giudici e Autorità indipendenti: concorrenza e sinergia tra rimedi' *Rassegna di diritto civile*, 403-424 (2020).