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SUMMARY: 1. Introduction: the "*Litigation financing*" phenomenon, *Carhart* v. *Halaska* and Richard Posner's opinion on the impact of litigation trolling. – 2. Patent troll and litigation troll: setting the ground to investigate the litigation financing. – 3. The main concerns about *litigation trolling* – 4. The main opportunities about *litigation trolling* – 5. The legal feasibility of the *litigation trolling* in the EU: the Italian case.– 5.1 The dogmatic problems: the impact of *litigation trolls* on the traditional function of civil liability.– 5.2 Procedural issues related to *litigation trolling*, with particular attention to Italian law. – 6 Conclusion: what to do about *litigation trolls*?

1. Introduction: the "*Litigation financing*" phenomenon, *Carhart* v. *Halaska* and Richard Posner's opinion on the impact of litigation trolling.

One of the main rationales behind the development of the *litigation financing* activity is that "*desperate people make great customers*".[1] The term "*litigation financing*" refers to the purchasing and financing of damage claims, operated by third parties without any direct relation to the victims of the offence; the purpose of this activity is to profit by obtaining a percentage (in case of financing) or the entirety (in case of purchase) of the compensation accorded in court in case of success.

This activity – originally arising in a specific market sector[2] – is nowadays common in the US;[3] as a consequence, legal and economics experts gradually begun to analyze which risks the unregulated development of such a practice might imply.

In June 2015, Judge Richard Posner rendered a significant opinion on this argument in the decision *Carhart* v. *Halaska*.[4]

1 Cfr. BROOOK D., *Litigation By Loan Shark,* in *Legal Affairs,* 2004, available at: http://www.legalaffairs.org/issues/September-October-2004/feature_brook_sepoct04.msp.

2 The phenomenon of litigation financing has been systematically observed at first in compensation claims promoted in the maritime law sector. See GARD *Insight: High Rollers in the Courtroom Casino – Champerty and the Rise of Litigation Finance,* 2014, available at: http://www.gard.no/web/updates/content/20740525/high-rollers-in-the-courtroom-casino-champerty-and-the-rise-of-litigation-finance.

3 MARTIN S., *The Litigation Financing Industry: the Wild West of finance should be tamed not outlawed,* in *Fordham Journal of Corporate & Financial Law,* 2004, Vol. 10, Iss. 1, 55 ss.

4 United States Court of Appeal, VII Circuit, 8 June 2015, no. 14-2968, *Charhart-Halaska International LLC,* v. *Christopher G. Halaska and Halaska International Inc.* The case at stake involved two societies: *Carhart-Halaska International LLC (CHI)* and the company *MRO Industrial Sales,* as sales agent of *CHI*. At the conclu-

In his opinion on the case, Posner has the chance to express his general opinion on the phenomenon of the acquisition of compensation claims by third parties outside the litigation. Posner underlines how such activity is purely speculative, since it is impossible to calculate in advance the amount of the compensation accorded after a trial: as a consequence, the mere acceptance of these activities by the US legal system implies the admission of egoistic interests within a litigation. These interests, furthermore, are promoted by individuals that are unrelated to the concrete event which is decided, since they operate only in order to obtain a profit in case of victory.

This "gambling" activity on the trial – Posner says – damages the natural development of the judicial activity and its underlying principles: it fosters the birth of figures operating in the claims commerce similarly to how patent trolls act in the intellectual property sector,[5] and might ultimately culminate in the creation of a "*Trolldom*" of speculation in the claims market.

Apart from the *Carhart* v. *Halaska* case implications, Posner's opinion is particularly significant in the view of the gradual diffusion of the litigation trolling in the US as well as in the European Union framework: it is pivotal for legal scholars to investigate the most controversial legal aspects of these conducts, their pros and cons and their systemic implications regarding the development of the judicial activity.

2. Patent troll and litigation troll: setting the ground to investigate the litigation financing.

The first aspect to be taken into account concerns the parallel between the *litigation trolling* and the traditional *patent troll* activity.

Posner compares these two phenomena because what *patent trolls* do – which is buying a large number of patents in order to profit from their future sale, without any relation with those individuals or entities that have developed the object of the protection – seems similar to how *litigation trolls* operates by acquiring the right to propose claims in court. Such a comparison leads to Posner's negative opinion on *litigation trolls: patent trolls* operate their business in contrast with the very own *rationale* behind patent protection; they bend a tool, which should protect inventors (through exclusivity) and the community (through the publishing of the invention after patent's expiration), to their own interest, and deprive it of its functional basis.[6]

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sion of the collaboration between *CHI* and *MRO* Christopher Halaska – one of the two co-owner of *CHI* – acquired *MRO*'s claim for breach of contract towards *CHI,* in order to exercise a legal action against his own society and its co-owner, Chris Charhart.

5 Cfr. *ex multis* Golden J., *Patent Trolls' and Patent Remedies,* in *Texas Law Review,* 2007, vol. 85, 2111 ss.; McDonough J.F., *The Myth of Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, in *Emory Law Journal,* 2007, vol. 56, 189; Addy G., Douglas E, *Mind the gap: economic costs and innovation perils in the space between patent and competition law*, 2012, 7, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208654.

6 On the theoretical *rationale* of patents – and on the relation between intellectual property and comple-

As a consequence, they hamper the free unfolding of the competitive system, and the incentives for technological development - which constitute the very basis of the institute - are undermined.[7]

Patent trolls take advantage of the patent system without providing any kind of inventive activity, and whereas inventors use their egoistic interest to ultimately foster innovation, *patent trolls* apply a purely speculative approach, without any innovation-related activity.[8]

We assess that Ponsner's opinion cannot be totally embraced: even though both patent and *litigation trolls* can be qualified as *non-practicing entities*,[9] these two figures cannot be equalized; moreover, the stigmatization of the first one should not lead to the plain refuse of the second.

As we already observed, the disvalue of *patent trolls* arises from the fact that they avail themselves of an instrument that was originally developed to protect innovation in order to create barriers to that same aim, by increasing transaction costs on the operators on the market.[10] Though, in order to evaluate whether the *litigation trolling* activity might harm the market it is not sufficient to assess its speculative nature: it is necessary to prove that *litigation trolls* operates against the core values at the basis of the tool they use (that is, litigation). The mere speculative aim of *litigation trolls* can not, by its own, justify an hostility towards their activity:[11] in our society we are able to observe many examples of instruments that – despite being accepted and used in day-to-day activities – are born from speculative interests. One of the most famous example is the life-insurance contract: even though scholars originally evaluated it as a form of "bet" on the death of the insured person,[12] such a contract is

tition – see *ex multis* VANZETTI A., DI CATALDO V., *Manuale di Diritto Industriale,* 2012, 7th ed., Giuffré, 375-377; CHEUNG N., *Property Rights and Invention,* in *Research in Law & Economics Paper Series,* 1986, Vol. 5 iss. 6; FISHER M., *Classical Economics and Philosophy of the Patent System,* in *Intellectual Property Quarterly Review,* 2005, vol. 1, iss. 6; Sherman B., Bently L., *The Making of Modern Intellectual Property Law,* 1999, Cambridge University Press, 15-24; DAM K., *The Economic Underpinnings of Patent Law,* in *Journal of Legal Studies,* 1994, vol. 23, iss. 247; ULLRICH H., *Intellectual Property: Exclusive Rights of a Purpose – The Case of Technology Protection by Patents and Copyright,* Max Planck Institute for Intellectual Propery and Competition Law, 2001, Research Paper No 13, 8 ss.

7 HARHOFF D., HALL B., VON GRAEVENITZ G., HOISL K., WAGNER S., *The strategic use of patents and its implications for enterprise and competition policies*, Tender for No ENTR/05/82, 2007, Laboratorio di Economia e Management (LEM), Scuola Superiore Sant'Anna; Lianos I., *A Regulatory Theory of IP: Implications for Competition Law,* in *CLES Working Paper Series,* 2008, 1; DIXON P., GREENHALGH C., *The Economics of Intellectual Property: A Review to Identify Themes for Future Research,* 2002, University of Oxford Department of Economics Discussion Paper Series, 4-7.

8 BRADLEY WENDEL W., *Litigation Trolls,* in *Cornell Law Faculty Working Papers,* 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702024.

9 SHRESTHA S., *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities,* in *Columbia Law Review,* 2010, iss. 114, 119-131.

10 SICHELMAN T., *Commercializing Patents,* in *Stanford Law Review,* 2010, iss. 62, 341-368; Positions on *patent troll* are, though, quite different among legal scholars: see MAGLIOCCA G., *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation,* in *Notre Dame Law Review,* 2007, iss. 82, 1809-1810; RISCH M., *Patent Troll Myths,* in *Seton Hall Law Review,* 2012, vo. 42, 456-467.

11 FISHER D., *IBM GC Says: Beware of Lenders Offering To Finance Your Lawsuit,* in *Forbes,* 13 feb. 2013.

12 MERKIN R., *Gambling By Insurance. A Study of the Life Insurance Act 1774,* in *Anglo American Law Review,*

nowadays accepted and used in negotiations.

The "acceptance" of life-insurance contracts does not come, though, from the fact that it has someway lost its aleatory or speculative nature,[13] but from the recognition of its the social security function and usefulness in the allocation of risks related to life-events.[14]

Another position that should be confuted is the opinion that litigation in principle should not be object of speculative activities at all: legal systems all over the world already have a plurality of solutions in order to subordinate the payment of lawyers involved in a controversy to a specific outcome, like *contingency or success fees*.[15]

In order to appropriately evaluate the *litigation trolling* phenomenon it is therefore necessary to analyze not only the aims behind this activity, but also to assess the overall effects that these practices produce on the welfare of the society; in spite of its speculative nature, in fact, *litigation trolls* might as well determine several positive effects on the market.

3. The main concerns about *litigation trolling*

We will focus hereafter on the risks that a large-scale development of *litigation trolling* might have on the judicial order and in particular, on the litigation system.

The first aspect to be taken into account refers to the potential spur of non-meritorious litigation fostered by the *litigation trolls*, since they are exclusively interested in gaining a profit from the possible compensation, and operate without any fear of promoting "daring" litigations.[16]

Truth to be told, such a problem seems to recall debates that already occurred for

1980, iss. 9, 331; cfr. also SANDEL M., *What Money Can't Buy: The Moral Limits of Markets,* 2012, 144-148. For a general insight see ROSSETTI M., *Il diritto delle assicurazioni,* Vol. III, *L'assicurazione della responsabilità civile, assicurazione sulla vita, assicurazione e prescrizione, assicurazione e processo,* Cedam, 2013, 787 ss.

13 See BARISON S., GAGLIARDI M., *Dell'assicurazione sulla vita. Artt. 1919-1927,* in *Il codice Civile. Commentario*, Giuffré, ed. 2013, 14 ss.

14 *Ex multis,* BRACCIODIETA A., *Il Contratto di Assicurazione. Disposizioni Generali. Artt. 1882-1903,* in *Il Codice Civile. Commentario*, Giuffré, ed. 2012, 6 ss.; CORRIAS P., *Previdenza risparmio ed investimento nei contratti di assicurazione sulla vita,* in *Riv. Dir. Civ.,* 2009, I, 90.91; POLOTTI DI ZUMAGLIA A., *voce "Vita (Assicurazione sulla)",* in *Digesto Comm.*, XVI, Torino, 1999, 429; PECCENINI F., *L'assicurazione*, in *Tratt. Dir. Priv.* supervised by Rescigno, XIII, 2007, 94 e segg.; COTTINO G., IRRERA M., *Il contratto di assicurazione in generale*, in CAGNASSO O., COTTINO G., IRRERA M., *L'assicurazione: l'impresa e il contratto*, in *Tratt. Dir. Comm.* supervised by Cottino, X, Padova, 2001, 70; BIGLIAZZI GERI L., BRECCIA U., BUSNELLI F.D., NATOLI U., *Diritto civile,* Torino, 1992, III, 621; SCALFI G., *voce "Assicurazione"*, in *Digesto Comm.*, I, Torino, 1987, 339 ss.; SALANDRA V., *Assicurazione*, in *Commentario al Codice Civile*, supervised by Scialoja and Branca, Bologna, 1966, 185 ss.

15 Cfr. DANOVI R., *Compenso professionale e patto di quota lite*, Milan, 2009.

16 STEINITZ M., *Whose Claim Is This Anyway? Third-Party Litigation Funding*, in Minnesota Law Review, 2011, iss. 95, 1286-87; MOLITERNO J., *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation Rules",* in *Georgia Journal of Legal Ethics,* 2003, 223-228; MOLOT J., *Litigation Finance: A Market Solution to a Procedural Problem*, in *Georgia Law Journal,* 2010, iss. 99, 102 ss.

different legal tools: the same concerns arose, for example, during the implementation and the development of the tort of *champerty* (and, more in general, for any agreement meant to award a percentage of the recovery accorded in a lawsuit as a reward for the lawyer involved)[17] in common law systems. Despite the strong opposition that this kind of contracts originally encountered, in recent years many *common law* systems – such as United Kingdom and Australia – reconsidered their position on this issue and gradually abrogated the prohibition of *champerty*.[18] Such a development is extremely significant if we consider that the tort of *champerty* is potentially even more harmful than the *litigation trolling*, since it might also include the main elements of the crime of usury.[19]

Furthermore, the emergence of non-meritorious litigations is a general risk that is involved in any mass-litigation instrument,[20] with primary reference to *class actions*.[21] In the light of this fact, we might conclude that the proper debate should not focus on the risk that *litigation trolls* might foster non-meritorious litigation but, on the contrary, on the presence and efficacy of legal instruments in order to prevent and manage those kind of controversies. In the Italian legal system we can recall as an example the rules on the *lite temeraria*[22] or the competences accorded to the judge in the allocation of the costs of the proceeding; this evaluations applies as well to any kind of sanction that can be imposed to those who conduct litigations on the basis of totally unfounded grounds.[23]

Also, even if the *litigation trolling* would increase the number of litigations, this might not necessarily overload the legal system; under certain conditions it might on the contrary lighten the burden of the court system: that would happen, for example, whether those who would be entitled to act in court opt for non-contentious solutions like mediation or arbitrations (furthermore in the case of arbitrations parties would even be able to choose the most convenient *forum* for both of them).[24]

It must be said, though, that the recourse to tools such as mediation and arbitration entails further potential risks for the litigation system. If we hypothesize that the plaintiff (a

17 This aspect will be subject to further investigation in the following parts of this work. See also the already mentioned work by Moliterno J., 250-251.

18 See Aitken L., *Before the High Court: 'Litigation Lending' After Fostif*, in *Sydney Law Review,* 1006, 171; Chen, D., *Can market stimulate rights? On the alienability of legal claims*, in *The RAND Journal of Economics*, 2015, Vol. 46, iss. 1, 26; Regan M.C., Heenan P.T., *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services,* in *Fordham Law Review,* 2010, Vol. 78, 2137-2191.

19 Martin S., *Financing Plaintiff's Lawsuits: An Increasingly Popular (and Legal) Business,* in *University of Michigan Journal of Law Reform,* 2000, iss. 33, 59-71.

20 Judge Posner, in the 7th *Circuit Federal Court* decision in the case *Rhone* c. *Poulene Rorer Inc.,* 1995, already observed «*a great likelihood that the plaintiff's claims, despite their human appeal, lack legal merit*».

21 Bone R., *Class Action,* in *University of Texas Law, Law and Economic Research Paper* No. 209, 2011.

22 Art. 96 comma 3 c.p.c. See also Busnelli F.D., *L'enigmatico ultimo comma dell'art. 96 c.p.c.: responsabilità aggravata o "condanna punitiva"?,* in *Danno e responsabilità,* 2012, 985 ss.; Dalla Massara T., *Terzo comma dell'art. 96 c.p.c.: quando, quanto e perché?,* in *Nuova giurisprudenza civile commentata,* 2011, 55 ss.

23 Cfr. Guerrero R., *Reevaluating Proposals for Tort Claims Markets in a World of Mass Tort Litigation,* in *The Review of Litigation,* Vol. 39, iss. 299, 2013.

24 Gross S., *We Could Pass a Law… What Might Happen if Contingent Legal Fees Were Banned,* in *DePaul Law Review,* 1998, iss. 47, 325 ss.

litigation troll that acquired the claims from the real victim) has enough economic resources to promote any futile litigation in court, it is possible that he might avail himself of mediation to force the defendant to accept sub-optimal conditions: the failure of the attempt to mediate, and the subsequent beginning of a cause before a court has costs that the defendant might not be able to sustain in the short term, and that could be not entirely refunded even in case of success in court.

This consideration reveals the main problem behind *litigation trolling*: the misalignment between the actual victim (and his aims) and the harmful event in the controversy; the acquisition of the claim by a third person implies to functionalize that same event to the (different) interests of the claim-buyer, and it might contrast with the traditional conception of the litigation system as an instrument meant to grant the victims of unlawful conducts the re-construction of their monetary and non-monetary rights.

On this aspect it has been observed[25] that through the development of a dedicated market, claims would circulate like any other material good, and would lose their "personalistic essence" (and this implies significant consequences for non-monetary damage claims); furthermore, the circulation of damage claims might result in a decrease in the utilization of some socially-desirable instruments, such as injunctions and equity.

4. The main opportunities about *litigation trolling*

If – on one side – the development of *litigation trolling* can raise some doubts, we must nonetheless underline that this kind of activity represents also a significant opportunity for the development of the market and the enhancement of the access to justice, which should be taken into account in the context of a broader evaluation.

The first relevant *pro* about the *litigation trolling* activity is that victims of the different harms are able – through the sale of their claim – to immediately recover an arranged amount and obtain a compensation independently from a favorable judgment in court: the risk of obtaining a compensation lower than the sum awarded (or even no compensation at all) will be entirely shifted on the claim-buyer, that will as well hold any cost related to the litigation.

Such a consideration has significant implications in terms of actual pursuance of claims – regardless whether their exercise may be in court or by means of a non contentious instrument –: the possibility of selling claims would (on one side) prevent tortfeasors from obstruct and drag on the definition of the controversy in order to take advantage of victims' lack of economic resources;[26] on the other side, it would foster litigation in all those sectors where the presence of collateral elements – e.g. burden of proof or great disparities between parties contractual power – currently dissuades individuals from proposing actions in court.[27]

25 Abramowicz M., *On the Alienability of Legal Claims,* in *Yale Law Journal,* 2004, iss. 114, 712 ss.

26 Martin S., *The Litigation Financing Industry: the Wild West of finance should be tamed not outlawed,* in *Fordham Journal of Corporate & Financial Law,* 2004, Vol. 10, iss. 1, 75.

27 These issues are particularly relevant, for example, in follow-on antitrust claims. See Davola A., *Oltre il private enforcement: l'ipotesi di un mercato delle azioni di risarcimento del danno antitrust,* in *Danno e responsabilità,*

Subsequently, the main advantage that *litigation trolls* can supply to the market is to represent an additional solution – besides litigation in first person – to victims of unlawful conducts, who don't have enough resources to fruitfully promote their rights in court: those who suffered harm from a tort will, in fact, be able to choose to sell their claim and to release themselves from any risk or cost related to the exert of these rights. The sale of a claim is not a duty, but only a further option that victims can consider within their legal strategy, and adds to the traditional range of remedies: the victim of a tort might as well decide to begin a litigation by himself; if he opts for the assignment of his claim to a third-party, such a choice will grant him to avoid any expenditure related to litigation, and to assign any encumbrance to the claim buyer.[28] This opportunity is significantly relevant if we consider that, in the light the persisting economic crisis, it is not unlikely that victims of torts do not have sufficient capital to pay in advance the expenses needed for the litigation and – in the lack of alternatives – are unable to assert their rights when harmed.

Furthermore we should consider another aspect: a general growth in the amount of litigation would also have a deterring effect on potential infringers, since their risk to be subject to litigation in case of unlawful conducts would be, as a matter of fact, higher.[29]

The development of a market for damage claims would as well curtail the general uncertainty within the judicial system: since *litigation trolls* would perform deep analysis on their potential "investments" in order to distinguish which claims would be more likely to be successful in court and which are not, any player of the market would benefit from the development of a specific *expertise* in this business (and, more in general, from the study of the characteristics of different claims) in order to assess the chance of compensation for any kind of claim and the "risk rate" of being adjudged guilty for unlawful conducts.

In the light of these considerations, we should reconsider our initial question: allowing (or even implementing) the activity of *litigation trolls* would operate in detriment – as Posner believes – or in favor of the access to justice principle? Once again, though, it is not possible to provide a univocal response to this question: the *pros* and *cons* of *litigation trolling* should, in fact, be analyzed in the concrete scenario of the market that the development of such an activity would create.

As a consequence, we must evaluate in the first place whether the *litigation trolling* is legally admissible within the EU framework and, if the answer is positive, understand if there are enough incentives (not in term of general welfare, but) for individuals to practice this activity; this is pivotal in order to assess if the circulation of claims might in fact develop itself towards the foundation of a real market.

This second question seems to find indeed an immediate response (while the aspect of the legal feasibility of a claims market needs an in-depth analysis on substantive and

2015, 7, 677 ss.

28 CHOHARIS P., *Creating a Market for Tort Claims*, in *Yale Journal on Regulation*, 1995, iss. 4, 481-482.

29 Cfr. SUGARMAN P, YARASHUS V., *If You Like Enron, You'll Love Tort Reform,* in *Boston Bar Journal,* 2004, iss. 46, 26-27.

procedural issues):[30] in particular, we can get relevant insight from the economic data gathered by the studies on the *litigation funding* phenomenon;[31] *litigation trolling* and l*itigation funding* do share, in fact, some fundamental operative elements and, more specifically, the essential aim of obtaining a profit through a speculation on the investment needed to conduct a litigation in court and on the compensation accorded by the judge.

With regards to *litigation financing*, a solid empirical background[32] (and the development of a real industry dedicated to this activity) widely showed the profits arising from this activity: the same economic profitability can be found in the *litigation trolling*.

5. The legal feasibility of the *litigation trolling* in the EU: the Italian case.

Since we can assume that the *litigation trolling* has an economic relevance on the market, we must now concentrate on the aspect of the legislative implementation of such an activity within the EU framework; even though *litigation trolls* are nowadays known and common in the US experience, neither EU case law nor legal scholars examined in depth its main criticalities.

In hypothesizing the development of a regulated *litigation trolling* activity within the EU legal system we must face both dogmatic and procedural issues, which will be hereafter evaluated separately in order to sketch out a first general reflection on the topic.

5.1 – The dogmatic problems: the impact of litigation trolls on the traditional function of civil liability.

Our first element of reflection concerns the general function of civil liability within the European Union, and how the implementation of *litigation trolling* might change it. We must consider more in details whether the separation between the two figures of the injured victim and of the beneficiary of compensation might distort the traditional assumption of the compensatory nature of reparation.

Such a problem arises specifically for the European legal experience, whereas it has a small relevance in the US, where the existence of *punitive damages* already overcame this conceptual obstacle: if we assume that the need of repressing unlawful conducts can justify the imposition of duties independent (and even greater) than the damage suffered by the victim, it is clear that we will conveniently accept also a substitution mechanism within

30 See. *infra* par. 5.

31 Cfr. Hodges C., Vogenauer S., Tulibacka M., *Costs and Funding of Civil Litigation: A Comparative Study,* University of Oxford, *Legal Research Paper Series,* 2009, 24-30, available at http://ssrn.com/abstract=1511714.

32 Abrams D., Chen D., *A Market for Justice: A First Empirical Look at Third Party Litigation Funding,* 2013, in 15 *University of Pennsylvania Journal of Business Law,* 1075 ss.
Available at: http://scholarship.law.upenn.edu/jbl/vol15/iss4/4.

litigations, whether the presence of a third party might raise the chance of having a judicial resolution of the controversy.

The European experience is, though, much more controversial on this aspect, and there has been among scholars a great debate on the relation between compensation and punishment.[33]

Since the difference amongst the various Member States on this aspect are particularly critical, we might benefit from delimiting our *prima facie* analysis of this aspect to the Italian legal experience, where this problem has been debated both in case law and in theory.

Italian case law – and, in particular, the interpretation of the *Corte di Cassazione*[34] – in many occasions stigmatized the use of *punitive damages* by highlighting that the enforcement of a obligation that is not functional to compensation would result in a mere *petition principiis*;[35] as a consequence, punitive damages should not be compatible with Italian civil liability rules. In the light of such a clear stance, someone might consequently have concerns about the legitimacy of the separation between the victim of a tort and the individual entitled to compensation after the sale of a claim to a *litigation troll*: this process, might, in fact, contradict the assumption that the ultimate aim of compensation is the reintegration of the victim's violated rights.[36]

We believe though that this position can be confuted by two sets of considerations.

The first – essential - aspect to be taken into account is the fact that, besides its compensatory function, civil liability has also a pivotal general-preventive function that considers (apart from the damage suffered by the victim) the position of the tortfeasor and the appropriateness of the compensation in order to orient his future behaviors.[37]

This function of civil liability seems far more compatible to the acquisition of a claim by *litigation trolls* than the compensatory one: as a consequence, we should not consider *litigation trolling* to be *in toto* unsuitable for the conceptual basis of civil liability, whether this practice has the concrete effect of dissuading potential infringers from unlawful conduct.

Such interpretation is supported by the re-thinking process that the *Corte di Cassazione* is promoting in the interpretation of the role of civil liability: against the traditional position that affirmed the necessary coexistence of compensation and reparatory function,[38] some

33 Busnelli F.D., *L'illecito civile nella stagione europea delle riforme del diritto delle obbligazioni,* in *Riv. dir. civ.,*. 2006, iss. 6, 444.

34 *Ex mutis* see Cass., 19 gennaio 2007, n. 1183, in *Foro it.,* 2007, I, 1460, commented by Ponzanelli G., *Danni punitivi: no grazie*, and in *Nuova giurisprudenza civile commentata,* 2007, 981 ss., commented by Spoto G., *I* punitive damages*, al vaglio della giurisprudenza italiana*

35 Scalisi V., *Il nostro compito nella nuova Europa,* in *Europa e diritto privato,* 2007, 2, 250.

36 Vettori G., *La responsabilità civile fra funzione compensativa e deterrente,* in www.personaemercato.it, 2008.

37 Francescelli P. *La responsabilità civile,* Maggioli, 2009, 19 ss. and therein references.

38 Apart from the already mentioned Cass., 19 Jan. 2007, n. 1183, see also Cass., 8 Feb. 2012, n. 1781, in *Danno e responsabilità*, 2012, 609 ss., commented by Ponzanelli G., *La Cassazione bloccata dalla paura di un risarcimento riparatorio,* e in *Corriere giuridico,* 2012, 1068 ss., commented by Pardolesi P., *La Cassazione, i danni punitivi*

recent judgments seem to suggest the legal admissibility of remedies pursuing further objectives.In a recent judgment on the validity of he Belgian *astreintes*[39] in the Italian system,[40] the *Corte di Cassazione* prospected a new interpretation of the role of civil liability. The judges, in particular, evaluated the possibility of move from the traditional system (based on the conception of damage as a *consequence of the unlawful act*) in favor of solutions aimed at evaluating the damage in terms of "*unlawful*" *event*.

The second aspect to be taken into account concerns the *object* of the compensatory nature: in the light of the traits of the debate on *punitive damages*, it is reasonable to believe that the qualification of the reparation accorded in court as compensatory pertains to the moment of its *quantification*, without any consideration regarding the beneficiary. The qualification of the sum awarded by the judge as compensatory or punitive should operate, in fact, only as a parameter to quantify the amount.

This position is – even though indirectly – supported by significant Italian cases on the issue of *inter vivos* or *mortis causa* transferability of credits arising from damage compensation (both patrimonial or non-patrimonial).[41] In case of road-accident litigations, for example, it has been stated that the compensatory obligation is autonomous from its legal source, and that the quantification of the compensation transforms the personal right (in the specific case, the right to health) into a patrimonial right on the sum awarded,[42] and such right is free to be transferred or sold, with or without payment.[43]

Some scholars[44] feared that the development of a "damage-credit market" might prejudice debtors by fractioning – through circulation – their debts amongst a profusion of different creditors: they affirmed that the exercise of such a right might make the payment obligation of debtors harder,[45] even leading to conflicting judgments between different reditors and therefore encouraging abuse of trial.[46]

This position is unfounded: the transfer (and even the split) of a credit deriving from

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39 On the main characteristics of astreintes, see De Stefano F., *L'esecuzione indiretta: la coercitoria, via italiana alle "*astreintes*",* in *Corriere merito* , 2009, 1181 ss., Capponi B., Astreintes *nel processo civile italiano?,* in *Giust. civ.,* 1999, II, 157 ss., Patti S., *Pena privata,* in *Dig. disc. priv.,* 1995, Torino, 349 ss.

40 Cass., 15 Apr. 2015, n. 7613, in *Diritto civile contemporaneo,* 7 luglio 2015, commented by Sciarratta N., *La Cassazione su* astreinte, *danni punitivi e (funzione della) responsabilità civile.*

41 *Ex multis* Cass. civ., 10 Jan., 2012, n. 52*, in Foro it.* 2012, 2, 429. Cfr. altresì Cass. civ., 22 Feb. 2012, n. 2564; Cass. civ., 20 Sep. 2011, n. 19133; Cass. civ., 13 May 2009, n. 11095; Cass. civ., 5 Nov. 2004, n. 21192; Cass. civ., 21 Apr. 1986, n. 2812. Among scholars cfr. Quadri F., *La cessione del credito risarcitorio ed il relativo esercizio dell'azione diretta,* in *Altalex, Quotidiano di informazione giuridica*, n. 2458, iss. 6 Apr. 2009.

42 Cass. civ., 4 Feb. 1992, n. 1210. Cfr. also Cass. civ., 7 May 1963, n. 1123.

43 Cass. civ., 3 Oct. 2013 n° 22601.

44 Miotto G., *Cessione dei crediti risarcitori e disciplina delle attività finanziarie,* in *Responsabilità civile e previdenza,* 2013, 553.

45 Argine S., Miotto G., *L'abuso della cessione del credito risarcitorio,* comment to Trib. Milan, 14 May 2015, n. 6099 and to G.d.P. Milano, 13 jan. 2016, n. 227, in *Danno e Responsabilità* (to be published).

46 See Ghirga M. F., *Recenti sviluppi giurisprudenziali e normativi in tema di abuso del processo,* in *Riv. dir. proc.,* 2015, 445 ss.

the compensation of a damage does not affect the proceeding in which such a credit was determined (and the same consideration operates for the transfer of claims). The action in the proceedings is, in fact, unitary, and this happens independently from what might happen before (in case of assignment of a credit) or after (in case of assignment of the right to file a claim in proceeding) its filing in front of a judge; in the same way, a request for compensation remains always unitary and complete, and has to be quantified by the judge as a whole without any regard to the number of future potential creditors.

Even if the victim of a unique tort is not allowed to fraction its judicial protection regarding that event[47] there is no reason to believe that – once the judge has calculated the amount of the compensation – the credit arising from compensation could not circulate and be transferred as any other credit. Of course, it will be necessary to respect the specific legal provision of each Member State regarding the cession of credits. As a consequence, debtors will suffer no more burden than what legal systems already regulate and allow through the traditional law of obligations.[48]

Also, even if we accept the point of view of those (few)[49] who affirm that the *fragmentation* of a credit might constitute an abuse of the right of credit, and therefore compromise the debtor's right to the fulfillment of their obligation, it is difficult to understand how such a position would influence the rules on the *cession* of compensation. The right to transfer and the right to divide a credit are in fact two independent characteristics of obligations, and they operate separately: as a consequence, the potential unlawfulness of splitting up a credit does not influence the possibility of assigning that same credit as a whole.

In the same way the right to compensation for damages is – after its quantification, and independently from its punitive or compensative nature – a merely financial right, and it loses its connection (and its ontological fundament) with the victim of the tort. As a consequence, there seems to be no boundaries to the *ab origine* circulation of the damage claim and to the activity of *litigation trolls*.

The main problematic aspect of the topic seems to be, though, another one. The real problem about *litigation trolls* is not the fact that individuals may or may not be able to transfer (and sell) their right to propose actions in court, but the impact that this process would have on the access to justice principle, because of the involvement of third parties' economic interests. It is disputed, in fact, whether the right to propose a claim – even though susceptible of circulation – may be considered a purely private good:[50] the whole society benefits from the resolution of litigations in conformity with certain values, and the motivation that judges offer as a basis for their decisions are instruments to understand, criticize and even reform the law; in the light of this point of view, it is possible that the *litigation trolling* denies the very own goals of the judicial system, by adapting an instrument that is essential to protect substantive justice (the proceeding) to private interests and profit logics.

47 Trib. Milan, 14 maggio 2015, n. 6099.

48 On this aspect, see in general Galgano F., *Trattato di diritto civile*, Vol I, Padova, 2010, 74 ss., and, in particular, see Art. 1260 of the Italian Civil Code.

49 Cfr. Argine S., *Il fenomeno del frazionamento quale manifestazione abusiva del diritto,* in *Foro pad.,* 2015, 17 ss.

50 Bradley Wendel W., *Litigation Trolls,* in *Cornell Law Faculty Working Papers,* 2015, 14.

5.2 – Procedural issues related to *litigation trolling*, with particular attention to Italian law.

The second element of reflection in assessing the legitimacy of the *litigation trolling* activity concerns its potential contrast with the procedural law of different Member States.

On this aspect, it would be impossible to operate an unitary analysis for all Member States in order to evaluate the existence of normative boundaries for *litigation trolling*. Despite the normative harmonization of European private law in recent years, procedural law has still maintained profound (and different) roots in the individual Member States' tradition. The preponderance of the national sovereignty and the primacy of the principle of procedural autonomy – as recognized by the Court of Justice of the European Union[51] – are still major obstacles in the establishment of an European procedural law.[52] In order to evaluate the procedural restrictions to *litigation trolling* our study must therefore assume a national point of view; we will then focus our attention on the normative obstacles existing in the Italian legal system.

Truth to be told, the procedural obstacles to *litigation trolls* in Italian law seems to be more illusory than real: the main dispositions that could impede the circulation of claims within the Italian legal system are the Articles 111 and 81 c.p.c (*codice di procedura penale* – Italian code of civil procedure), two norms that respectively regulate a) the succession of a right subject to litigation and b) the rules for procedural sobstitution (that is, individuals' right to enforce the right of a third person in their own name) in the procedural l*ocus standi.*

Even though both norms might interfere with the circulation of claim action among privates: an exhaustive analysis shows that they cannot be a hindrance to *litigation trolling*.

a) Art. 111 c.p.c. states that if, during the trial, the right subject to litigation is transferred *inter vivos*, the proceeding goes on between the originally involved parties. Such a provision does not seem to affect the individuals' faculty to sell the right to promote a claim to a third person: the norm regulates only those transfers that occur while the proceeding *has already begun*. The link between the plaintiff and the defendant's rights exists only once the trial has started, since Art. 111 c.p.c. aims at protecting the parties' right to face the same counterparty for the whole trial and, more in general, the general interest to the subjective steadiness of proceedings so that a *lite pendente* alteration of the parties involved in the trial does not affect the *thema decidendum*.[53]

Since the rationale of the norm is to maintain constancy-in-time of the parties involved in the proceedings, we can reasonably conclude *a contrario* that no limits exist on the circulation

51 For the first enunciation of this principle see EC Court of Justice. 16 Dec. 1976, case 33/76, *Rewe,* in *Racc.,* p. 1989, and 9 Nov. 1983, case 199/82, *San Giorgio*, in *Racc.*, 3595.

52 See Trocker N., *Civil law e common law nella formazione del diritto processuale europeo,* in *Rivista italiana di diritto pubblico comparato,* 2007, 421; Cannizzaro E., *Effettività del diritto dell'Unione e rimedi processuali nazionali,* in *Il diritto dell'Unione Europea*, 2013, 659; Id., *Sui rapporti fra sistemi processuali nazionali e diritto dell'Unione europea,* in *Il diritto dell'Unione Europea,* 2008, fasc. 3, 447 ss.

53 Consolo C., *Spiegazioni di diritto processuale civile*, 2015 (ed. X), col. II, 458; Carnelutti F., *Appunti sulla successione nella lite, in Rivista trimestrale di diritto e procedura civile,* 1932, I, 6-7.

of rights occurring *before* the beginning of a litigation. Before the trial, the sale of the right to promote the claim do not differ from any other disposable right within the Italian legal system.[54] Furthermore the object of the assignment in the *litigation trolling* activity is not the right that is enforced in trial (i.e., the right to compensation), but the right to propose a claim: the separation between these two rights implies the non-applicability of Art. 111 c.p.c. to the assignment; this is also the position of those who debated on the relevance of Art. 111 c.p.c. in the regulation of transfer of businesses.[55]

b) Also Art. 81 c.p.c. seems to represent an apparent obstacle, more that a real one, even if the norm – stating that "*unless where expressively provided by the applicable law provisions, nobody may claim the right of somebody else in a proceeding*" – seems to create a bond between the ownership of right that is subject to litigation (that is, the condition of being victim of a tort) and the entitlement to enforce such a right in trial. Nevertheless, the disposal of Art. 81 c.p.c. must be interpreted in compliance with the values that the norm seeks to protect, which suggests a different explanation: Art. 81 does not aim at ascertaining the effective plaintiff's ownership of the right involved in the litigation but, on the contrary, it establishes a duty (for the judge) to verify the *assertions* of the parties, in order to prevent individuals from enforcing rights that they do not own. In other words, the norm disciplines a rule of *procedural legitimacy,* and it ties the *legitimatio ad causam* (both active and passive) to the declaration of ownership by the parties. The effective ownership shall be, instead, established only at the end of the proceeding.[56]

The last (but not least) procedural problem to take into account involves the powers of a party in relation to the possible transfer of a claim operated by the counterparty. Such a problem is particularly significant, since it is currently devoid of a case-law experience that could provide a solution.

If the assignment of a claim is considered like the transfer of a credit obligation, then the mere communication of the event (by the assignor to the other parties) should be sufficient, and the counterparty will be able to propose exception only on the basis of its personal relation with the assignor in the fulfillment of the obligation. Whether the assignment of a claim has to be qualified as transfer of a right, it will be possible for the counterparty to propose exception every time that such an operation could be unfavorable to him. In our opinion, the second solution seems the most plausible one, but this issue is still unsolved, and will assume a pivotal importance if the *litigation trolling* will be practiced

54 According to Redenti E., *Sui trasferimenti delle azioni civili*, in *Rivista trimestrale di diritto e procedura civile*, 1955, cit. 80, civil claims should be *in general* transferable unless the law expressly forbids it.

55 Trib. Reggio Emilia, 16 Jun. 2015, in *Foro it.,* 2015, 11, 3726 – 3732, commented by Dalfino D. and Pardolesi R. Cfr. also Dalfino D., *Successione nel processo* (voce), in *Digesto civ., Aggiornamento*, 2007, Turin, 533 ss.

56 Monteleone G., *Manuale di diritto processuale civile, vol. I, Disposizioni generali. I processi di cognizione di primo grado. Le impugnazioni*, Padova, 2012, 193. Also Cass. Sez. lav., 6 Feb. 2004 n. 2386; Cass. civ., 13 Apr. 1989 n. 1751; Cass. civ., 18 Feb. 1986 n. 957; Cass. civ., 17 Dec. 1982 n. 475. Cfr. also Russo F., *Il regime processuale delle eccezioni di difetto di legittimazione attiva e passiva e di difetto di titolarità del rapporto. A proposito dell'ordinanza di rimessione alle sezioni unite 13 febbraio 2015 n. 2977*, in *Diritto Civile Contemporaneo,* 2015, II, available at http://dirittocivile-contemporaneo.com/2015/05/il-regime-processuale-delle-eccezioni-di-difetto-di-legittimazione-attiva-e-passiva-e-di-difetto-di-titolarita-del-rapporto-la-parola-alle-sezioni-unite-cass-ord-13-febbraio-2015-n-2977/.

within the Italian legal system.

6. Conclusion: what to do about *litigation trolls*?

After discussing *pros* and *cons* of the l*itigation trolling* and analyzing the potential normative problems that this activity might imply in the EU framework, we can now try to offer an overall evaluation of this phenomenon and to hypothesize some form of its regulation.

In order to do so we must, though, operate a last step back, and ask ourselves about the logic behind *litigation trolls* and behind the affirmation of this activity in the US.

In our opinion, the *raison d'etre* of a claims market – and of the *litigation trolls* – shall be found in the intrinsic lack of legal protection for victims of torts; this lack, in particular, can be appreciated from different points of view, such as the economic cost of enforcing rights or the relation between the efficacy of remedies provided by law and the burdens they implies in terms of fulfillment of the duty of proof.[57] Against this bedrock, *litigation trolls* offer to victims of unlawful conducts a new solution in order to immediately obtain compensation, and this solution operates besides and in addition to traditional remedies.

Legal scholars must investigate the potential forms of regulation of *litigation trolling*, in order to hypothesize a set of rules that might consider, both the advantages that *litigation trolls* could bring to tort victims and the risks that this speculative activity might imply.

A first solution could be allowing the *litigation trolling* activity – and therefore the right to sell a claim – only for some specific types of claims, in which the benefits of the *litigation trolling* would be maximized.

As an example, we might hypothesize to implement the claim market only in those markets where the cost of filing a claim is disproportionate respect to the expected compensation (like consumers' claims for *antitrust infringement*) or in which the burden of proof is so demanding and complex that it can not be accomplished by ordinary individuals, like in *medial malpractice* claims, which involves a significant amount of preparation in the evaluation of the technical aspects of the litigation (and have, as a consequence, very high average costs within the EU).[58]

It is also possible – in order to mitigate the speculative inclination of *litigation trolling* and at the same time promote substantive justice – to allow the sale of claims for those kind of litigations that have a low relevance in terms of individual compensation, but do assume a significant preponderance for the protection of general interests of the society: this may

57 CHEN, D., *Can market stimulate rights? On the alienability of legal claims*, in *The RAND Journal of Economics*,, 2015, Vol. 46, iss. 1, 52.

58 HODGES C., VOGENAUER S., TULIBACKA M., *Costs and Funding of Civil Litigation: A Comparative Study,* University of Oxford, *Legal Research Paper Series,* 2009, 24-30, available at http://ssrn.com/abstract= 1511714, 111.

happen in those cases in which unlawful behaviors create massive externalities, like litigations on pollution or more in general on environmental liability.[59] In environmental liability cases, for example, the individual claims do not furnish an effective form of protection for the interests underpinning, and even though there has been a significant enhancement of the collective enforcement remedies in the last years, this kind of solutions has not yet proven effective.[60]

Another solution is allowing the *litigation trolling* activity on the general market (for any type of claims), but at the same time preparing a set of legal solutions to control its speculative attitude on the side of quantification of compensation.[61] This could be made, for example, by imposing caps in the amount of compensation awarded in all those cases in which the claimant of a non-patrimonial damage does not coincide with the victim of the harm. Such a solution would be also coherent with the compensative nature of our civil liability system.

Despite the different strategies in order to regulate the *litigation trolling* and its effect on the market, one aspect is always pivotal: *litigation trolling* is a kaleidoscopic activity, and it has, besides a speculative natures, *also* deterrence effects on unlawful conducts *and* potential benefits for victims in terms of immediate access to compensation. On these aspects, it significantly differs – despite Posner's opinion – from *patent trolling,* and it has significant positive implications for the general welfare.

As a consequence, *litigation trolling* must be seen as an opportunity to enhance access to justice for individuals, and this represents exactly the ultimate goal of the private enforcement system. This opportunity is – of course – balanced by the risk that such an instrument might be used for egoistic purposes and in detriment to the market but this is, truth to be told, a problem that has always existed (and has been faced) in any market.

The task that legislators must accomplish is, though, precisely reducing this risk by regulating the *litigation troll* phenomenon and by finding optimal solution in order to minimize its unlawful utilizations without, at the same time, frustrating its virtuous potential.

59 Fisher D., *IBM GC Says: Beware of Lenders Offering To Finance Your Lawsuit,* in *Forbes,* 13 Feb. 2013, 13.

60 It is impossible to go into details on this aspect in the present work: for a further analysis, cfr. Bergh D., *The preventive function of collective actions for damages in consumer law,* in *Erasmus Law Review,* 2008, 1, 2; Stadler A., *Group actions as a remedy to enforce consumer interests,* in *New frontiers of consumer protection: the interplay between private and public enforcement,* Intersentia, 2009.

61 See Martin S., *The Litigation Financing Industry: the Wild West of finance should be tamed not outlawed,* in *Fordham Journal of Corporate & Financial Law,* 2004, Vol. 10, Iss. 1, 75.