

The regulatory function of contract law

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Structure of the presentation

- Reasons for the existing separation between the law of contract in regulated market sectors and general contract law
- Relevant changes in the law of contract and in regulated market sectors
- Reasons for co-ordination
- Available models of co-ordination

Thesis

- The law of contract in regulated market sectors is to be co-ordinated with general contract law, both performing, albeit in a partially differentiated manner, a regulatory function:
 - A) at national level
 - B) at European level

The regulatory function of private law

- The regulatory function of private law: a comparison between national systems and European law
- The role of mandatory provisions
- The role of optional provisions
- The role of general clauses
- The role of private organizations and self-regulation

The law of contract in regulated market sectors: general overview

- 1) The divide between the law of contract in regulated market sectors and general contract law
- 2) Possible explanations:
 - A) peculiarity of general and sector-specific regulatory goals
 - B) deeper influence of competition law in regulated market sectors
 - C) prominent role of public and private regulators in setting the legal regime of contracts
 - D) Reduced room for optional provisions

General overview: main features of the law of contract in regulated market sectors (I)

- Peculiarity in the system of the sources of law
- Reduced room for manouvre left to private autonomy
- Principles enshrining regulatory goals: emphasized regulatory function of contract law
- Principles of market regulation become principles of contract regulation (content of the contract)

General overview: main features of the law of contract in regulated market sectors (II)

- Information asymmetry-transparency-duties of information
- Guarantee regarding comparability of the offers
- Access to services and principle of equality of treatment
- Guarantees regarding quality and continuity of the services
- Exit and competitiveness: right of withdrawal

General overview: the principles at stake

- Proportionality principle as general clause and assessment criterion for *ex ante* regulatory intervention (see art.4 and 19 Italian Code of Electronic communications)
- Principle of non discrimination and principle of equality of treatment
- Transparency principle
- Principle of service quality and continuity
- Universal provision of services

General overview: the sources of the law of contracts in regulated market sectors

- Universal Service Directive – (‘whereas’ 30)
(30) Contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. Most service providers in a competitive environment will conclude contracts with their customers for reasons of commercial desirability. In addition to the provisions of this Directive, the requirements of existing Community consumer protection legislation relating to contracts, in particular Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(8) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts(9), apply to consumer transactions relating to electronic networks and services. **Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, condition for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. Where service providers other than direct telephone service providers conclude contracts with consumers, the same information should be included in those contracts as well. The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.**

General overview: Significant changes in the law of contract in regulated market sectors

- Markets' liberalization processes foster a reduction/change of regulation's function and a more penetrating role of competition law
- At sources of law level: increasing role of co-regulation and self-regulation techniques, which imply more room for manouvre for collective private autonomy

General overview: legal regimes for the contract and the stages of liberalization

- Three macro-phases of liberalization:
 - A) the regulatory regime of contract given the existence of public monopolies: a ceased phase.
 - B) The law of contract in transition towards liberalization
 - C) The law of contract in regulated market sectors: full completion of the liberalization process, both from an economic and a legal viewpoint

General overview: relevant changes in the law of contracts in regulated market sectors

- Questions arising in consequence:
 - A) at sources of law level, is the law of contract in regulated market sectors verging on general contract law?
 - B) Are the goals of regulation pursued by competition law or by regulatory techniques?
 - C) How much does the role of optional provisions- endowed of regulatory function- gain in relevance?

The law of contracts in regulated market sectors

- Market sectors considered: energy and gas, telecommunications, credit and financial markets
- National legal systems: the Italian experience and the English experience

The law of contract in the energy sector:

Sources

- **Legislator:** European Union (Directive 2003/54/CE), national legislator (Legislative decree n.79/99 which implements past European directive)
- **Public Regulator:** Ministero dello sviluppo economico, Autorità dell'energia elettrica e del gas (Legal base: **Law 14th of November 1995, n. 481**, art. 2, par. 12, section h): “emana le direttive concernenti la produzione e l'erogazione dei servizi da parte dei soggetti esercenti i servizi medesimi, *definendo in particolare i livelli generali di qualità riferiti al complesso delle prestazioni e i livelli specifici di qualità riferiti alla singola prestazione da garantire all'utente, sentiti i soggetti esercenti il servizio e i rappresentanti degli utenti e dei consumatori*”)
- **Private Committees:** Consultation committee (competences for facilitating dispute resolution arising in connection with the ‘Net Code’)
- **Regulatees:** undertakings (as individual subjects or jointly associated in networks)

The goals of DIR 2003/54:

- (6) network access must be non-discriminatory, transparent and fairly priced
- (19) All Community industry and commerce, including small and medium-sized enterprises, and all Community citizens that enjoy the economic benefits of the internal market should also be able to enjoy high levels of consumer protection, and in particular households and, where Member States deem it appropriate, small enterprises should also be able to enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs, for reasons of fairness, competitiveness and indirectly to create employment.
- (20) Electricity customers should be able to choose their supplier freely. Nonetheless a phased approach should be taken to completing the internal market for electricity to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose their supplier.
- (21) Progressive market opening towards full competition should as soon as possible remove differences between Member States. Transparency and certainty in the implementation of this Directive should be ensured.
(‘whereas’ Dir. 2003/54/CE)

- **Directive 2003/54/CE**

Article 3 Public service obligations and customer protection

(...)

3. Member States shall ensure that **all household customers**, and, where Member States deem it appropriate, small enterprises, (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy **universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort.**

Member States shall impose on distribution companies an obligation to connect customers to their grid under terms, conditions and tariffs set in accordance with the procedure laid down in Article 23(2). **Nothing in this Directive shall prevent Member States from strengthening the market position of the domestic, small and medium-sized consumers by promoting the possibilities of voluntary aggregation of representation for this class of consumers.**

The first subparagraph shall be implemented **in a transparent and non-discriminatory way** and shall not impede the opening of the market provided for in Article 21(..)

5. Member States shall take appropriate measures to **protect final customers**, and shall in particular ensure that there are adequate safeguards to protect vulnerable customers, including measures to help them avoid disconnection. In this context, Member States may take measures to protect final customers in remote areas. They shall ensure **high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms.** Member States shall ensure that the eligible customer is in fact able to switch to a new supplier. As regards at least household customers, these measures shall include those set out in Annex A.

ANNEX A Measures on consumer protection

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council(1) and Council Directive 93/13/EC(2), the measures referred to in Article 3 are to ensure that customers:

- (a) have a right to a contract with their electricity service provider that specifies:
 - the identity and address of the supplier;
 - the services provided, the service quality levels offered, as well as the time for the initial connection;

- if offered, the types of maintenance service offered;
- the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
- the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any **right of withdrawal**;
- any **compensation and the refund arrangements** which apply **if contracted service quality levels are not met**; and
- the method of initiating procedures for settlement of disputes in accordance with point (f).

Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract;

- (b) are given adequate notice of any intention to modify contractual conditions and are informed about their **right of withdrawal** when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions notified to them by their electricity service provider;
- (c) receive **transparent information** on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services;
- (d) are offered a wide choice of payment methods. Any difference in terms and conditions shall reflect the costs to the supplier of the different payment systems. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods;
- (e) shall **not be charged for changing supplier**;
- (f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC(3);
- (g) when having access to universal service under the provisions adopted by Member States pursuant to Article 3(3), are informed about their rights regarding universal service.

The law of contract in the energy sector: the Italian experience

- The law of contract in the energy sector
- The regulatory instruments:
 - Decisions issued by the Independent Authority for energy and gas: determination of minimum tariffs and price-cap aiming at a balance between tariffs and costs (**Testo integrato delle disposizioni dell'Autorità per l'erogazione dei servizi di trasporto, di misura e di vendita dell'energia elettrica per il periodo di regolazione 2004 - 2007 (Allegato A alla Delibera 5/04 del 30 gennaio 2004)**); transparency duties (**Direttiva per la trasparenza dei documenti di fatturazione dei consumi di elettricità, 152/06**); standard setting regarding the quality of service (**testo integrato della qualità del servizio**, decision n. 4/04)
 - Code of transmission, dispatchment, development and security of the net (“**Codice di rete**” or Code) concerning access to nets: issued by the net-manager (GRTN) (pursuant to art. 1, par. 4 Decreto del Presidente del Consiglio dei Ministri 11th of May 2004);
Transportation enterprises may revise or issue the Code; for such purpose interested parties may participate in the revision procedure, which provides for the institution of a technical consultation committee (“Comitato di consultazione”) among interested transportation enterprises. The Committee is competent for all Codes set by the managers of the net.

ABOUT REGULATED MARKET

- **Terms and conditions concerning the provision of electric energy to clients in a regulated regime:** *minimum conditions for the provisions of electric energy applicable to providers. Such provisions are optional only if the providers intend to ameliorate them, pursuant to the principle of non discrimination of clients, as set by the Authority in its decision **Delibera 200/99**.*
- **Code of commercial conduct,** *providing norms of behaviour aimed at ensuring transparency and fairness of minimum and special tariffs to clients in the regulated markets.*

The Code can be issued either by the providers (pursuant the obligation set by the Authority in its decision **Deliberazione n. 204/99**) either by the Authority itself, pursuant **Deliberazione 242/00**: in this case the code is binding for providers.

ABOUT FREE MARKET

- **Code of commercial conduct for the provision of electric energy to suitable final clients,** approved by the Authority with its decision **Delibera 105/06**. (The Code does not influence the content of economic and contractual offers, but it sets transparency and information duties in favour of final clients.)
- Tariff setting by a mechanisms of price-caps in the view of equalling tariffs to costs **Testo integrato delle disposizioni dell'Autorità per l'erogazione dei servizi di trasporto, di misura e di vendita dell'energia elettrica per il periodo di regolazione 2004 - 2007 (Allegato A alla Delibera 5/04 del 30 gennaio 2004).**
- **d.lgs. n. 206/05, or Code of Consumption,** applying, among others, to *distance selling contracts and contracts negotiated outside commercial premises.*

Regulation and Liberalization

Consiglio di Stato, Sez. VI, 5/5/2006 n. 3352

L'Autorità per l'energia elettrica ed il gas può regolare il mercato anche in regime di liberalizzazione, per salvaguardare le dinamiche concorrenziali a tutela dell'utenza.

L'Autorità per l'energia elettrica ed il gas ha il potere di regolare il mercato anche in regime di liberalizzazione, affinché siano salvaguardate le dinamiche concorrenziali a tutela dell'utenza. Infatti, la liberalizzazione di un mercato non comporta automaticamente il passaggio ad una situazione di concorrenza, la cui promozione rientra tra le competenze dell'Autorità, fin quando essa ritenga che il mercato non sia idoneo alla formazione corretta dei prezzi in una reale competizione. Ne consegue che, è legittima la deliberazione dell'Autorità per l'energia elettrica ed il gas n. 248 del 29 dicembre 2004, con cui la stessa ha modificato il meccanismo di indicizzazione delle tariffe per la fornitura del gas naturale ai clienti finali del mercato vincolato, già disciplinato con la propria precedente delibera del 29 novembre 2002, n. 195, in quanto con la suddetta deliberazione non ha esercitato un potere di fissazione delle tariffe, bensì quello di regolazione dei comportamenti delle imprese del settore, tali da consentire una effettiva concorrenza, a tutela degli utenti e dei consumatori.

The Italian experience: contracts in the energy sector

- The effects of regulation on contracts
- Automatic mechanisms of reimbursement to clients in case of non compliance with the standards of service set in the “Testo integrato della qualità del servizio” (delib. n. 4/04, art. 3 Dir. 2003/54/CE e allegato A)
- Sanctioning procedures initiated by the Authority:

The Authority for electric energy and gas initiated formal inquiries for the possible levying of fines against Aquamet S.p.a., distributor of natural gas and its parent company Amga S.p.a. pursuant art. 2, par. 20, lett. d) and c), of the L.n. 481/95 (Delib. 237/05)

According to the terms and conditions available, these companies are charging natural gas suppliers considerable extra fees in case of switching by end customers, which is actually an essential service whose remuneration is already included in the official tariff set by the Authority. In addition, the Amga Group requires monthly meter readings by gas suppliers that opt not to have the distributor take care of metering, and otherwise charging them a fee. Such a requirement, however, is illegitimate as it exceeds the protections the Authority has put in place for utilities and consumers. It is also detrimental to the growth of competition in the towns served by these distributors, since it gives Amga advantages at the group level that are extraneous to competing providers.

Therefore, upon launching the enquiry to see if a fine is warranted, the Authority has ordered the companies to:

- remove from their websites, within five days, the clauses on fees they should not be charging;
- reimburse users that have paid the fees (Delib. 237/05)

- By its decision Delibera 236/05 the Authority order an inspection in the premises of S.I.P.P.I.C SpA, as a consequence of the complaints received from the final clients of S.I.P.P.I.C. SpA. The company required payment for services subject to standard of commercial quality and for information contained in the payment bills as well as in the contracts for the provision of electric energy. The Authority gathered from the company relevant information and documents in order to assess the reasonableness of the complaints and it ascertained that the behaviour of the company constitutes a violation of the orders of the Authority.

The English experience: contracts in the energy sector

- Ofgem adopts Better regulation: only regulating where necessary while designing rules that support competition and protect the customer.
- The regulator retains concurring competences related to antitrust and consumer protection

As regards the access and the management of the nets:

- **The standard conditions of the licences set the duty** to issue self-regulation codes, which define the goals, the main contents, and the revision procedures
- **Self-regulation codes**, issued by the providers, provided of a binding nature pursuant a Framework Agreement, which needs to be subscribed.

As regards final individual clients:

- **The standard standard conditions of the licenses** set the duty for the providers to issue **codes of conduct** (Code of Practice on Procedures with Respect to Site Access, Code of Practice on Payment of Bills and Guidance for Dealing with Customers in Difficulty, Provision of Services for Persons who are of Pensionable Age or Disabled or Chronically Sick). In 2005 a revision procedure has been initiated in order to modify these standard conditions. The aim is evaluating the opportunity to add special provisions to ensure full achievement of consumer protection, currently resting on general consumer law.
- The regulator also provided for the setting of independent entities endowed with dispute resolution and managed by the providers.

The law of contract in the telecommunication sector

- The European level: the Universal service directive
- The English experience: sources, goals of regulation, regulatory instruments, the effects of regulation
- The Italian experience: sources, goals of regulation, the regulatory instruments, the effects of regulation

Contracts in the telecom sector: the European level

- The goals of regulation

Article 8 Policy objectives and regulatory principles Universal services dir.

The objectives of regulation

- 1) to encourage competition in the electronic communications markets;
 - 2) to improve the functioning of the internal market;
- and to guarantee basic user interests that would not be guaranteed by market forces

Universal services Directives, art.20

Contracts

1. Paragraphs 2, 3 and 4 apply without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC and 93/13/EC, and national rules in conformity with Community law.
2. Member States shall ensure that, where subscribing to services providing connection and/or access to the public telephone network, consumers have a right to a contract with an undertaking or undertakings providing such services. The contract shall specify at least:
 - (a) the identity and address of the supplier;
 - (b) services provided, the service quality levels offered, as well as the time for the initial connection;

- (c) the types of maintenance service offered;
- (d) particulars of prices and tariffs and the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
- (e) the duration of the contract, the conditions for renewal and termination of services and of the contract;
- (f) any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
- (g) the method of initiating procedures for settlement of disputes in accordance with Article 34.

Member States may extend these obligations to cover other end-users.

3. Where contracts are concluded between consumers and electronic communications services providers other than those providing connection and/or access to the public telephone network, the information in paragraph 2 shall also be included in such contracts. Member States may extend this obligation to cover other end-users.
4. Subscribers shall have a right to withdraw from their contracts without penalty upon notice of proposed modifications in the contractual conditions. Subscribers shall be given adequate notice, not shorter than one month, ahead of any such modifications and shall be informed at the same time of their right to withdraw, without penalty, from such contracts, if they do not accept the new conditions.

- Art. 20 – Contracts (Univ. Serv. Directive)
 4. Subscribers shall have a right to withdraw from their contracts without penalty upon notice of proposed modifications in the contractual conditions. Subscribers shall be given adequate notice, not shorter than one month, ahead of any such modifications and shall be informed at the same time of their right to withdraw, without penalty, from such contracts, if they do not accept the new conditions.
- 40) Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end-users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing service. The provision of this facility between connections to the public telephone network at fixed and non-fixed locations is not covered by this Directive. However, Member States may apply provisions for porting numbers between networks providing services at a fixed location and mobile networks.
- Article 21 - Transparency and publication of information
 1. Member States shall ensure that transparent and up-to-date information on applicable prices and tariffs, and on standard terms and conditions, in respect of access to and use of publicly available telephone services is available to end-users and consumers, in accordance with the provisions of Annex II.
 2. National regulatory authorities shall encourage the provision of information to enable end-users, as far as appropriate, and consumers to make an independent evaluation of the cost of alternative usage patterns, by means of, for instance, interactive guides.
- Article 22 - Quality of service
 1. Member States shall ensure that national regulatory authorities are, after taking account of the views of interested parties, able to require undertakings that provide publicly available electronic communications services to publish comparable, adequate and up-to-date information for end-users on the quality of their services. The information shall, on request, also be supplied to the national regulatory authority in advance of its publication.
 2. National regulatory authorities may specify, inter alia, the quality of service parameters to be measured, and the content, form and manner of information to be published, in order to ensure that end-users have access to comprehensive, comparable and user-friendly information. Where appropriate, the parameters, definitions and measurement methods given in Annex III could be used.

Contracts in the telecom sector: the English experience

- **Sources:** Communication Act 2003 which reforms the regulatory framework for the communications sector (sect.1(7) enables OFCOM to contract out their functions to a third party, where an order providing for such has been made by the Secretary of State under the Deregulation and Contracting Out Act 1994.)
- **The goals of regulation:**
the Act provides for:
 - the transfer of functions to the Office of Communications (OFCOM) from the bodies and office holders which currently regulate the communications sector (which broadly speaking encompasses telecommunications and broadcasting) and manage the radio spectrum;

The English case: regulatory instruments

- Contracting out functions of OFCOM relating to the regulation of broadcast advertising under the Deregulation and Contracting Out Act 1994 (sect. 69, 70, 71) and the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (art. 3, 4, 5)

This last Order identifies those functions in relation to the regulation of broadcast advertising which OFCOM may contract out. They are—

- (a) functions relating to regulation of advertising standards in the Communications Act 2003, plus certain wider enforcement functions (including functions in the Broadcasting Act 1990 and the Broadcasting Act 1996) which may be exercised in connection with the functions relating to the regulation of advertising standards;
- (b) functions relating to the regulation of broadcast advertising under the Medicines (Monitoring of Advertising) Regulations 1994; and
- (c) functions relating to the regulation of broadcast advertising under the Control of Misleading Advertising Regulations 1988.

- Deregulation and Contracting Out Act 1994 (sect. 69, 70, 71):

69.—(1) This section applies to any function of a Minister or office-holder—

- (a) which is conferred by or under any enactment; and
- (b) which, by virtue of any enactment or rule of law, may be exercised by an officer of his; and
- (c) which is not excluded by section 71 below.

(2) If a Minister by order so provides, a function to which this section applies may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the office-holder or Minister whose function it is.

(3) A Minister shall not make an order under this section in relation to an office-holder without first consulting him.

(4) An order under this section may provide that a function to which this section applies may be exercised, and an authorisation given by virtue of such an order may (subject to the provisions of the order) authorise the exercise of such a function—

- (a) either wholly or to such extent as may be specified in the order or authorisation;
- (b) either generally or in such cases or areas as may be so specified; and
- (c) either unconditionally or subject to the fulfilment of such conditions as may be so specified.

(5) An authorisation given by virtue of an order under this section—

- (a) shall be for such period, not exceeding 10 years, as is specified in the authorisation;
- (b) may be revoked at any time by the Minister or office-holder by whom the authorisation is given; and
- (c) shall not prevent that Minister or office-holder or any other person from exercising the function to which the authorisation relates.

70.—(1) This section applies to any function of a local authority—

(a) which is conferred by or under any enactment; and

(b) which, by virtue of section 101 of the [1972 c. 70.] Local Government Act 1972 or section 56 of the [1973 c. 65.] Local Government (Scotland) Act 1973 (arrangements for discharge of functions by local authorities), may be exercised by an officer of the authority; and

(c) which is not excluded by section 71 below.

(2) If a Minister by order so provides, a function to which this section applies may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the local authority whose function it is.

(3) A Minister shall not make an order under this section in relation to a local authority without first consulting—

(a) in the case of an authority in England or Wales, such representatives of local government;

(b) in the case of an authority in Scotland, such associations of local authorities,

as he considers appropriate.

(4) Subsections (4) and (5) of section 69 above shall apply for the purposes of this section as they apply for the purposes of that section; and in subsection (5) of that section as so applied any reference to the Minister or office-holder by whom the authorisation is given shall be construed as a reference to the local authority by which the authorisation is given.

(5) Where at any time—

(a) an order is in force under this section in relation to any function of a local authority ("authority A"); and

(b) arrangements are in force under section 101 of the [1972 c. 70.] Local Government Act 1972 or section 56 of the [1973 c. 65.] Local Government (Scotland) Act 1973 for the exercise of that function by another local authority ("authority B"),

it shall be an implied term of those arrangements that, except with the consent of authority A, authority B shall not give any authorisation by virtue of the order in relation to that function.

71.—(1) Subject to subsections (2) and (3) below, a function is excluded from sections 69 and 70 above if—

- (a) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the State; or
- (b) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual; or
- (c) it is a power or right of entry, search or seizure into or of any property; or
- (d) it is a power or duty to make subordinate legislation.

(2) Subsection (1)(b) and (c) above shall not exclude any function of the official receiver attached to any court.

(3) Subsection (1)(c) above shall not exclude any function of a local authority under, or under regulations made under, any of the following enactments, namely—

- (a) section 247 of the [1947 c. 43.] Local Government (Scotland) Act 1947 (enforcement of non-domestic rates);
- (b) Part VI of the [1967 c. 9.] General Rate Act 1967 (distress for general rates);
- (c) paragraphs 7 and 7A of Schedule 2 and paragraph 11 of Schedule 5 to the [1987 c. 47.] Abolition of Domestic Rates Etc. (Scotland) Act 1987 (enforcement of community charges and community water charges);
- (d) paragraphs 5 to 7 of Schedule 4 to the [1988 c. 41.] Local Government Finance Act 1988 (enforcement of community charge);
- (e) paragraph 3(2)(b) of Schedule 9 to that Act (enforcement of non-domestic rates);
- (f) paragraphs 5 to 7 of Schedule 4 to the [1992 c. 14.] Local Government Finance Act 1992 (enforcement of council tax);
- (g) paragraphs 2 and 6 of Schedule 8 and paragraph 11 of Schedule 11 to that Act (enforcement of council tax and council water charge); and
- (h) paragraph 2 of Schedule 10 to the [1994 c. 39.] Local Government etc. (Scotland) Act 1994 (enforcement of water and sewerage charges).

- Communication Act 2003 Sect. 6 - Duties to review regulatory burdens
- (2) In reviewing their functions under this section it shall be the duty of OFCOM-
 - (a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and
 - (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM.
- (3) In determining for the purposes of this section whether procedures for self-regulation are effective OFCOM must consider, in particular- (a) whether those procedures are administered by a person who is sufficiently independent of the persons who may be subjected to the procedures; and (b) whether adequate arrangements are in force for funding the activities of that person in relation to those procedures.

- **Regulatory contract between OfCOM and ASA (memorandum of understanding)**

In particular, Ofcom is intending to contract out from the Act:

- (a) its functions relating to the setting, reviewing and revising of standards codes for broadcast advertising to BCAP (from section 319(1))
- (b) its functions relating to the handling and resolving of complaints about the observance of broadcast advertising standards codes to ASA(B) (from section 325(2)) and
- (c) other supplementary functions to ensure that BCAP and ASA(B) are invested with the appropriate legal authority they require

Ofcom is also intending to use DCOA to contract out to ASA(B) its functions relating to the handling and resolving of complaints about the compliance of broadcast advertising with the *Control of Misleading Advertisements Regulations 1988* and the *Medicines (Monitoring of Advertisements) Regulations 1994*.

Ofcom agrees that the following broadcast advertising regulation functions should, subject to the appropriate constraints identified in this document and the Authorisation, and for the time period specified in the Authorisation, henceforth be carried out by ASA(B) and BCAP:

- a) Handling and resolution of complaints about advertising content on radio and television
- b) Advertising code setting, monitoring and enforcement
- c) Teleshopping and other non-spot advertising content
- d) Political advertising
- e) Scheduling of spot advertising
- f) Broadcast sponsorship
- g) Interactive and other new forms of advertising
- h) Public Policy requirements
- i) Audience Research
- j) Publicity
- k) Compliance with the Control of Misleading Advertisements Regulations 1988 (CMARS) and the Medicines Monitoring of Advertising Regulations 1994 (MMAR)

Contracts in the telecom sector: the Italian experience

- Sources:
- Legislator: European Union (Dir. 2002/19/CE access, Dir. 2002/20/CE authorizations, Dir. 2002/21/CE framework legislation, Dir. 2002/ 22/CE universal service), national legislator (D.lgs. 259/2003, Code of electronic communications)
- Public regulator: Ministry of communications, Authority for the guarantees in the telecommunication sector “Autorità per le garanzie nelle telecomunicazioni” (Instituting Act: **L. 31st July 1997, n .249**, which sets the competence of the Authority of issuing directives concerning general levels of quality of the services and the duty, for each manager of the net, to adopt a chart of services that contains the minimum standards for each sector activity. (see art. 1, par. 6, lett. b, n.2)
- Private organizations:
- regulatees: individual companies or jointly associated companies

Contracts in the telecom sector: the Italian experience

- **The regulatory instruments:**
 - Decisions of the independent Authority for telecom sector: regarding quality of the services, and the charts of telecommunication services (delibera n. 179/03/CSP), regarding quality and chart of services of access to Internet from unique position (decision delibera n. 131/06/CSP), measures for users' protection facilitating the full comprehension of economic terms and conditions for telephonic services and the comparability of market offers. (decision Delibera 126/07/CONS)
 - regulation concerning dispute resolution of claims arising between telecom entities and users. (decisions delibera 182/02/CONS and delibera 307/03/CONS)
 - **Chart of services** issued by the Authority, decision **Delibera del 24 luglio 2003, n. 179/03/CSP** (*Approvazione della direttiva generale in materia di qualità e carte dei servizi di telecomunicazioni ai sensi dell'articolo 1, comma 6, lettera b), numero 2), della legge 31 luglio 1997, n. 249*).
It sets the general discipline for the provision of services and the minimum content of contractual duties of the providers.
It also sets and qualify the information duties of the providers towards the users and the Authority itself.
 - **Code of consumption**, applying, among others, to *distance selling contracts* and *contracts negotiated outside commercial premises*.

The Law of contracts in the telecom sector: the Italian experience

- The effects of regulation on contracts
- Sanctions issued by the Authority in case of violation of the Code of electronic communication concerning universal service and users rights related to nets and telecom services (right of withdrawal free of penalties in case of unilateral modification of contractual terms and conditions– art. 70, 4 comma, CCE; number portability; minimum contract information – art. 70; quality and continuity of the service– art. 72 CCE): sanctions are issued by virtue of the competences of alternative dispute resolution granted to the Authority pursuant to art. 84 CCE (regulation concerning dispute resolution, decision n. 182/02/Cons)
- Complaints procedures provided for in the Charters of services and in contracts (artt. 5, 8 decision 179/03/Csp); detailed provision of the cases in which indemnization is granted on demand and automatically due to contractual non feasance and non compliane with standards of quality of the service.

- **Art. 70 – Contratti (CCE)**
4. Gli abbonati hanno il **diritto di recedere** dal contratto, senza penali, all'atto della notifica di proposte di modifiche delle condizioni contrattuali. Gli abbonati sono informati con adeguato preavviso, non inferiore a un mese, di tali eventuali modifiche e sono informati nel contempo del loro diritto di recedere dal contratto, senza penali, qualora non accettino le nuove condizioni.
- **Art. 71 - Trasparenza e pubblicazione delle informazioni**
1. L'Autorità assicura che informazioni trasparenti e aggiornate in merito ai prezzi e alle tariffe, nonché alle condizioni generali vigenti in materia di accesso e di uso dei servizi telefonici accessibili al pubblico, siano rese disponibili agli utenti finali e ai consumatori, conformemente alle disposizioni dell'allegato n. 5.
2. L'Autorità promuove la fornitura di informazioni che consentano agli utenti finali, ove opportuno, e ai consumatori di valutare autonomamente il costo di modalità di uso alternative, anche mediante guide interattive.
- **Art. 72 - Qualità del servizio**
1. L'Autorità, dopo aver effettuato la consultazione di cui all'articolo 83, può prescrivere alle imprese fornitrici di servizi di comunicazione elettronica accessibili al pubblico di pubblicare, a uso degli utenti finali, informazioni comparabili, adeguate ed aggiornate sulla qualità dei servizi offerti. Le informazioni sono comunicate, a richiesta, anche all'Autorità prima della pubblicazione.
2. L'Autorità precisa, tra l'altro, i parametri di qualità del servizio da misurare, nonché il contenuto, la forma e le modalità della pubblicazione, per garantire che gli utenti finali abbiano accesso ad informazioni complete, comparabili e di facile consultazione, anche utilizzando i parametri, le definizioni e i metodi di misura indicati nell'allegato n. 6.

“Direttiva generale in materia di qualità e carte dei servizi di telecomunicazioni” e la successiva delibera n. 131/06/CSP del 12 luglio 2006 “Direttiva in materia di qualità e carte dei servizi di accesso a Internet da postazione fissa”

Art. 3 – Principi fondamentali

1. Gli organismi di telecomunicazioni assicurano l'eguaglianza di trattamento degli utenti, prescindendo da differenze di sesso, razza, lingua, religione e opinioni politiche tra gli utenti medesimi.
3. I comportamenti degli organismi di telecomunicazioni nei confronti degli utenti si ispirano a criteri di obiettività, giustizia ed imparzialità. Le clausole delle condizioni generali e specifiche di fornitura del servizio e delle norme regolatrici di settore si interpretano in funzione di tale obbligo.
4. I servizi sono offerti dagli organismi di telecomunicazioni in modo regolare, continuo e senza interruzioni, ad eccezione di quelle dovute ad interventi di manutenzione e riparazione.

Art. 11 – Rimborsi e indennizzi

1. Per gli inadempimenti contrattuali ed il mancato rispetto degli standard di qualità di cui all'articolo 10, comma 1, lettera a, gli organismi di telecomunicazioni fissano ed indicano nelle carte dei servizi e nella documentazione di fatturazione, i casi di indennizzo a richiesta e di indennizzo automatico e i relativi importi che devono essere univocamente determinabili e proporzionati al pregiudizio arrecato. In ogni caso, gli organismi di telecomunicazioni corrispondono un indennizzo rispondente ai requisiti sopra indicati per i ritardi nella fornitura del collegamento iniziale, ivi compresi i casi in cui il collegamento è fornito al proprio cliente mediante servizi di accesso disaggregato a livello di rete locale.

- In particular, the Authority exercised such competences in matters related to:
- Right of withdrawal of the users;
- **transparency of telephonic tariffs of the following kinds:** fix lines, mobile phones and access to internet;
- **reimbursement of residual credit** in mobile number portability.
- As regards in particular the modification of tariffs unilaterally defined by the manager of the mobile net **WIND**, the Authority immediately intervened pursuant art. 98, par. 9, Code of electronic communication, ordering –among others- ad hoc inspections. As a consequence the Authority contested to Wind the violation of art. 70, par. 4, Code of electronic communications, thus initiating a formal sanctioning.
- “la comunicazione relativa alla variazione dei piani tariffari, inviata con sms e senza l’indicazione sulla possibilità di esercitare tale diritto, "sarebbe dunque violare la regolamentazione in vigore e potrebbe, in base alla normativa, essere sanzionata". Gli operatori possono anche offrire nuovi e più costosi piani tariffari, ma "occorre garantire agli utenti, che conseguentemente intendono cambiare operatore, la portabilità immediata del numero di telefono, assicurando il mantenimento del credito residuo. All’Agcom l’Antitrust chiede dunque che venga assicurato, in questi casi, uno speciale regime di immediata portabilità”.

Contracts in the credit sector

- The law of contracts in the credit sector
- The goals of regulation

Contracts in the credit sector

- The instruments of regulation
- Changes in the sources of law: from command and control to delegation
- Art. 7.5 L.40/2007
- Agreement between the National association of Bankers and consumers associations: “ABI-Associazioni dei consumatori”

Contracts in the credit sector

- Effects on the general discipline of contracts

Peculiar features of the law of contracts in regulated market sectors

- The law of contract in regulated market sectors retains distinctive peculiarities due to the specific characters of the market sectors. These peculiarities are also due to the connection between the discipline of contract and the goals of regulation.
- The realm of regulated market sector is not uniform. In particular the regulatory models set for financial and credit sectors are different from those regarding, directly or indirectly, economic services of general interest. (see White Paper 2004)

Peculiar features of the law of contracts in regulated market sectors

- These peculiar features justify the special regime of contracts which can be described by the following relevant profiles:
 - A) persisting difference of the sources of law that set the legal regime of the contracts: prominent role of the Independent Authorities and coordination between administrative techniques of regulation and judicial protection.
 - B) Discontinuities in the legal regime of contracts
 - B1) Wider – but often weaker- protection to consumers in B2C contractual relationships.
 - B2) More penetrating regulation of long-term B2B contractual relationship: wider role of mandatory rules, associated with contraction of private autonomy.

Reasons for co-ordination between general contract law and the law of contract in regulated market sectors

- Three lines of change in the same direction:
 - A) reduced role of hierarchical regulation and wider role for co-regulation in the law of contract in regulated market sectors --- increased importance of the role of private autonomy
 - B) Increased influence of European law in the law of contract --- growth of the regulatory functions of general contract law
 - C) Need to minimize anti-competitive aspects and to facilitate pro-competitive aspects of the law of contract as a general feature of liberalized markets.

Co-ordination between contract law and regulated market sectors: the national level

- The highlighted changes support the need for co-ordination:
- Which are the available models in order to achieve co-ordination?
 - A) The insertion of the discipline of contracts in regulated market sectors in the civil code, as contractual types.
 - B) The issuing of a special codification: a process akin to the codification of consumer contracts (code of consumption).
 - C) The issuing of general principles of the law of contracts in regulated market sectors: soft law.

Co-ordination between contract law and regulated market sectors: the European level

- The integration of the principles of the law of contracts in regulated market sectors in the CFR
- The co-ordination between the Review of the Acquis and consumers and users' protection in regulated market sectors
- Towards an integrated multi-level system.