Essays

Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code

Tommaso Febbrajo*

Abstract

In Italy, pre-contractual liability is governed by a statutory provision that requires parties to act in good faith during the negotiation and formation of the contract (Art 1337 Civil Code).

Nonetheless, since the entry into force in Italy of the current 1942 Civil Code, Art 1337 has been consistently given a narrow interpretation. From this narrow perspective, pre-contractual liability applies only in two cases: 1) when a party terminates negotiations without a valid reason or 2) when a party, aware of the existence of grounds for invalidity of the contract, fails to communicate these grounds to the other party. Over the last decade, however, courts seem to have phased out this narrow interpretation, and case law has broadened the boundaries of pre-contractual liability.

This paper retraces the key steps that led to the broader interpretation of pre-contractual liability currently adopted within Italian courts and outlines the new and innovative broad scope of pre-contractual liability, with the aim of indicating when the duty of good faith attaches and what this duty entails. The article then illustrates to what extent damage relating to pre-contractual liability is compensable and what role the traditional distinction between positive and negative interests actually plays.

I. Introduction

A survey of the provisions set out in the Italian Civil Code shows that 'good faith' – and the identical concept of 'fairness' – come into play at different stages of contractual relations: a) Art 1175 provides that 'the debtor and the creditor shall behave according to rules of fairness', b) Art 1366 provides that the 'contract must be interpreted in good faith', and c) Art 1375 provides that the 'contract must be executed in good faith'.[1]

* Associate Professor of Private Law, University of Macerata.

[1] For an effective description of the Italian conception of the duty of good faith, see A.M. Musy, 'The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures' *Global Jurist Advances*, 1, 295 (2001).

At the pre-contractual stage, Art 1337, entitled 'negotiations and pre-contractual liability', states that 'the parties, in the conduct of negotiations and the formation of the contract, shall behave according to good faith'. This article contains an express provision that imposes a duty on each party to deal in good faith both during contract negotiations and during the contract drafting stage. Any party engaging in unfair behaviour faces the risk of incurring pre-contractual liability. Such a responsibility to behave in good faith does not safeguard the interests underlying the fulfilment of the contract; rather, it safeguards fair dealing during negotiations and the party's right to not engage in negotiations that might prove futile due to the other contracting party's lack of good faith or their lack of a genuine intent to conclude the contract.[2] Nonetheless, unlike other rules, good faith does not imply a specific kind of formally pre-determined behaviour. Good faith is, therefore, understood as an open term (a general clause). The content of good faith cannot be established *a priori*, but depends on the circumstances of the specific case and must be specified by judges and courts.[3]

Since the entry into force of the current Civil Code in 1942, Art 1337 has been systematically interpreted in a narrow fashion. Although the provision envisages an open rule, the majority of courts do not allow Art 1337 to perform such an intense and general role, allowing liability for damages to arise out of this legal norm only in the following two cases: 1) where a party breaks off negotiations without a valid reason (so-called 'unjustified withdrawal'), when negotiations have reached such a stage that the other party may reasonably expect that a contract will be concluded; 2) where a party, aware of the existence of grounds for invalidity of the contract, fails to inform the other party as provided for under Art 1338 of the Civil Code.[4] Moreover, according to the approach traditionally followed by Italian courts, the conclusion of a valid contract precludes any pre-contractual liability. Finally, a well-established principle states that in cases of pre-contractual liability, the guilty party is only obliged to compensate the other party for

[2] Corte di Cassazione 24 April 2012 no 6526, *Danno e Responsabilità*, 799 (2012).

[3] M.W. Hesselink, 'The concept of good faith', in A.S. Hartkamp, E.H. Hondius et al eds, *Towards a European Civil Code* (Boston and London: Kluwer Law International, 2004), 474; H.B. Schäfer and H.C. Aksoy, 'Good Faith', in A. Marciano and G.B. Ramello eds, *Encyclopedia of Law and Economics* (New York: Springer, 2015), 1-8; C.B. Andersen, 'Good Faith; Good Grief' *International Trade and Business Law Review*, 310 (2014). For a general overview of the issues relating to the role of general clauses and their enforcement: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006).

[4] F. Benatti, 'Responsabilità precontrattuale, I) Diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVII, 7; G. D'Amico, *La responsabilità precontrattuale,* in V. Roppo ed, *Rimedi,* V, 2, *Trattato del contratto* Roppo (Milano: Giuffrè, 2006), 983. See also: G. Alpa, 'Appunti sulla responsabilità precontrattuale nella prospettiva della comparazione giuridica' *Responsabilità civile e previdenza*, 535 (1981); G. Perlingieri, 'La responsabilità precontrattuale di Francesco Benatti, cinquanta anni dopo' *Rassegna di diritto civile*, 1301 (2012).

their so-called 'negative interest', namely for costs incurred during negotiations and for lost opportunities for income. Compensation cannot be awarded, however, for the so-called 'positive interest', or the benefit that the aggrieved party would have received from the contract if it had been validly concluded and performed.[5]

Over the last decade, this position appears to have been phased out,[6] as case law has broadened the material scope of pre-contractual liability to the detriment of the traditionally strict interpretation of Art 1337.

Thanks to this new approach, the duty to act in good faith during negotiations as set forth in this rule recovers its proper role in legislation as a general clause.

This paper retraces the key steps that led to the broader interpretation currently adopted by Italian courts and outlines the new and innovative scope of pre-contractual liability, with the aim of indicating when the duty of good faith attaches and what this duty entails. The paper then illustrates the extent to which a party may be compensated for damages they have sustained and the actual role that the distinction between positive and negative interests plays in determining this compensation.

II. The Duty of Good Faith in the Pre-Contractual Context: The Italian Paradox

[5] The distinction between 'positive' and 'negative' interest was drawn by Rudolf von Jhering in 1860: R. von Jhering, 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen' *Jahrbücher Fur Die Dogmatik Des Heutigen Römischen Und Deutschen Privatrechts*, I, (1861). According to this German scholar, positive interest refers to 'everything which (the obligee) would have had if the contract have been valid' (p 16). Conversely, negative interest is defined as the 'interest in the non-conclusion of the contract. (...). It is intended more widely to compensate for damage arising out of the reliance placed in vain by the obligee upon a contract which never proceeded, either because the contract was cancelled, or because the obligor defaulted' (p 17).

The distinction between 'positive' and 'negative' interest would appear to have been adopted by a number of legal systems today. These notions are frequently also invoked today in common law systems to determine the function of damages and their amount. Academics and judges, in both America and England, retranscribe these notions through the concepts of 'expectation interest' and 'reliance interest': E. McKendrick, *Contract Law* (London: Palgrave Macmillan, 2015), 402; H. Collins, *The Law of Contract* (Cambridge: Cambridge University Press, 2003), 405.

[6] Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725, *Danno e responsabilità*, 536 (2008), annotated by V. Roppo, 'La nullità virtuale del contratto dopo la sentenza Rordorf'. Among the several comments, see also T. Febbrajo, 'Violazione delle regole di comportamento nell'intermediazione finanziaria e nullità del contratto: la decisione delle sezioni unite' *Giustizia civile*, 2785 (2008). Upholding this approach, see Corte di Cassazione 8 October 2008 no 24795, *Foro italiano*, 440 (2009), with remarks by E. Scoditti, 'Responsabilità precontrattuale e conclusione di contratto valido: l'area degli obblighi di informazione'; Corte di Cassazione 11 June 2010 no 14056, *Foro italiano*, 320 (2010).

As previously mentioned, in Italian case law pre-contractual liability is traditionally subject to a dual limitation: a) absence of liability when a valid contract is concluded, and b) compensation only for costs and earnings lost during negotiations (which represents the 'negative interest' not 'positive interest', and does not consist of income arising from the contract, which cannot be compensated in any way).

The boundaries limiting the imposition of pre-contractual liability have been significantly reduced, especially through the application of the first of these limitations. Under the traditional view followed by Italian case law, 'when a valid contract is concluded, pre-contractual liability is therefore precluded'.[7] Such a statement also holds true when misconduct engaged in by one party has led the other party to enter into a contract with disadvantageous terms to which, under normal circumstances, she or he would not have agreed.[8] When negotiations result in the formation of a valid contract, any unfair behaviour by the parties is considered to be 'absorbed' and can no longer lead to pre-contractual liability, with the result that a victim of unfairness is deprived of any specific legal protection.[9]

The outcomes of this interpretation are especially evident with regard to duties of information: a lack of information is irrelevant unless it entails a defect of consent, such as fraud or error.

Some specific examples are revealing: the *Corte di Cassazione* has held that there was no pre-contractual liability where, a) a seller failed to inform a foreign buyer of the need for an import license,[10] b) a seller failed to inform the purchaser that no building work could be carried out on a piece of land sold in the contract,[11] and c) used cars were sold without any notification that they originated from a foreign market.[12] In all these cases, the lack of the disclosure of the information from one party to the other was not an impediment to consent, and was, therefore, deemed to entail no pre-contractual liability.

In contrast to prevailing doctrine,[13] the courts maintained their narrow

[7] For an illustration of this trend see Corte di Cassazione 25 July 2006 no 16937, *Corriere giuridico*, 539 (2007). Further references in C. Crea, *Sub. Art. 1337*, in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza. Delle obbligazioni*, I, (Napoli: Edizioni Scientifiche Italiane, 2010), 471.

[8] Corte di Cassazione 16 April 1994 no 3621, *Responsabilità civile e previdenza,* 1085 (1994).

[9] Corte di Cassazione 25 July 2006 no 16937 n 7 above; Corte di Cassazione 14 February 2001 no 2080, *Nuova giurisprudenza civile commentata,* II, 311 (2002).

[10] Corte di Cassazione 4 April 1975 no 1204, *Foro italiano*, I, 1990 (1975).

[11] Corte di Cassazione 2 November 1961 no 2537, *Foro padano*, I, 1029 (1962).

[12] Corte di Cassazione 5 February 2007 no 2479, *Giurisprudenza italiana,* 134 (2007).

[13] F. Benatti, *La responsabilità precontrattuale* (Milano: Giuffrè, 1963), 13 and 109; L. Mengoni, 'Sulla natura della responsabilità precontrattuale' *Rivista di diritto commerciale,* II, 365 (1956); R. Sacco, *Il contratto,* in R. Sacco and G. De Nova eds, *Trattato di diritto privato* Rescigno (Torino: Utet, 2004), 503. See also V. Roppo, 'Formation of Contract and

interpretation for at least fifty years. This situation gave rise to an 'Italian paradox': pre-contractual liability was restricted, even though Italian legislators were the first in Europe to codify the requirement of good faith and fair dealing during pre-contractual negotiations (Art 1337 of the Italian Civil Code).[14] Since Art 1337 enshrines a general clause, the courts could have extended the boundaries of this liability to include a variety of cases in which a party could claim damages. Nonetheless, as mentioned above, under the narrow interpretation followed by Italian courts for almost fifty years, pre-contractual liability was considered an appropriate ground for legal action only upon breakdown of negotiations without a valid justification and upon knowledge of contract invalidity (Art 1338).

This condition arose for the following reasons:

a) In the Italian legal system, general clauses as a whole have long been viewed with a certain degree of suspicion. This is due, on the one hand, to the excessively broad judicial discretion that they entail,[15] and on the other, to the clear link that existed between the general principles of good faith and fairness set forth in the 1942 Civil Code and Fascism.[16] An illustration of this is evident in the fact that, under its original formulation, Art 1175 established that the creditor and the debtor needed to comply with the rule of fairness, 'by reference to the principles of the corporatist legal order'[17] (the article was

Pre-Contractual Information from an Italian Perspective', in S. Grundmann and M. Schauer eds, *The Architecture of European Codes and Contractual Law* (New York: Kluwer Law International, 2006), 286, who appropriately summarizes how the Italian system understands pre-contractual liability in terms of 'courts versus scholars.'

[14] For example, in Germany, a provision similar to Art 1337 was only enacted with the 2002 reform of the law of obligations. However, even before then, pre-contractual liability was already considered applicable where the parties concluded a valid but disadvantageous contract. For further details, see: F. Benatti, *La responsabilità precontrattuale* n 13 above, 13.

[15] H.B. Schäfer and H.C. Aksoy, 'Good Faith' n 3 above, 4, who point out that in all legal systems, 'a major point of critique of the principle of good faith is its generality and broad scope. This is also in close relationship with the critique that the judiciary can arbitrarily interfere with the contract by using this principle'; S. Patti, 'Clausole generali e discrezionalità del giudice' *Rivista del notariato,* 304 (2010).

[16] P. Cappellini, 'Il fascismo invisibile. Una ipotesi di esperimento storiografico sui rapporti tra codificazione civile e regime' *Quaderni fiorentini,* 200 (1999); A. Somma, 'Fascismo e diritto: una ricerca sul nulla?' *Rivista trimestrale di diritto e procedura civile*, 597 (2001).

[17] The *Relazione al codice civile,* no 638, explains that under Art 1337, good faith is the basis for the behaviour of the parties during negotiations and formation of the contract, meaning that the parties must negotiate while 'always bearing in mind the purpose that the contract is intended to satisfy, the harmony of the interests of the parties, and the superior interests of the nation requiring productive cooperation'. It should be noted that since the 1970s, several Italian legal scholars have suggested re-reading general clauses from the perspective of constitutional solidarity, rather than from the original point of view of the Fascist corporatist system: P. Perlingieri, *Profili istituzionali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1979), 84; S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 126; P. Rescigno, 'Per una rilettura del Codice civile' *Giurisprudenza italiana,* IV, 224 (1968).

amended after the fall of the Fascist regime). These reasons gave rise, in Italian courts, and especially in the *Corte di Cassazione*, to a sort of reluctance to apply general clauses, described as a 'flight away *from* general clauses',[18] unlike the 'flight towards general clauses' embraced by the German legal system during the 1930s – and its well-known tragic outcomes.[19]

b) Secondly, when implementing Art 1337, courts were affected by the pre-contractual liability system that took shape by virtue of the Code of 1865, previously in force. Under the Code of 1865, while pre-contractual liability was not governed by statutory rules, case law already held, through *culpa in contrahendo*, that damages were compensable in two cases: 1) the conclusion of an invalid contract, and 2) the unjustified termination of negotiations.[20] In the interpretation of the two new rules expressly dealing with pre-contractual liability enshrined in Arts 1337 and 1338 of the 1942 Civil Code, courts and legal scholars were affected by a sort of 'path dependence.' These new provisions were deemed to be a 'statutory validation' of the 'two-sided' scope of application of the liability already applied by courts: Art 1337 was considered to govern the case breaking off negotiations and Art 1338 seemingly governed the case where the parties concluded an invalid contract.

c) Moreover, Rudolf von Jhering's[21] doctrine of *culpa in contrahendo,* which relies on the failed stipulation of a valid contract,[22] also influenced the narrow approach adopted by Italian case law towards the application of the good faith principle to negotiations.

According to this theory, a party who, through his or her own culpable conduct, prevents a contract from being formed or causes the contract to be invalid, should be liable for damages suffered by the innocent party who relied on the validity of the forthcoming contract. This liability is based on the principle of good faith and duty of care required of the parties not only in performing contractual duties, but also during the stage of negotiation and drafting of the contract.

Nonetheless, in this respect it must be noted that German legal scholars have severely criticized this doctrine since the turn of the twentieth century, notably with regard to its perceived boundaries: once it has been established that parties must also perform their duties with diligence during negotiations, there is no point in limiting *culpa in contrahendo* to the case of a void

[18] P. Rescigno, 'Appunti sulle «clausole generali»' *Rivista di diritto commerciale,* 2 (1998).

[19] J.W. Hedemann, *Die Flucht in die Generalklauseln. Eine Gefahr für Staat und Recht* (Tübingen, 1933).

[20] A cornerstone in defining the scope of precontractual liability was Gabriele Faggella's theory of 'precontractual periods': G. Faggella, *I periodi precontrattuali e la responsabilità precontrattuale* (Roma: Cartiere Centrali, 2nd ed, 1918).

[21] R. von Jhering, 'Culpa in contrahendo' n 5 above, 16.

[22] Ibid 17.

contract.[23] These observations have not been upheld by Italian case law, and for more than fifty years Italian case law has claimed that pre-contractual liability cannot attach where the parties conclude a valid contract.

III. Key Steps Towards Full Enforcement of Contractual Good Faith: A Brief Overview

As mentioned above, Italian courts were, for a lengthy period of time, reluctant to apply the general duties laid down in the 1942 Civil Code whereby the parties were to act in accordance with the principle of good faith and fairness. These duties are clearly evidenced by Art 1175, which applies to all obligations and states that 'the debtor and the creditor shall behave according to rules of fairness'. For more than two decades since the enactment of the 1942 Civil Code, both the meaning and impact of this provision were undercut by the courts' narrow interpretation that any unfair behaviour contrary to Art 1175 only entitles the aggrieved party to consequential damages if it also breaches an individual right already set forth in a statutory provision.[24]

However, as of the 1980s, Italian case law gradually phased out this narrow approach, which undermined the enforcement of good faith in contract law, and began to adopt a much broader conception of the principle of good faith and its application in the pre-contractual stage.

The process began with the acknowledgement of the fact that the normative value underlying the duty of good faith is an objective standard. In this respect, it was stated that the principle of good faith is 'one of the hinges and overriding principles of the legal discipline of obligations and establishes a proper legal duty' which is violated not only if one of the parties has acted maliciously, to the other party's detriment, but also when the conduct of said party has not been guided by openness, diligent fairness, and a sense of social solidarity, which are an integral part of good faith.[25]

Another major step in this direction was marked by a clarification of the constitutional principles underlying the duty of good faith, namely the principle of social solidarity enshrined in Art 2 of the Italian Constitution. From this point of view, the duty to act in accordance with good faith becomes

[23] See T. Mommsen, *Erörterungen aus dem Obligationenrecht,* II, *Ueber die Haftung der Contrahenten bei der Abschliessung von Schuldverträgen* (Braunschweig: C.A. Schwetschke, 1879), 16.

[24] Corte di Cassazione 16 February 1963 no 357, *Foro padano,* I, 1284 (1964). Among scholars, S. Rodotà criticizes this view in 'Appunti sul principio di buona fede' *Foro padano*, 128 (1964). Recently on this issue, see G. Perlingieri, *Regole e comportamenti nella formazione del contratto. Una rilettura dell'art. 1337 del codice civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 53.

[25] See Corte di Cassazione 18 February 1986 no 960, *Giustizia civile,* 234 (1987).

a source of implied contractual obligations, in addition to the express terms set out in the agreement, and entails a duty to 'safeguard the interests of the other party, as long as this does not unfairly limit the legitimate interests of the acting party'.[26]

This obligation to preserve and safeguard the interests of the counterpart could lead the parties to modify their performances, to meet duties not laid down in the contractual program, or to tolerate modifications relating to the other party's performance.[27]

Finally, this development reached its climax in some recent judgments in which the *Corte di Cassazione* held that the standard of good faith provides a

> 'tool that allows courts not only to control but also to replace and supplement contractual terms if the outcome is not considered fair and equitable, in order to assure a proper balance between the parties' interests'.[28]

In other words, setting aside this latest and controversial trend, Italian case law now universally acknowledges that the notions of good faith and fairness are expressions of the general principle of social solidarity recognized by the Italian Constitution, and that they refer to specific obligations that apply both during contract negotiations and during the performance of contracts. These obligations are in addition to any other contractual duty already binding on the parties; in the event of their infringement, the aggrieved party is entitled to claim damages. It is also generally accepted that public policy imposes the requirement of good faith in all dealings (Art 1175 of the Civil Code) and during the pre-contractual stage (Art 1337 of the Civil Code).

IV. Towards a 'New' Model of Pre-Contractual Liability: The Case of 'Delay' when Concluding a Contract

This being said, it is now time to focus on the process that led Italian case law to broaden the scope of pre-contractual liability, growing out of the traditional restraining approach.

[26] A landmark decision upholding this approach is the so-called 'Fiuggi judgment': Corte di Cassazione 20 April 1994 no 3775, *Giustizia civile,* 246 (1994).

[27] See for instance, Corte di Cassazione 9 March 1991 no 2503, *Corriere Giuridico*, 789 (1991). In this case, the Court held that good faith required the seller of real estate to conclude the contract with a party other than the one with whom he had concluded the preliminary contract, since that was the only way to achieve the result foreseen by the parties.

[28] Corte di Cassazione-Sezioni Unite 13 September 2005 no 18128, *Foro italiano,* I, 2985 (2005); Corte di Cassazione-Sezioni Unite 15 November 2007 no 23726, *Nuova giurisprudenza civile commentata*, 458 (2008); Cassazione 18 September 2009 no 2010, *Contratti*, 5 (2010).

The first departure from the conventional understanding of pre-contractual liability took place in 1998, when the *Corte di Cassazione* held that damages caused by a delay in concluding a contract were compensable.[29] The facts of the dispute were the following: a farmer applied to ENEL (at the time, the sole supplier of electricity in Italy) to irrigate his fields, paying the necessary contribution. However, electricity only began to be supplied a year-and-a-half after the request. The farmer claimed damages caused by the undue delay. The court of first instance upheld the claim. The court of appeal rejected the request, under the then prevailing interpretation of Art 1337. The court reasoned that Enel's misconduct during negotiations was 'absorbed' by the subsequent conclusion of a valid contract.

The *Corte di Cassazione* rejected the latter interpretation, stating that 'the conclusion of the contract does not render irrelevant the behaviour contrary to good faith during the formation of a contract'. Therefore, pre-contractual liability can be applied if a party, contrary to the duty to act in good faith, concludes the contract with notable and undue delay. Thus, for the first time, pre-contractual liability was considered to apply even if a valid contract had been subsequently concluded.

V. The Complete Overturning of the Traditional Interpretation of Art 1337: The Case of the Conclusion of a 'Valid but Disadvantageous' Contract

The traditionally strict interpretation of pre-contractual liability was definitively abandoned in 2007 when the *Sezioni Unite* (Joint Chambers) of the *Corte di Cassazione* rendered two identical judgments (the so-called 'twin judgments') concerning the infringement of information duties by a bank in its dealings with customers.[30]

To understand the issue better, it is first necessary to note that Italian legislation on financial services does not provide specific remedies the breach of a broker's duties of disclosure under private law.[31] This is an example of

[29] Corte di Cassazione 16 October 1998 no 10249, *Giustizia civile,* I, 89 (1999).

[30] Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 4 above. The judgments confirm the conclusions already reached on precontractual liability a few years earlier, by Corte di Cassazione 29 September 2005 no 19024, *Danno e responsabilità,* I, 25 (2006) annotated by V. Roppo and G. Afferni, 'Dai contratti finanziari al contratto in genere: punti fermi della cassazione su nullità virtuale e responsabilità precontrattuale'.

[31] The only exception to this absence of regulation in the Italian context is the law implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, where it is stated that: 'the contract is void, if the supplier (...) breaches pre-contractual information duties so as to significantly distort the representation of its terms. Voidance may be enforced only by the consumer and requires parties to repay what has been received' (Art 67-*septiesdecies,* Codice del consumo, decreto legislativo 6 September 2005 no 206).

what is considered to be the 'crucial issue' in the field of duties of information affecting European contract law: there is an absence of provisions specifying what legal consequences (sanctions and remedies) will attach when due information is not given by the obliged party.[32] This problem rose to dramatic heights following the notorious scandals involving Cirio, Parmalat and Argentine bonds in Italy in 2001 and 2002.[33] Indeed, from 2003 onwards, thousands of investors seeking to recover their lost capital filed actions against the banks and brokers involved in the placement of 'junk bonds'.

The lower courts adopted very different solutions to this regulatory gap in contractual remedies available for the breach of information duties, thus giving rise to a patchy framework with unpredictable legal outcomes.[34] In some cases, the remedy awarded to the aggrieved party was due to the financial contract's invalidity due to its breach of mandatory rules (Art 1418 of the Italian Civil Code);[35] in other cases, the contract was deemed void for fraud or error;[36] and in yet other cases, damages were awarded under pre-contractual or contractual liability.[37]

With the aforementioned 'twin judgments' handed down in 2007, the Supreme Court clarified the controversial issue, overruling the traditional interpretation of pre-contractual liability. In these revolutionary leading judgments, the *Sezioni Unite* clearly affirmed the following statements: a) violations of mandatory rules prescribing behaviour and conduct (such as good faith) can render a contract void only when expressly provided by law; Art 1418 of the Civil Code (which establishes the nullity of the contract in case mandatory rules are violated) applies only to mandatory provisions concerning the structure or content of the contract; b) contrary to the traditional stance, the material scope of pre-contractual liability is not limited to cases of unjustified termination of negotiations or to the conclusion

[32] V. Roppo, 'Formation of contract and precontractual information from an Italian perspective' n 13 above, 296.

[33] For further details on these cases, see C. Amato, 'Financial Contracts and 'Junk Titles' Purchases: A Matter of (In)Correct Information', in M. Kenny, J. Devenney and L. Fox O'Mahony eds, *Unconscionability in European Private Financial Transactions. Protecting the Vulnerable* (Cambridge: Cambridge University Press, 2010), 321.

[34] G. Alpa, 'Gli obblighi informativi precontrattuali nei contratti di investimento finanziario. Per l'armonizzazione dei modelli regolatori e per l'uniformazione delle regole di diritto comune' *Contratto e impresa*, 889 (2008).

[35] Tribunale di Mantova 12 December 2004, *Contratti*, 585 (2005); Tribunale di Avezzano 23 June 2005, *Foro italiano*, I, 2535 (2005); Tribunale di Genova 18 April 2005, *Danno responsabilità*, 604 (2005); Tribunale di Cagliari 2 January 2006, *Responsabilità civile previdenza*, 1418 (2007).

[36] Tribunale di Lanciano 30 April 2007, available at http://www.ilcaso.it/giurisprudenza/archivio/fin.php?id_cont=598.php (last visited 6 December 2016).

[37] Tribunale di Asti 29 March 2007, *Corriere del merito,* 1023 (2007); Tribunale di Foggia 30 June 2006, *Contratti,* 423 (2007).

of a voidable contract; c) the extent of pre-contractual liability (Art 1337 of the Civil Code) cannot be predetermined with any degree of precision; it certainly imposes a requirement to deal fairly and to disclose to the other party all information relevant to the conclusion of the contract; d) there is pre-contractual liability when the contract is valid but deemed 'disadvantageous' for one party as a result of behaviour engaged in by the other during negotiations which is contrary to the principle of good faith; in this case, the compensable damage lies in the 'decrease in profitability' or in the 'increase in economic burden' produced by the behaviour that was contrary to good faith, in addition to further provable damages if proved.[38]

This ruling rejected the traditional limit whereby no liability attached if a valid contract is concluded.[39] It broadened the boundaries of pre-contractual liability to include a new scope of application: a breach of good faith during negotiations that leads to a 'valid but disadvantageous contract'.

VI. Compensable Damage when a 'Valid but Disadvantageous' Contract Is Concluded

After reviewing the key steps in the juridical understanding of Art 1337 of the Civil Code, it is now time to more closely examine the new case of pre-contractual liability arising when a party enters into a contract that is valid but disadvantageous due to the other party's unlawful behaviour.

A survey of the case law following the leading case of 2007 shows that two kinds of 'valid but disadvantageous contracts' may be identified.

a) The first kind occurs when improper behaviour leads to contractual terms that differ from those that would have been stipulated if the principle of good faith had been followed. In this case, the disadvantage is *objective*: one of the parties, due to the misconduct of the other, purchases at a price that is different from the market value.

An example is illustrated by the proceedings concerning an investor who bought shares in a reputable Italian bank, paying a higher price than the market value because of misleading information contained in the prospectus. The *Corte di Cassazione* stated that under Art 1337 of the Italian Civil Code, the buyer was entitled to a compensatory sum equal to the difference between the paid price and the real value of the shares.[40]

b) In the second kind of cases, misleading statements during negotiations result in commercial transactions that are less advantageous than one of the

[38] Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above.

[39] To this effect, see: Corte di Cassazione 23 March 2016 no 5762 available at http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/04/Cassazione-1337.pdf (last visited 6 December 2016).

[40] Corte di Cassazione 11 June 2010 no 14056, *Guida al diritto*, 29, 35 (2010).

parties could reasonably have expected. In this situation, the disadvantage is *subjective* and unrelated to the market value of the transaction. This kind of damage is illustrated in a case handed down by the *Corte di Cassazione* in 2008.[41] During the negotiations for the purchase of an industrial machine, a seller informed his client that the sale would be subject to a tax benefit of thirty-three percent of the asset value, without knowing that the benefit had been suspended by the Italian Government a few months earlier. The buyer trusted the seller and bought the machinery. As soon as he discovered that he was not entitled to the tax benefit, he sought compensation for damages assessed at thirty-three percent of the asset's value, as he had not been properly informed.

The seller claimed that there could be no pre-contractual liability because the parties had entered into a valid contract.

The *Corte di Cassazione* considered this to be a case of pre-contractual liability arising from a 'valid, but disadvantageous contract', such that the 'decrease in profitability or the increase in economic burden' due to the breach of good faith had to be compensated. In this case, the contractual terms experienced a 'decrease in profitability' equal to the tax benefit that could not be enjoyed: thirty-three percent of the asset's value.

It appears clear that for the buyer, this solution is more advantageous than other remedies, such as the invalidity of the contract or a right of withdrawal, which seek to restore the claimant to the same position in which he would have been if no breach of good faith had occurred. Indeed, this solution allows the buyer to maintain the contract at the same price that he reasonably believed he could afford. On the other hand, such a decision is highly detrimental to the seller who did not act in good faith, forcing him to sell the asset at a non-market price (thirty-three percent lower than the originally planned price).

Such a solution was envisioned in a ruling given by the *Corte di Cassazione* in 1980: in that case, the victim of unfairness during negotiations suffered both types of damages (subjective *and* objective).[42] A buyer purchased a property with the false belief – created by misleading information given by the owner – that he could obtain an annuity of seven point five-eight per cent of its value by renting it out. Having discovered the fraud (in fact, the annual gain was approximately three per cent), the buyer sued for damages. The *Corte di Cassazione* ruled that the victim was entitled to obtain the following damages: 1) the difference between the expected income and the actual income for a period equitably assessed at five years (loss of profit); 2) the

[41] Corte di Cassazione 8 October 2008 no 24795, *Foro italiano*, 440 (2009), with commentary by E. Scoditti, 'Responsabilità precontrattuale e conclusione di contratto valido: l'area degli obblighi di informazione'.

[42] Corte di Cassazione 9 February 1980 no 921, *Giustizia civile*, 2 (1980).

difference between the price paid for the asset and its actual market value (actual loss).

It is noteworthy that the remedy for such a specific violation of good faith makes the pre-contractual information given by one party to the other legally binding as terms of the agreement: the party providing information is bound to perform in accordance with what was said, regardless of his or her intentions, aims and awareness.

Thus, the Italian legal system incorporates and generalizes a kind of remedy that had already been adopted in European private law when information duties are breached in business-to-consumer relations.

The binding effect of information available in the pre-contractual context is established, for example, in the Timeshare Directive,[43] the Package Travel Directive[44] and especially in the Consumer Sales Directive.[45]

Moreover, the *Draft Common Frame of Reference*[46] set out in Art II-3:109, entitled 'Remedies for breach of information duties', provides that

> 'if a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded (...) the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness

[43] Directive 94/47/EC of the European Parliament and the Council 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. See, in particular, Art 3(2): 'The Member States shall make provision in their legislation to ensure that all the information referred to in para 1 which must be provided in the document referred to in para 1 forms an integral part of the contract. Unless the parties expressly agree otherwise, only changes resulting from circumstances beyond the vendor's control may be made to the information provided in the document referred to in paragraph 1. Any changes to that information shall be communicated to the purchaser before the contract is concluded. The contract shall expressly mention any such changes'.

[44] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. See especially Art 3, which regulates the content of the brochure when available to the consumer: 'The particulars contained in the brochure are binding on the organizer or retailer (...)'. On this topic, M.B.M. Loos, 'Precontractual Information Obligations for Package Travel Contracts' *Journal of European Consumer and Market Law*, 128 (2016).

[45] Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. See, in particular, Art 2(2): 'Consumer goods are presumed to be in conformity with the contract if they: (...) (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling'. The binding effect of precontractual statements from the seller is clearly provided in Art 4: 'The seller shall not be bound by public statements, as referred to in paragraph 2(d) (...)'.

[46] C. von Bar, E. Clive and H. Schulte – Nölke eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Full Edition (Munich: Sellier European Law Publisher, 2009).

of the information'.[47]

A similar provision is established in Art 69 of the draft proposal for a Common European Sales Law (CESL)[48] and in the Principles of the Existing EC Contract Law (the '*Acquis* Principles'):[49] Art 2:208 (Remedies for breach of information duties) states that 'if a party has failed to comply with its duties under Art 2:201 (Duty to inform about goods or services) to 2:204 (Clarity and form of information) and a contract has been concluded, this contract contains the obligations which the other party could reasonably expect as a consequence of the incorrectness of the information'.

VII. The Current Roles of 'Positive Interest', 'Negative Interest', and Their Differences

Art 1337 of the Italian Civil Code does not establish a remedy for a breach of the pre-contractual duty of good faith. Traditionally, it has always been stated that the party who has behaved unfairly must pay damages. It should be noted that Art 1418 of the Civil Code states that if mandatory rules are violated (among which the rule requiring the observance of good faith in negotiations is certainly included), the contract is void.[50] However, to guarantee

[47] On this subject, C. Castronovo, 'Information Duties and Precontractual Good Faith' *European Review of Private Law,* 559 (2009); R. Shulze, 'Precontractual Duties and Conclusion of Contract in European Law' *European Review of Private Law,* 852 (2005).

[48] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. Art 69 of the Proposal (*Contract terms derived from certain pre-contractual statements*), holds the seller liable not only for his own statements but, in certain circumstances, also for those made by the producer and other persons in the chain of transactions: 'Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract'. On this subject, B. Seifert, 'Art. 69: Pre-contractual Statements Under Article 69 CESL – Remake or Revolution?', in A.C. Ciacchi ed, *Contents and Effects of Contracts-Lessons to Learn From The Common European Sales Law* (Berlin: Springer, 2016), 133; J. Plaza Penades and L.M. Martinez Velencoso eds, 'European Perspectives on the Common European Sales Law' (Berlin: Springer, 2014), 89; P. Sirena and Y. Adar, 'Principles and Rules in the Emerging European Contract Law: From the Pecl to the Cesl, and Beyond' *European Review of Contract Law*, 9 (2013); D.G. Baird, 'Precontractual Disclosure Duties under the Common European Sales Law' *Common Market Law Review*, 50 (2013); F. Cafaggi, 'From a Status to a Transaction-based Approach? Institutional Design in European Contract Law' *Common Market Law Review*, 318 (2013); P. Giliker, 'Pre-contractual Good Faith and the Common European Sales Law: A Compromise Too Far?' *European Review of Private Law*, 85 (2013).

[49] Prepared by the Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract II,* (Munich: Sellier European Law Publisher, 2009).

[50] A European overview on this topic in R. Schulze and P. P. Viscasillas eds, *The Formation of Contract* (Baden-Baden: Nomos, 2016), 25-96; R.I. Ortiz, 'Pre-contractual Liability in the Civil Law', in L.A. Di Matteo, A. Janssen, U. Magnus et al eds, *International Sales Law*

certainty in legal relations and the predictability of legal outcomes, most Italian jurists and Italian case law agree that voidance of the contract under Art 1418 of the Civil Code does not apply in cases where the rules that have been violated require specific behaviour (such as the rule on good faith), even if they are mandatory in character; rather, voidance applies only if the rules regarding the form or the content of the contract are violated.[51]

According to the traditional view followed by the Italian courts, in cases of pre-contractual liability, not all damage can be compensated; only negative interests, ie the costs and earnings lost during negotiations,[52] may be. Positive interests, the gains that would have been obtained with the conclusion and performance of the contract, cannot be compensated. This interpretation is clearly influenced by the studies of the German scholar Rudolph von Jhering and his distinction between *Negatives Vertragsinteresse*, regarding the interest that recovers the situation prior to the conclusion of the invalid contract, and *Erfüllungsinteresse*, concerning the situation after the contract's performance.[53] Although von Jhering's thesis was formulated to identify a form of liability only when a contract is invalid, Italian scholars and case law have extended it to cover all pre-contractual liability.

It is worth verifying whether such a distinction is still valid in the face of the most recent developments in Italian case law that have extended the scope of pre-contractual liability to the conclusion of a valid but disadvantageous contract.

It should first be noted that, in practical terms, it has never been possible to apply the distinction between positive and negative interests rigorously. As both scholars and the courts have already pointed out, the lost opportunities recoverable under the negative interest could be equal to or

(Baden-Baden: Nomos, 2016), 39-56; J. Cartwright and M. Hesselink eds, *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2008), 30-68.

[51] Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above; Corte di Cassazione 29 September 2005 no 19024 n 30 above; Corte di Cassazione 25 September 2003 no 14234, *Contratti,* 145 (2004); Corte di Cassazione 14 July 2000 no 9321, *Corriere giuridico,* 1479 (2000). In legal literature: F. Santoro Passarelli, *Dottrine generali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1981), 171; G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013). Opposing this view, see: F. Prosperi, 'Violazione degli obblighi di informazione nei servizi di investimento e rimedi contrattuali (a proposito di Cass., sez. un., 19 dicembre 2007, nn. 26724 e 26725)' *Contratto e impresa*, 953 (2008). See also L. Di Donna, 'Remedies for the Breach of the Duty to Inform Consumers' *European Business Law Review*, 2, 253 (2012), who points out how Italian 'doctrine has always affirmed the independence of the rules of conduct and the rules of validity, so that the breach of the principle of precontractual good faith could never result in the invalidity of the contract, but only in a compensation for damages'.

[52] To this effect, see: Corte di Cassazione 30 July 2004 no 14539, *Foro italiano*, I, 3009 (2004).

[53] R. von Jhering, 'Culpa in contrahendo' n 5 above, 16.

greater than the positive interest.[54]

This being said, it must be stressed that in the light of the current boundaries of pre-contractual liability, it no longer appears possible to uphold the traditional view where, in cases of the breach of good faith during negotiations, compensable damage is limited to compensating the negative interest. The extent of compensation must be established on a case-by-case basis, with reference to the specific circumstances of the unlawful conduct. Currently, compensable damages in pre-contractual liability must be considered as 'a set of various types of harm, with the shared premise that they are all consequences of the breach of the duty to act in good faith set forth in Article 1337 of the Civil Code'.[55]

With this view, in terms of the grounds for compensable damage, a new distinction must be drawn between cases where no valid contract results from the contractual negotiations, and cases where a valid but disadvantageous contract is concluded as a consequence of the pre-contractual misconduct of one party. The distinction between positive and negative interest may continue to play a role only with respect to the former case. With regard to the latter, such a distinction now appears almost redundant; in pre-contractual fault, the extent of the compensation must be determined according to a criterion that focuses on providing the utmost protection for the aggrieved party.

VIII. Pre-Contractual Liability in Contract Relations between the Public Administration and Private Parties

To complete the survey of the recent developments regarding pre-contractual liability in Italy, it is worth retracing the major steps that led to the application of Art 1337 to the activities of the public administration.

In the first phase, which lasted until the late 1950s, the public administration was not considered subject to pre-contractual liability for negotiations with private parties. Case law held that the public administration was incapable of unfair behaviour because its institutional purpose was the pursuit of the common good.[56]

The situation began to change in the early sixties, as the *Corte di Cassazione* for the first time assigned pre-contractual liability to the public administration where it unjustifiably withdrew from negotiations.[57]

[54] Corte di Cassazione 13 December 1994 no 10649, *Contratti,* 164 (1995); F. Benatti, *La responsabilità precontrattuale* n 13 above, 151.

[55] See G. Meruzzi, 'La responsabilità per rottura di trattative', in G. Visintini ed, *Trattato della responsabilità contrattuale*, I, *Inadempimento e rimedi* (Padova: Cedam, 2009), 808.

[56] For further references to the understanding of the public administration's role at the time, see R. Alessi, *La responsabilità precontrattuale della P.A.* (Milano: Giuffrè, 1951).

[57] Corte di Cassazione-Sezioni Unite 12 July 1961 no 1675, *Foro italiano*, I, 98 (1962); Corte di Cassazione 8 May 1963 no 1142, *Foro italiano,* I, 1699 (1963). According to these

Nevertheless, this responsibility was limited to cases where the public administration was in a private negotiation (*iure privatorum*). In this specific case, the unfair behaviour of public bodies during pre-contractual negotiations was assessed by taking into account the rules envisaged in the Italian Civil Code. On the contrary, under Art 1337, *culpa in contrahendo* could not be implemented in the case of public procurement tendering procedures due to the nature of the public authority's exercise of power.[58] Indeed, in Italian Administrative Law, personal rights that have their basis in the powers and actions of public administrative authorities are known as 'legitimate interests' ('*interessi legittimi*'). Before 1999, no action for damages could be filed for infringements of '*interessi legittimi*.' Accordingly, authorities in the public administration were exempt from civil liability for unlawful exercise of their public powers.[59]

Such a restrictive interpretation has been gradually phased out thanks in part to provisions introduced on this topic by European Union Law. In particular, Council Directive 89/665/EEC and Directive 92/13/EEC[60] on Review Procedures provide that in the Member States 'effective and rapid remedies must be available in case of infringements of Community law in the field of public procurement or national rules implementing that law'.

In light of this framework, a change in the traditional trend was inevitable and, according to most Italian scholars,[61] even desirable. As for public procurement law, these Directives called for the implementation of effective remedies to ensure not only the correction of procedures and the annulment of unlawful acts, but also to grant bidders the right to claim damages if harmed by any unfair behaviour on the part of the public administration.

The turning point in the traditional understanding eventually came with

rulings, civil courts only have the power to assess whether the public body negotiated fairly and not whether it was a proper administrator.

[58] Corte di Cassazione 29 July 1987 no 6545, *Foro italiano,* I, 460 (1988); Corte di Cassazione-Sezioni Unite 6 October 1993 no 9892, *Giurisprudenza italiana,* I, 95, (1995).

[59] See generally, R. Caranta, 'Public Law Illegality and Governmental Liability', in D. Fairgrieve, M. Andenas and J. Bell eds, *Tort Liability of Public Authorities in a Comparative Perspective* (London: BIICL, 2002).

[60] Council Directive 89/665/EEC of 21 December 1989, on the '*application of review procedures to the award of public supply and public works contracts*' and Council Directive 92/13/EEC of 25 February 1992, '*coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors*', implemented in Italy by legge 6 December 1991 no 1034 and legge 19 February 1992 no 142.

[61] E. Casetta, 'Responsabilità della Pubblica Amministrazione' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1997), XIII, 210; S. Cassese ed, *Trattato di diritto amministrativo* (Milano: Giuffrè, 2003), II, 1649; G.M. Racca, 'La responsabilità contrattuale e precontrattuale della Pubblica Amministrazione', in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti,* I, *I contratti della pubblica amministrazione* (Torino: Utet, 2007), 637.

the landmark judgment of the Joint Chambers of the *Corte di Cassazione* 22 July 1999 no 500.[62] This judgment overruled the previous principle that no claim for damages could arise from the breach of legitimate interests. It stated that public entities could be held liable under civil law for damages caused during the exercise of their powers, including damages resulting from an infringement of the principle of fairness and good faith set out in Art 1337 of the Italian Civil Code.

Since the principle of public entity liability has been established, case law has increasingly broadened the scope of pre-contractual liability in the field of the public administration.[63]

The courts currently identify two different cases for liability resulting from the award of public contracts:

a) Liability for the adoption of unlawful provisions. In determining this kind of liability, courts are required to rule on the legitimacy of the administrative acts. This judgment refers to the legality of any aspect of an administrative decision and the liability is considered to be of an extra-contractual (tortious) nature. The judgment upholding contract validity safeguards the legitimate interest of the private party and may result in the annulment of decisions involving the ground of illegality.[64]

b) Liability for the adoption of unfair behaviour, identified regardless of the lawfulness of the administrative action. The judgment on the issue of liability enables the administrative courts to evaluate the overall behaviour of the public administration during the competitive bidding procedure for public contracts, in order to establish whether the public administration has fulfilled or failed to fulfil its duties of fairness and of good faith. If any improper behaviour during negotiations is ascertained and if all the elements for liability are present, a judgment requiring the contracting entity to compensate the damages incurred by private parties under Art 1337 of the Italian Civil Code may result.[65]

Public procurement tendering procedures are one of the most interesting areas in which liability of public bodies first occurred, and later developed into a more extensive application.[66] In particular, the *Consiglio di Stato*

[62] Corte di Cassazione-Sezioni Unite 22 July 1999 no 500, *Foro italiano,* 3201 (1999).

[63] Consiglio di Stato 8 September 2010 no 6489; Consiglio di Stato 28 May 2010 no 3393; Consiglio di Stato 8 October 2008 no 4947, all available at www.giustizia-amministrativa.it.

[64] Consiglio di Stato 27 June 2013 no 3521, available at http://www.diritto.it/docs/35829-responsabilit-della-pubblica-amministrazione-da-provvedimento-illegittimo (last visited 6 December 2016); Consiglio di Stato 20 October 2008 no 5124, available at www.giustizia-amministrativa.it.

[65] Corte di Cassazione 03 July 2014 no 15260, *Urbanistica e appalti*, 1181 (2014); Consiglio di Stato 10 December 2015 no 5611, available at www.giustizia-amministrativa.it.

[66] For further remarks on this topic, see S. Ponzio, 'State Liability in Public Procurement. The Case of Italy', in D. Fairgrieve and F. Lichère eds, *Public Procurement Law: Damages*

recently stated that, during a tender procedure for the award of public contracts, pre-contractual liability may occur not only when the tendering procedure is set aside by a Court, but also: a) when a public authority calls off a tender because it changes its project, and many years have passed since the first act of the procedure, b) if the project can no longer be realised for technical reasons, c) if the public authority has become aware that the procedure was flawed from the beginning and should have been annulled from the start, and d) when a public authority calls off the tender or refuses to sign the contract after the adjudication decision because of a lack of funds.[67]

In such cases, liability has been found despite the lack of administrative unlawfulness, merely on the basis of the public party's unfair behaviour which violated the private party's the legitimate expected interest upon the positive conclusion of the negotiation.[68]

In recent times, Italian case law made further progress in overruling the traditional approach, which had excluded any liability before the award of the contract.[69] In this regard, it was stated that contracting authorities may be held liable for the loss caused by infringements of any of the rules relating to the selection of the contractor, even when the economic operator is unable to demonstrate its right to be awarded a contract.[70]

Italian case law commonly holds that all claims stemming from pre-contractual liability are of a tort law character (under Art 2043 of the Italian Civil Code).[71] As an aspect of its 'tort' nature, pre-contractual liability of public entities does not arise from the mere unlawfulness of the administrative action, but also requires that fault on the part of the public authority be established.[72] Indeed, a necessary element of an Italian damages claim is demonstrable fault, and the same set of rules applies to damages actions in public procurement law.

as an Effective Remedy (London: Bloomsbury Publishing, 2011), 67-80.

[67] Consiglio di Stato 7 February 2012 no 662, *Corriere Giuridico*, 675 (2012).

[68] Consiglio di Stato-Adunanza Plenaria 5 September 2005 no 6, available at www.giustizia-amministrativa.it; Consiglio di Stato 8 October 2008 no 4947, available at www.giustizia-amministrativa.it, both find pre-contractual liability for unfair behaviour despite considering the revocation of the award procedure to be legal.

[69] Consiglio di Stato 3 February 2011 no 780, *Danno e Responsabilità*, 4, 447 (2011).

[70] Consiglio di Stato 15 July 2013 no 3831, available at www.giustizia-amministrativa.it; Consiglio di Stato 13 December 2013, no 6000, available at www.giustizia-amministrativa.it; Corte di Cassazione 12 May 2015 no 9636, *Corriere Giuridico*, 1, 56 (2016).

[71] Recently, Corte di Cassazione 17 September 2013 no 21255, *Corriere Giuridico*, 489 (2014). It is worth noting that two recent rulings, contrary to the established trend, base their reasoning in the contractual nature of *culpa in contrahendo*: Corte di Cassazione 12 July 2016 no 14188, available at http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/07/Cass.-12-luglio-2016-n.-14188-Rel.-Valitutti.pdf (last visited 6 December 2016); Corte di Cassazione 20 December 2011 no 27648, *Europa e diritto privato*, 1227 (2012).

[72] Among the most recent rulings: Consiglio di Stato 13 February 2009 no 775, *Urbanistica e appalti*, 734 (2009); Consiglio di Stato 9 June 2008 no 2751, *Urbanistica e appalti*, 1285 (2008).

From this perspective, the Italian legal system appears to be inconsistent with EU principles. Indeed, under the European directives on this topic,[73] the right to damages arising from the infringement of rules on public procurement does not require the court to pre-emptively ascertain the fault of the public entity.

On this point, the Court of Justice's case law has clarified that the Procurement Remedies Directives[74] must be interpreted as 'precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable',[75] including where the application of such legislation rests on a presumption that the contracting authority is at fault. The Court noted that a fault requirement means that an injured party runs the risk of not being compensated. This is deemed contrary to the objective of this directive, namely to ensure effective and rapid review.[76]

From this point of view, the Italian system still has a long way to go to ensure that the rules regulating the public administration's pre-contractual liability fully comply with European principles.

IX. Conclusion

As recent developments in Italian case law have made clear, in contrast to traditionally-held rules, the material scope of pre-contractual liability is not limited to cases of unjustified termination of negotiations or to conclusions of a voidable contract. Pre-contractual liability also attaches when the contract is valid but 'disadvantageous' for a party as a result of the other party's behaviour during negotiations which is not in good faith and when there is 'delay' in conclusion of the contract.

Italian law now definitely rejects the conventional principle claiming that there is no pre-contractual liability when a valid contract has been concluded.

This certainly constitutes a great achievement, allowing, on the one hand,

[73] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts and the recent Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[74] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992.

[75] Case 314/09 *Stadt Graz* v *Strabag AG and Others*, available at www.eurlex.europa.eu; Case 46/93 *Brasserie du Pecheur – Factorame*, available at www.eurlex.europa.eu; Case 6/90 *Francovich* v *Italy*, available at www.eurlex.europa.eu.

[76] F. Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Cheltenham: Edward Elgar Publishing, 2015), 265.

for Art 1337 to recover its proper role in legislation as a general clause and, on the other, for enhanced standards of fairness during negotiations as well as enhanced protection for the aggrieved party.

However, it is worth noting that recent developments have extended the material scope of pre-contractual liability without establishing new definitive boundaries. As the *Corte di Cassazione* clearly emphasized in 2007,[77] 'the extent of pre-contractual liability (Art 1337 of the Civil Code) cannot be precisely predetermined'. This new approach requires Italian courts and scholars to face a challenging task: they must establish the new and innovative shape of pre-contractual liability, attempting to identify when the duty of good faith attaches and what the breach of this duty entails.[78] It can be assumed that further developments in the area of pre-contractual liability in Italy will focus on identifying new cases that will trigger such a liability. In general terms, courts must draw a clear distinction between lawful behaviours that parties are allowed to pursue in negotiations to advance their own legitimate interests thanks to contractual freedom, and unfair courses of conduct relevant under Art 1337 of the Italian Civil Code. In this perspective, the duty of disclosure is a field in which a great need for balance arises between, on the one hand, the enforcement of good faith, morality and fairness during negotiations and, on the other, the liberal principle of contractual freedom.

Even with its 'new' and expanded boundaries, pre-contractual liability in Italy still does not appear to entail a generally applicable duty to inform in all situations and for all information. Silence, in and of itself, does not constitute a breach of good faith during negotiations; under certain circumstances, a party could fail to inform without being held responsible for any damage, as remaining silent does constitute an expression of the individual's right.[79] As has clearly been stated in this respect, a '*one against all*' form of protection would constitute a Pyrrhic victory, since it would overwhelm 'the competition mechanism, which is ultimately the key element in a self-regulated and decentralized economic system'.[80] In performing this crucial task, which

[77] Corte di Cassazione-Sezioni Unite 19 December 2007 no 26724 and no 26725 n 6 above.

[78] An international overview of this issue is in: O. Crespo, M. and G. Rubio, M. Paz, 'Precontractual Liability in European Contract Law' *InDret*, 2 (2010) available at http://ssrn.com/abstract=1638990 (last visited 6 December 2016).

[79] The issue has been traditionally addressed from an economic point of view, in an attempt to provide precise criteria to determine when a duty to disclosure exists: A. Porat, 'The Law and Economics of Mistake in European Sales Law' *Common Market Law Review*, 127-146 (2013); H. Kötz, 'Precontractual Duties of Disclosure: A Comparative and Economic Perspective' *European Journal of Law and Economics*, 5-19 (2000). For the European perspective, see T. Wilhelmsson and C. Twigg-Flesner, 'Pre-contractual Information Duties in the *Acquis Communautaire*' *European Review of Contract Law*, 441-470 (2006).

[80] H. Rösler, 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law' *European Review of Private Law,* 733

consists in drawing a distinction between what is 'fair' and what is 'unfair', courts must take into account the circumstances of each specific case. Indeed, good faith and standards of fairness cannot but vary according to the nature of the contract and the contracting parties. For example, the level of protection resulting from the enforcement of general clauses should increase, and freedom of contract be restrained, when the transaction involves a perceived 'weaker' party, namely a party that, for various reasons, has less bargaining power than the counterpart (not only consumers but also small businesses, franchisees, investors, etc).[81] Recently, on this note, the *Corte di Cassazione*,[82] ruling on a case concerning an insurance contract, held that Art 1337 requires the insurer to provide customers in a comprehensive and timely manner with all the information necessary to assist their decision-making, and to avoid misleading or deceptive representations; in addition, insurers must offer policies that are truly suitable to clients' needs. Thus, pre-contractual good faith is considered a source of a far-reaching set of duties and obligations which, prior to this judgment, were deemed applicable only when expressly established as such in specific legislation.

(2010). For similar remarks in the Italian context, see F. Galgano, *Diritto civile e commerciale*, 1, II (Padova: Cedam, 2004), 320.

[81] O. Cherednychenko, 'Public Regulation, Contract Law, and the Protection of the Weaker Party: Some Lessons from the Field of Financial Services' *European Review of Private Law*, 663-684 (2014); S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the Improper Veneration of 'Freedom of Contract'' *European Review of Contract Law*, 167-182 (2014); G. Vettori, 'Contract without Numbers and without Adjectives. Beyond the Consumer and the Weak Enterprise' *European Review of Contract Law*, 221-248 (2013).

[82] Corte di Cassazione 24 April 2015 no 8412, available at http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/01/Cass.-24-aprile-2015-n.-8412.pdf (last visited 6 December 2016).