

## Privatisations and consumer protection

by Mario Serio

Consumer protection is a topic that has long been associated with a number of other matters of undisputed relevance in Italian law of contract, such as the ambit of validity of standard-form contracts, the requirements of banking contracts and the limits of judicial intervention.

The common core of all research, study and analysis concerning consumer protection has always been the identification of the most efficient ways to protect contractual parties who by reason of their less privileged position may fall prey to an attempt by the other party to exploit their stronger position, for example by imposing clauses the consumer may not have been aware of, or denying the later access to the drafting of the contract. For this reason, the Italian legislator has frequently laid down provisions to close the gap between the position of the consumer and the other party in numerous economic fields and created a set of general rules to give the consumer a well-defined identity within private law.

A new statute law relating to consumer rights has recently been introduced and has enabled the process of giving support to weaker parties to spread to new areas that do not necessarily involve the traditional problems of validity of contractual clauses.

It should not be assumed that such areas have been regulated as they appear now as a direct result of the extension of other rules affecting the consumer's position. However such provisions, in the vast majority of cases, seem to be in line with the new consumer wave, whose origins can easily be traced in other European legal systems.

One of the areas most affected by the redefining of the consumer's position is that of privatisations, i.e. the process of transferring control over previously state-owned companies, industries, firms and enterprises, etc., to the private sector, as a consequence of the decline of the welfare state.

Although the processes in question are far from finished and tend to be delayed by political interference, and privatisations which have already taken place are hardly free of state control there are several important implications for consumers, both in the laws that have made these few privatisations possible and in the day-to-day contracts between privatised companies and the general public. Both aspects will now be examined in order to discover whether or not privatisations have provided new protection for consumers – which has entirely new aspects and affects the functioning of privatised companies.

First, we need to examine the features which contribute to the definition of a consumer within the context of privatisations.

The general definition given by Law No. 52 of 1996 – according to which the consumer is the physical person who acts for individual and not professional purposes – constitutes an appropriate starting point. However, such a narrow definition could penalise other individuals who might happen to enter into

a contract with privatised legal entities and not conform to such a model.

It must be stressed, therefore, that under the general concept of contractual relationships originating within privatised companies, consumer status and associated protection should be attributed to all individuals who, regardless of their formal legal position, conduct business with those companies in a non-professional way. The principle should, for example, be applicable to shareholders, both prospective and actual, and their position is expressly taken into account by Law Decree No. 332/1994 (converted into Law 4474/1994) concerning state-owned company sell-outs. Indeed, it is indisputable that shareholders should be entitled to fair treatment and full protection when a public offer for sale is launched or company prospectuses are issued and circulated.

In other words, what really matters when it comes to the qualification of a consumer for the purposes of regulating such a relationship with privatised companies, is not so much the legal definition of the position itself, but its nature on the one hand – i.e. not having a professional character (in the spirit of Law No. 52 of 1996) – in the conduct of a single transaction and, on the other, the need to strengthen the consumer's position to put it on an equal footing with his or her counterpart.

### CONSUMER PROTECTION GIVEN PRIORITY

It is clear ... that the legislative provisions regulating public authorities that monitor the activities of private companies have changed the traditional pattern, which notably excluded any external intervention in the drafting of a contract and precluded any outside evaluation of its merit, in accordance with the principle of privity of contract (art. 1372, Civil Code). Consumer protection is now deemed to be more important than privity of contract and must take precedence over it.

Thus the field of privatisation has been very much affected by the recent trend towards consumer protection and is an obvious area in which to establish new forms of provision. However, other manifestations of this reassuring tendency can be found in certain specific pieces of legislation relating to privatisations or privatising processes, notwithstanding their dual nature (i.e. both public and private).

In fact, the consumer's position has been strengthened significantly by virtue of the laws relating to privatisation of public utilities such as electricity and gas. There are now provisions for the setting up of authorities to deal specifically with customers' complaints and compensation for damages incurred as a result of violations of codes of conduct.

The same applies to banking services since a law was introduced forcing them to become public limited companies. One of the major effects of this process was the passing of a general law (No. 154, 1992) on relationships between banks and their customers, which has put greater emphasis on transparency in the drafting of contractual clauses and also created a banking ombudsman. In addition, very strict limits have been imposed on the banks' previously unlimited capacity to modify their main contractual clauses by virtue of *jus variandi*.

Other relevant consequences have resulted from the ongoing privatisation process, albeit in an indirect way. In the case of privatisations where the state has not transferred all of its shares in the company, for example, stringent checks on the merits and legality of expenditure are carried out by the Corte dei Conti (whose powers have also recently been upheld by the Corte Costituzionale). This body safeguards the interests of the general public (very closely related to those of consumers) with regard to the handling of public funds.

In addition, other forms of general control over the adherence of privatised companies to the rules governing consumer interests are exercised by institutions such as the Central Bank (for banks and financial institutions), CONSOB (for companies within the Stock Exchange) and ISVAP (for insurance companies). Such controls are very far-reaching and in certain circumstances can lead to the liquidation of companies found to have committed serious violations.

As mentioned earlier, each new privatising law has created new bodies to deal with completely new tasks. The law (see, e.g. art. 2, law 481/1995) gives the authority the power to act as a 'watchdog' to ensure that contracts between consumers and suppliers of public services meet adequate standards and do not contain clauses which might be unfair in substance or performance, as specified in Law No. 52 of 1996.

These bodies should also scrutinise the services offered by privatised firms: for example, their ability to satisfy environmental standards, to meet the needs of the disabled and underprivileged, their compatibility with competition and anti-trust laws, etc. Very extensive powers are conferred upon these bodies, who are able not only to impose financial penalties for the infringement of any legally-binding rules in the above-mentioned areas, but also to inspect plants and order their closure (if safety standards are poor) or withdraw licences and concessions.

A further example of the interest that the Italian legislator has taken in protecting the consumer's position when dealing with a privatised company is the provision making it compulsory for every company, when supplying a public service under a concession or licence granted by the state, to stipulate in a general agreement that the private licensee will guarantee a fixed standard both in general and more marginal services offered to individuals.

It is clear from what has been said so far that the legislative provisions regulating public authorities that monitor the activities of private companies have changed the traditional pattern, which notably excluded any external intervention in the drafting of a contract and precluded any outside evaluation of its merit, in accordance with the principle of privity of contract (art. 1372, Civil Code). Consumer protection is now deemed to


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Obviously one should not jump to conclusions and state that the contractual parties' autonomy over the conditions of contract has been entirely taken over by the state or its authorities; there are areas within contract law boundaries where privity of contract is still enforced. It is undeniable, however, that the new legislative tendency is to prevent any damage to the consumer's position in the initial stages of the contract by prohibiting or preventing clauses that are unfair or inadequate.

**NEW AUTHORITIES TO DEAL WITH COMPLAINTS**

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Of course this trend towards consumer protection is not uncommon in other legal systems. For example, since 1950 (see *Tamlin v Hanniford* [1950] KB 18, 65 and Lord Denning's outstanding opinion), English courts have emphasised that consumers' interests should be strongly supported in privatisation processes, as the latter are funded by taxpayer's money. The UK trend has continued in recent times (the *Companies Acts* 1985 and 1989, *Financial Services Act* 1986 and the new *Financial Services and Markets Bill*). This is another example of the beneficial effect privatisation can have on the general field of protection of weaker contractual parties.

In conclusion, it can be said that in Italy, and elsewhere, privatisation has resulted not only in a strong affirmation of the market's preference for the removal of commercial and economic activities from the over-powerful control of the state and the relative growth of the liberalisation process (without which a truly free European market seems to be only a utopian ideal) but has also allowed a strongly-supported, sympathetic attitude towards consumers to be converted into legislative provisions. 

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