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Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi

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In 2000 the Italian Competition Authority took action against a complex horizontal agreement in the motor-vehicle insurance market where there had been collusion for years to fix premium prices. Hundreds of follow-on civil actions were brought by consumers seeking compensation for damages they had suffered as a consequence of the anticompetitive conduct. For the first time the Italian legal system faced large scale enforcement of competition law by private parties. This paper describes the development of the *Corte di Cassazione* case-law on the controversial issue of consumer legal standing and explains why the Court's decisions act more as a disincentive to private enforcement than an incentive. Moreover, the paper analyses the Court of Justice's decision in Cases C-295-298/04. In that case the Court commented on several procedural aspects of civil actions based on violations of Article 81 EC: the entitlement to rely on the invalidity of a prohibited agreement or practice and the concomitant right to claim damages; the limitation period for seeking compensation for harm caused; and, the ability of the national courts to award punitive damages. The paper concludes that the solutions presented by the ECJ seem even better than the European Legislator's intervention because they respect the legal tradition of each Member state and do not contrast with the structure and scope of national private law remedies already in force.

1. PRIVATE ENFORCEMENT OF COMPETITION LAW IN ITALY: THE *STATUS ARTIS* IN LIGHT OF THE ECJ JUDGMENT IN JOINED CASES C-295-298/04

The Italian competition law system is relatively young. For decades, anticompetitive conduct was solely examined under the *Codice Civile* provisions prohibiting unfair competition. However, at the end of 1990, after a very long drafting process, the first Italian Competition Act was adopted in strict adherence with the competition law provisions contained in the EC Treaty.[1] It has been pointed out that such a delay allowed the Italian competition law system to start directly from the most advanced front of competition law, thus avoiding facing a significant part of the previous troubled development.[2] This is true only in part. In fact, the Competition Act has been based on an old-fashioned competition culture which has been strongly influencing the interpretation and even the application of such new rules in courts. Indeed, prior to the

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[1] Law No. 287, dated October 10th 1990 'Norme per la tutela della concorrenza e del mercato'. The Italian Codice civile provisions prohibiting unfair competition are provided for by article 2598 and followings.

[2] Tesauro, 'Concorrenza e Autorità Antitrust, un bilancio a 10 anni dalla legge', speech at Autorità Garante della Concorrenza e del Mercato, Roma, October 9th -10th 2000.

enactment of Law 287/90 (the Competition Act), competition was perceived as a *business* for enterprises,[3] a kind of special field of law with a marked individualistic dimension in which the concept of 'free competition' was seen as a synonym for entrepreneurial economic freedom.[4] The Italian Codice Civile prohibitions of unfair competition have been intended to protect solely commercial enterprises against anti-competitive acts by direct competitors. Such an individualistic dimension, in which the public interest in a competitive market was not taken into account at all, has for decades been one of the deepest cultural barriers between the Italian competition law environment and the most developed competition law systems in the world.

In such an old-fashioned cultural environment any private enforcement rule of competition law, in which the consumers would have had a proactive role in promoting the enforcement of competition law in court, was inconceivable.[5] Just few years ago, in 2003, the Corte di Cassazione firmly denied consumers legal standing under Italian competition law,[6] only recognising such standing for the first time in 2005.[7]

Notwithstanding the ECJ held, more than thirty years ago, that the prohibitions laid down in Articles 81 and 82 EC are directly effective and that the national courts should safeguard the rights which litigants can derive the prohibitions, private enforcement in Italy, as well as in other EU countries, is still in its infancy. Its use is very far from the scale known in other jurisdictions, especially the United States, where some 90% of antitrust proceedings are initiated by private parties. In the European Union, however, the emphasis has traditionally lain with public enforcement (both by the European Commission and by national authorities). This is why competition law in Italy was originally conceived as an administrative tool, a means for the State to intervene in market processes in order to achieve public goals.[8]

The marked administrative path was evidently in the legislator's mind when the Italian Competition Act was adopted. In fact, the Italian legislator adopted a kind of 'binary'

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[3] However in Italy, at the beginning of the twentieth century some typical legal reasoning of the modern antitrust law has been anticipated, by a case-law tendency. See Ghidini, 'I limiti negoziali alla concorrenza', in Galgano, *Trattato di diritto commerciale*, IV, 31, 1981.

[4] Meli, *Autonomia Privata, Sistema delle invalidità e disciplina delle intese anticoncorrenziali*, Milano, 2001.

[5] For the proposes of this Paper, the expression *private enforcement* means the application of antitrust law in civil disputes before national courts. For extended discussion of these issues, see, Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford, OUP, 1999; Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, The Hauge, Kluwer, 2002.

[6] Corte di Cassazione Decision dated February 4th 2005, No. 2207, *Foro It.*; Decision of the Corte di Cassazione dated December 9th 2002, No. 17475, *Foro it.*, 2003, I. The issue of consumer standing under Italian competition law is discussed in § 3. As noted by Palmieri and Pardolesi, the Italian competition law system 'has been living for almost two years the nightmare of a dimidiated antitrust law system' as a consequence of the 2003 'false move' by the Corte di Cassazione 'that has been threatening to nip private enforcement in the bud'. See Palmieri & Pardolesi, 'L'antitrust per il benessere (e il risarcimento del danno) dei consumatori', (2005), I 1015 Foro It. Here translated by the Author.

[7] Corte di Cassazione Decision No. 2207 dated February 4th 2005.

[8] Gerber, *Law and Competition in Twentieth Century Europe, Protecting Prometheus*, Oxford, Oxford University Press, 2001.

system in which the task of dealing with national competition matters was split between the civil judicial authority and the administrative one depending on the (private or public) nature of the interests needing protection.[9] Pursuant to Law 287/90, the administrative 'side' is made up of the *Autorità Garante per la concorrenza ed il mercato* (hereafter 'AGCM'), a public agency with a structure and powers resembling those of the European Commission (the AGCM having wide powers to investigate and sanction violations of Italian competition law);[10] the *Tribunale Amministrativo Regionale del Lazio* (hereafter 'TAR Lazio'), an administrative Court, which has exclusive administrative jurisdiction - in first instance - on the AGCM's Decisions; and the *Consiglio di Stato* (Council of State) competent to hear appeals against the AGCM Decisions in the second instance.

The other side of the 'binary' competition law system is the civil judicial authority. Pursuant to article 33.2 of Law 287/90, the ordinary second instance court (i.e. the Corte d'Appello territorially competent) has exclusive jurisdiction on civil actions based on national competition law (i.e. actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules).[11] The exclusive jurisdiction provision of article 33.2 constitutes an exception to the ordinary Civil procedure rules on jurisdiction,[12] the legislator having conferred the private enforcement of national competition rules to Courts of Appeal, 'in recognition of the fact that a higher court is better placed to deal with disputes involving complex economic assessments'.[13] This decision regarding exclusive jurisdiction also reflects an effort to avoid judicial fragmentation, and to secure uniformity and specialisation through the appointment of a small number of courts with a regional jurisdiction. Notwithstanding the legislator's good intentions, article 33.2, has highlighted at least two serious structural weaknesses in its judicial application: a) it does not take a clear position on the issue of consumer standing; b) it is not applicable to law suits concerning violations of EC competition rules.

At first glance such an approach appears inconsistent with the EU competition law system in which private enforcement is perceived as an essential tool to create and sustain a competitive economy in the common market.[14] Damages actions based on

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[9] For an introduction to the Italian Competition Law system, see Fattori & Todino, *La disciplina della concorrenza in Italia*, Bologna, 2004.

[10] For a detailed description of the structure and role of the Italian Competition Authority, see *Antitrust a portata di mano,* AGCM publications, September 2002. Available in English at http://www.agcm.it/.

[11] Under the article 33.2 of Law 287/90, 'Actions for nullity and for damages as well as actions for obtaining interim relief in connection with violation of the provisions set forth in Titles from I to IV are brought before the Corte d'Appello having territorial jurisdiction'.

[12] By the ordinary Civil procedure rules on jurisdiction, the Giudice di Pace or the Tribunale have jurisdiction as court of first instance, further details are provided in the § 3.

[13] Tesauro, 'Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues' (2001) European Competition Law Annual 267.

[14] EU Commission's Green Paper on Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, COM (2005) 672 final, page 3. See Jones, *Private Enforcement of Antitrust Law in the EU, UK and*

infringement of competition law actually serve several purposes: compensating those who suffered a loss as a consequence of anti-competitive behaviour; ensuring the full effectiveness of the antitrust rules of the Treaty; discouraging anti-competitive behaviour and contributing significantly to the maintenance of effective competition in the Community. The new regime under Regulation 1/2003[15] increases the likelihood of consumer actions becoming a central pillar of an effective competition law system within the European Union.[16]

The desirable increase in the frequency of consumers' private actions in the Common market may be jeopardised; however, by the negative influence of some cultural and legislative elements - most of them even cryptic - present in the individual legal systems of the Member States.[17] Remarkable differences are, in fact, still present in Member States' legislation on civil suits based on competition rules, in particular regarding legal standing, probation, class actions, limitation period, and punitive or exemplary damages.[18] The result of a private action based on a violation of EC competition law is therefore highly influenced, if not jeopardised, by the variety of national rules regarding civil actions. Even the compensation for the damage suffered by a customer as a consequence of an agreement that violates Article 81 EC largely depends on the compatibility of the national rules of the Member State with the EU competition law system. On this point, the *Ashurst* comparative report reveals that specific national rules on procedural aspects of civil actions adversely affect the success of the private enforcement of competition law.[19] There is no doubt, however, that the effectiveness of private enforcement mainly depends on the consumer's proactive attitude. *Consumers* are those who exist at the final level of the production/distribution chain and by consuming finish the whole economic process. The consumer is better placed (i.e. has economic incentives) to promote a civil action against the company which has illegally disrupted the competitive economic setting of the market. This is the case when the end buyer, for instance, has to pay an artificially increased price for a determined product or service; or he gives up a certain product/service due to the higher price imposed by the monopolist or by the cartel. Proactive consumers alone, however, are

USA, Oxford, OUP, 1999; Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 183-208.

15 Council Regulation (EC) No. 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

16 See Kroes, 'Damages actions for Breaches of EU Competition Rules: Realities and Potentials', Cour de Cassation, Paris, 17th October 2005; Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation', 8th Annual Competition Conference, Fiesole, Italy, September 17th 2004; Woods, Sinclair & Ashton, 'Private enforcement of Community competition law: modernisation and the road ahead' available at the web page: http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html

17 Gambaro & Sacco, *Sistemi Giuridici Comparati*, Torino, 1996.

18 See Ashrust Comparative Report, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, August 31st 2004, available at: http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

19 See *Ashrust* Comparative Report, op cit, n 18.

not enough to achieve effective private enforcement of competition law. Access to National judges is also a prerequisite.

Due to the preliminary ruling, ex Article 234 EC, made by the Giudice di Pace di Bitonto (Italy), the judgment of the Court of Justice in Joined Cases C-295-298/04 focuses on four aspects of national procedure that govern private actions in the Member states (i.e. the entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages; the limitation period for seeking compensation; and, the ability of the national courts to award punitive damages). The applicants in the main proceedings brought their actions before the Giudice di Pace to seek compensation for damages suffered as a consequence of an anticompetitive practice. Each company involved, in fact, had sanctions imposed by the AGCM in 2000 for engaging in illegal practices in violation of Article 2 Law No.287/90. The Giudice di Pace decided to stay the proceedings and to refer some questions on the interpretation of Article 81 EC to the Court of Justice for a preliminary ruling. With its first question the national Court asked whether an agreement or concerted practice which infringes national rules on the protection of competition, may also constitute an infringement of Article 81 EC.[20] It then referred for clarification four procedural issues: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages;[21] the compatibility of the Article 33(2) of Law No 287/90 with EC law;[22] the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81;[23] and the ability of the national courts to award punitive damages.[24] A more in-depth analysis of the four questions submitted to the Court follows in Section 4. The next section dedicated to providing a description of the structure of the RCA's illegal agreement.

2. THE RCA CARTEL

By Decision No. 8546, dated July 28th 2000, the Italian Competition Authority imposed sanctions on a cartel between several insurance companies active in the motor-vehicle civil liability (hereafter 'RCA') insurance market.[25] The AGCM found that thirty-nine insurance companies had joined the RCA cartel from 1994 to 1999; among them were all of the top twenty insurance companies in the market. The RCA cartel was in blatant violation of competition law: the joint market share of the colluding companies reached 80% of the domestic RCA insurance market.[26] The AGCM investigation started in 1999 on the basis of the assumption that between 1994 and 1999, RCA insurance

[20] It is the first question in Cases C-295/04 to C-298/04.

[21] It is the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04.

[22] It is the second question in Case C-298/04.

[23] It is the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04.

[24] It is the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04.

[25] Decision No.8546, dated July 28th 2000, *Bollettino*, No. 30, 2000.

[26] AGCM Decision No.8546, par. n. 261.

premiums were significantly higher in Italy than in the other major European Union Member States. The *Eurostat* data report[27] shows that in 1994 (the year of RCA insurance tariff liberalisation) Italy had the lowest insurance premium prices among European Member States, and that just five years later (1999) the premium prices had grown 63% in comparison with the European average. At the end of 1999 customers in Italy were paying the highest price for RCA insurance premiums within the European Union. This artificial price increase took place in a market characterised by very rigid elasticity from the demand side.[28] In fact, in the Italian legal system, in order to compensate for damages suffered by third parties, insurance against motor-vehicle accidents and third party liability is compulsory.[29] This means that in Italy anyone owning a motor-vehicle and wanting to use it in public areas (or in other places qualified by law as public areas) has to subscribe to an RCA insurance policy. From an economic point of view this means that the Italian RCA insurance market is inelastic because customers cannot easily react to the generalised price increase of RCA insurance premiums, unless they stop using their motor-vehicle in public areas.

Through its market investigation, the AGCM found several typical elements of a non competitive market: a) stability of the undertakings' market shares;[30] b) the presence of a major dominant group of companies and a fringe of smaller ones; c) anomalous speeding up of the premium price increase especially in the recent period;[31] d) the fact that the premium price increased much more in the Italian market than the European average;[32] e) the companies inability to reduce production costs;[33] and, f) market demand elasticity very close to zero.[34] Although the AGCM found several elements which indicated the presence of 'strong barriers to entry',[35] the market affected by the horizontal cartel was defined as having a national dimension.[36] In the AGCM's view, the fact that several, 'foreign insurance companies joined the cartel does not weigh on the market's geographical dimension' mainly because, 'to operate in this business, foreign companies have to set up in Italy their own distribution and liquidation structures, as well as to adapt themselves to Italian law on mandatory motor-vehicle insurance'.[37] The cartel consisted of a complex and structured horizontal agreement aimed at the 'extended and pervading' exchange of all kinds of strategic and sensitive

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[27] AGCM, Decision No.8546, par. 75.

[28] AGCM, Decision No.8546, par. 79.

[29] In order to grant the restoring of damages suffered by third parties as a consequence of motor vehicle circulation, the Italian legislator adopted the Legge No. 990, dated December 24th 1969 '*Assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti*'.

[30] AGCM Decision No.8546, par. n. 87 and followings.

[31] AGCM Decision No.8546, par. n. 71.

[32] AGCM Decision No.8546, paragraphs n. 70 and 75.

[33] AGCM Decision No.8546, par. n. 77 and followings.

[34] AGCM Decision No.8546, par. n. 195 and followings.

[35] AGCM Decision No.8546, par. n. 92.

[36] AGCM Decision No.8546, par. n. 64 and 65.

[37] AGCM Decision No.8546, par. n. 92; translated by the Author.

commercial information including: premium prices, terms and conditions of contracts, discount rates, sales takings, distribution costs, and accident costs, etc.[38]

RC Log, an Italian consulting firm specialized in the insurance business, played a central role in the exchange of information.[39] The cartel worked in this way: each insurance company was subscribed to the *RC Log* database; by virtue of such subscription, each company regularly sent its own commercial data (e.g. premium prices, terms and conditions of contracts, discount rates, sale takings, distribution costs, accident costs, etc.) to *RC Log* with the specific aim of receiving in exchange the competitors corresponding data. *RC Log* were periodically publishing (and distributing to all their subscribers) reports which contained all this commercial data in aggregate form. In order to improve such a complex information exchange mechanism, the colluding companies had several direct contacts between them (e.g. informal meetings, etc) with the aim of better defining the framework of their cooperation and even of choosing which new companies would be admitted to the illegal information exchange.

The AGCM demonstrated that through this information exchange mechanism, all colluding companies had artificially established (from 1994 to 1999) insurance premium prices 20% higher than the price in a competitive market.[40] The overall anticompetitive effect of the illegal activity was the elimination of every degree of uncertainty about the competitors' strategic behaviour in the market. The AGCM imposed sanctions on the cartel on the basis of art. 2.2 of Italian Law No. 287/90 (the equivalent of art. 81.1 EC Treaty) and imposed heavy fines on the colluding companies. In a subsequent administrative proceeding for the annulment of the AGCM's Decision, taken by the insurance companies, both the T.A.R. Lazio[41] - as Court of first instance - and the Consiglio di Stato - as the Court of appeal - confirmed the validity of the decision to impose sanctions on the cartel.[42]

3. How Can Consumers React to Anticompetitive Conduct? The Controversial Issue of Consumer Standing under the Italian Competition Act

Due to the significant number of companies who had joined the illegal agreement and to the mandatory nature of the RCA insurance policy, most Italian motor vehicle drivers were damaged by the cartel.[43] Indeed, when they realised that 'their' insurer had joined the cartel, many of the policy subscribers, despite the relatively minor monetary damage suffered, immediately gave their lawyer a *procura litis* to sue the colluding insurer

[38] AGCM Decision No.8546, par. n. 115.

[39] AGCM Decision No.8546, par. n. 115.

[40] AGCM Decision No.8546, par. n. 259.

[41] TAR Lazio, sez. I, July 7th 2001, No. 6139, in *Foro amm.*, 2001.

[42] Cons. Stato, sez. VI, April 24th 2002, No. 2199, in *Foro it.*, 2002, III, 482. The Consiglio di Stato discharged some insurance companies because of their limited role in the cartel.

[43] The monetary damage suffered by the policy subscribers is the price unduly paid, or better the difference between the competitive price and the price illegally fixed.

in a civil proceeding. The consumers' reaction to the illegal agreement was quite remarkable; only a few months after the publication of the AGCM Decision, a significant number of follow-on civil actions for damages had already been brought before the Italian civil courts by policy-holders against 'their' colluding insurer. In spite of article 33.2 Law 287/90, by which the Corte d'Appello has exclusive jurisdiction on civil actions based on a violation of competition law,[44] the majority of such claims were brought before the lower court (i.e. the Giudice di Pace) on the basis of the ordinary civil procedure rules on jurisdiction. It should be noted that according to Italian civil procedure rules, first instance jurisdiction belongs to the Giudice di Pace or to the Tribunale according to the value of the claim. In particular, while the Giudice di Pace has jurisdiction over claims with a value not exceeding €2,582.28,[45] all civil claims with values higher than €2,582.28 (or of indeterminable value) must be brought before the Tribunale. Moreover, under article 113 of the Code of Civil Procedure, if the value of the claim does not exceed €1,100, the Giudice di Pace shall decide the case on an equitable basis.[46] The 'equitable basis' provision authorises the judge to decide the case, disregarding the ordinarily applicable rules, without being bound either by the specific provisions of ordinary law applicable to the case, nor by the general principles embedded in such provisions, nor even by the general principles of the legal system.[47]

Maybe due to the lack of a good competition law culture among Italian attorneys, hundreds of RCA policy-holders individually sued 'their' insurer,[48] before the territorially competent Giudice di Pace, on the basis of the ordinary civil procedure rules on jurisdiction: that the value of the claim did not exceed the €1,100 threshold.[49] All the insurance companies sued before the Giudice di Pace assumed in their respective defences the lack of the Giudice di Pace's jurisdiction on the basis of the Corte d'Appello exclusive jurisdiction provision under art. 33.2 Law 287/90.

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[44] Art. 33.2 of Law 287/90 establishes the exclusive jurisdiction of the territorially competent Corte d'Appello on civil actions based on a violation of competition law (i.e. actions of nullity, actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules). See *supra* § 1.

[45] Art. 7 of the Code of Civil Procedure.

[46] As a consequence of the numerous successful actions brought before the Giudici di Pace by policy holders against the colluding insurance companies (described in this paragraph), the Italian Government adopted an emergency decree (i.e. Law Decree 8 February 2003 No. 18 "Disposizioni urgenti in materia di giudizio necessario secondo equità", then converted into Law No. 63 of 7 April 2003,) which amended the article 113 of the Code of Civil Procedure. By such Law, the Giudice di Pace may now decide on an equitable basis claims not exceeding €1,100 provided that they do not relate to contracts governed by uniform standard terms and conditions (so-called 'consumer contracts').

[47] Corte di Cassazione Sezioni Unite, decision No. 716, dated October 15th 1999. See Ashurst Italy Report, August 31st 2004, p 4.

[48] In Italy there is no general provision of law allowing for collective claims and class actions. It should be noted, however that under certain circumstances, representative organisations and public bodies have standing to request cease-and-desist orders and to claim damages vis-à-vis acts of unfair competition. These organisations and bodies are: professional associations (i.e. associations representative of undertakings) pursuant to Article 2601 of the Civil Code and the chambers of commerce pursuant to Article 2.5 of Law No 580/1993.

[49] The civil process before the Giudice di Pace is fast, cheap and not as strictly formal as the Tribunale.

In a surprising series of decisions favourable to consumers, most of the Giudici di Pace affirmed their jurisdiction and awarded to the plaintiffs monetary damages of up to 20 per cent of the insurance premiums paid, representing, in their view, the overcharge found by the AGCM. Such decisions were based on legal reasoning which differed widely from one judge to another,[50] but most of the Giudici di Pace who had affirmed their jurisdiction shared the opinion that those actions fall outside the scope of Italian competition law. The Giudice di Pace di Laviano, one of the first to reject an insurance company's defence, affirmed its jurisdiction on the basis of the assumption that, 'a civil action whose object is to recover a part of the premium price unduly paid to an insurance company' as a consequence of an anticompetitive conduct sanctioned by the Italian Competition Authority, 'does not fall within the scope of art. 33.2 of Law No. 287/90'.[51] Other Giudici di Pace shared this legal reasoning and affirmed their competence to decide the respective cases pending before them on the assumption that Competition law, 'was solely applicable to enterprises' and not to individual consumers.[52] However, other Giudici di Pace in the civil proceedings pending before them reached the opposite result: they denied their jurisdiction and affirmed the Corte d'Appello's exclusive competence to decide such cases.[53] Whether one likes it or not, the Giudice di Pace di Laviano's legal reasoning was indeed supported by a significant Corte di Cassazione precedent in the *Norme bancarie uniformi* case.[54] Indeed in that case the Corte di Cassazione stated that, according to the constitutional principle of 'free enterprise' established in art 41 of the Italian Constitution, national competition law is not directly concerned with consumer interests because the only interest that this law protects is free competition among commercial entities. By such a statement, the Corte di Cassazione denied consumers, as well as any other non-commercial party, standing under Italian competition law to claim the annulment of an anticompetitive agreement before the territorially competent Corte d'Appello.

Approximately three years later, in 2002, an RCA insurance case reached the Corte di Cassazione for the first time: the central question submitted to the Court related to the

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[50] A variety of legal grounds were cited as the basis for these decisions. Some Giudici di Pace argued that the reimbursement of the overcharge was a restitution grounded in the prohibition against unjustified enrichment; others argued that the overcharge was a breach of the principle of good faith and fair dealing; others relied on the bar to unfair contractual terms in consumer contracts; while still others relied on simple tort. For a detailed analysis, see Palmieri, 'Intese restrittive della concorrenza e azione risarcitoria del consumatore finale: argomentazioni «extravagantes» per un illecito inconsistente' (2003), I, 1121, Foro It.; Giudici, 'Private Antitrust Law Enforcement in Italy' (2004) 1 CompLRev 61.

[51] Giudice di Pace di Laviano, decision dated September 27th 2002, *Foro it.*, 2003, n. 42.

[52] See the decision of the Giudice di pace Milano dated January 2nd 2004; the Decision of Giudice di pace Davoli, dated November 13th 2002, *Foro it.*, 2003, n. 41.

[53] See the decision of Tribunale Torre Annunziata, dated July 26th 2004; the Decision of Giudice di pace Cosenza, dated October 31st 2003, *Foro it.*, 2005, I, 259; the Decision of Giudice di pace Albano Laziale, dated September 10th 2003, *Foro it.*, 2004, I, 466, commented by Pardolesi 'Cartello e contratti dei consumatori: da Leibniz a Sansone' (2004) I 469 Foro it.

[54] *Montanari c. Cassa di Risparmio di Genova e Imperia*, Cass. civ., sez. I, decision No.1811 dated March 4th 1999, in *Foro. It.*, 1006. In this case a consumer sued its bank claiming that the bank guarantee he had been required to sign was an improper requirement imposed by a bank cartel and prayed that it be declared null and void.

determination of the competent judge to decide claims for damages brought by end consumers against the colluding companies who had joined the RCA insurance policy cartel. By judgment No. 17475 also known as the '*Axa* decision' (named after the insurance company involved),[55] the Corte di Cassazione first section held - in perfect coherence with its previous statement in the *Norme bancarie uniformi* case - that: a) the aim of Italian competition law is to protect enterprises and the public interest in free competition in the market; b) only enterprises have standing under art. 33.2 Law 287/90; c) consumers do not have any legal standing, under national competition law, to recover damages suffered as a consequence of anticompetitive conduct; d) consumers damaged by anticompetitive conduct can promote a civil action under the general tort provision before the competent civil Court identified under the ordinary Civil procedure rules; and, e) the consumer would have been able to prove in Court that a subjective right - different from those protected by Law 287/90 - had been harmed by the colluding company. Very sure of the public nature of the Italian competition law and strongly based on a strict interpretation of article 33.2 of Law 287/90, the Corte di Cassazione *de facto* denied legal standing to consumers with regard to damages actions for breach of national competition rules.[56] According to this reasoning, the Corte d'Appello would have exclusive jurisdiction for damages actions for breach of national competition rules as long as such actions were brought by and between undertakings and not by consumers. It should be noted, however, that such a restrictive interpretation does not deny standing to consumers who, if damaged by an anticompetitive conduct, bring damage actions under the general tort rules (i.e. art. 2043 Codice Civile). According to ordinary civil procedure rules, such actions would have to be brought before the territorially competent judge depending on the value of the claim; indeed, due to the minimal monetary damage suffered by the plaintiffs in the RCA cases, the competent judge would have surely been the Giudice di Pace. Following the Corte di Cassazione's reasoning, the consumer would have been able to prove in Court that a subjective right - different from those protected by Law 287/90 which relates solely to undertakings - had been harmed by the colluding company. By such a statement the Corte di Cassazione clearly skews protection under the Italian competition law on the grounds of the subjects damaged by the anticompetitive conduct. The most favourable treatment (i.e. legal standing under art. 33.2 Law 287/90) is reserved for undertakings, or better the *conspirator's competitors*, whose harm is directly caused by the violation of competition law; consumers, whose harm is mediated by the colluding companies behaviour, fall out of the scope of the art. 33.2 and of competition law as a whole. By the Corte di Cassazione's statement, 'what in EC Competition law has appeared at the very borderline to the heterodoxy to the exegetes of the Courage case'[57] is pretty normal in the Italian competition law system.[58] In fact, while in *Courage* the ECJ stated that Art 81 EC protects not exclusively third parties but also, under

[55] Decision of the Corte di Cassazione dated December 9th 2002, No. 17475, *Foro it.*, 2003, I, 1121.

[56] Elmi, 'Tutele Civili e Antitrust' in Vettori (ed.), *Concorrenza e Mercato*, Milano, 2005.

[57] *Courage Ltd c. Bernard Crehan*, [2001] ECR I-6297.

[58] Palmieri, op cit, n 50.

certain circumstances, a party to a contract liable to restrict or distort competition which 'can rely on the breach of [Art 81 EC] provision to obtain relief from the other contracting party', in the *Axa* case the Corte di Cassazione stated that undertakings are the only subjects protected by national competition law.

The Corte di Cassazione at the same time denied consumers access to the Corte d'Appello but threw open the doors of the Italian legal system to a significant number of *low cost* civil proceedings under tort rules. In fact, the only procedural avenue available to consumers damaged by an anticompetitive conduct was to sue colluding companies under tort rules before the territorially competent Giudice di Pace as it would have been the only court to have the competence to decide such small value civil claims. The Corte di Cassazione went further: it would not be enough for the consumer to base his tort action on the decision of the Competition Authority against the cartel, a subjective consumer right had to be violated by the colluding company to justify the successful consumer civil action. The most relevant problems arise in relation to the individuation of such a *mysteriously* subjective consumer right violated by the cartel.[59]

The *Axa* statement (recently overruled by the Corte di Cassazione Decision No. 2207 dated February 4th 2005) has been heavily criticized by Italian doctrine quite unanimously;[60] most of the critics have pointed out that, by denying legal standing to consumers, the Corte di Cassazione has completely ignored both the ECJ decision in the *Courage* case, and the entire modernisation process of EC competition law (whose primary object is to foster the private enforcement of competition law in Member States).[61] Moreover, it has been underlined that the *Axa* decision violates article 1.4 Law 287/90, by which the courts have to interpret Italian competition law according to EC competition law principles.[62]

The *Axa* statement has recently been overruled by the Corte di Cassazione Decision in the *Unipol* case.[63] The Court was asked to decide which was the competent court to

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[59] Palmieri, op cit, n 50, 1221.

[60] See: Scoditti, 'Il consumatore e l'antitrust' (2003) I 1127 Foro it.; Bastianon, 'Antitrust e tutela civilistica: anno zero' (2003) 4 393 Danno e responsabilità; Calvo, 'Diritto antitrust e contratti esecutivi dell'intesa vietata (contributo allo studio dei Folgeverträge)' (2005) 2 181, I Contratti; Castronovo, 'Antitrust e abuso di responsabilità civile' (2004) 5 469 Danno e Responsabilità; Colangelo, 'Intese restrittive e legittimazione dei consumatori finali' (2003) 2 175 Diritto industriale; Libertini, 'Ancora sui rimedi civili conseguenti a violazioni di norme antitrust' (2004) 10 933 Danno e responsabilità; Negri, 'Risarcimento del danno da illecito antitrust e foro per la tutela del consumatore (la Cassazione non dilegua i dubbi nella vicenda RC auto)' (2003) 6 747 Il Corriere giuridico.

[61] I. Sabbatelli, 'R.c. auto: rimborsi e tutela dei consumatori' (2003) I, 684, Nuova giur. civ.; Tufarelli, 'La Corte di cassazione di fronte al danno da illecito antitrust: un'occasione persa!' (2003) I, 2144, Giust. civ.; Cameli, 'La disciplina antitrust ed il risarcimento dei danni nella giurisprudenza americana e in quella italiana' (2003) 79 Dir. comunitario scambi internaz.

[62] Giudici, op cit, n 50.

[63] See footnote n. ???. In this case, a consumer sued the colluded insurance company *Unipol*, before the Giudice di Pace di Avellino following the ordinary rules on jurisdiction; the defendant's main argument was the lack of Giudice di Pace jurisdiction on the basis of art 33.2 Law. 287/90. The Giudice di Pace rejected the *Unipol* defence, affirming that art 33.2 and its remedy of annulment, has to be referred to the upstream agreement (i.e. the cartel) and not to the downstream agreement (i.e. the contract between *Unipol* and the consumer) to

hear consumers' damages action under Italian competition law. This time the Third Section of the Court held that, due to its great significance, the issue of consumers' legal standing deserves careful examination and that joint sections of the Court ('Sezioni Unite') had to discuss and decide the issue.[64] The joint Sections of the Corte di Cassazione radically dismissed the previous restrictive interpretation of art. 33.2 and re-oriented Italian competition law in light of EC Treaty principles and the current tendencies of private enforcement of competition law in the European Union. The Cassazione stated that, 'Italian competition law is not the law of the entrepreneurs solely but the law of all market subjects'. Market subjects in the new Court's view are everyone who has a 'procedurally enforceable' legal interest related to the maintenance of the competitive character of the market. Such subjects, 'have juridical standing to the extent to which he/she can claim a specific injury deriving from the breach or the decrease of the competitive character [of the market]'. The consumer, here intended as whoever, 'closes the economic process started by the good's production', has finally been granted the legal standing to bring a damage action under art. 33.2. The Corte di Cassazione finally recognized the, 'diversity both in the scope and in functions between the Civil Code provisions on unfair competition law and the antitrust law' and affirmed 'the standing before the Court of Appeal to the consumer, third party with regard to the horizontal illegal agreement'.

Such a standing represents a kind of genetic mutation by which the *dominant element* of unfair competition law, that had significantly marked the origin and the subsequent development of the Italian anti-trust law system, has disappeared as a phenotype from the main structure. In fact, the Corte di Cassazione in the *Unipol* case affirmed that it is the territorially competent Corte d'Appello which has jurisdiction to decide in the first (and unique) instance, civil actions brought by consumers damaged by cartels. Thus it is this 'specialised' antitrust court (coherently with the original legislator's design) which has to decide in each case the validity of the policy subscriber's damage action based on the Italian competition authority decision. As aforesaid, several Giudici di Pace have already faced this delicate task and, despite the variety of the legal grounds at the base of their decisions,[65] in the majority of cases, the Giudici di Pace awarded policy subscribers a monetary compensation corresponding to a fraction of the insurance premium paid. This fraction in most cases had been derived from the Italian competition Authority's decision[66] and corresponded to 20% of the premium price

which has to be applied the ordinary rules of tort law. *Unipol* appealed this decision to the Corte di Cassazione.

64 Corte di Cassazione Ord., dated 17th October 2003, No.15538, *Foro it.*, 2938, I, 2003.

65 Giudici di Pace based their respective plaintiff's favourable decisions on the basis of different legal reasoning. Some argued that the restitution of the overcharge was based on the unjustified enrichment rules (i.e. art. 2033 Civil Code); others argued that such an overcharge was a consequence of the breach of good faith rules and fairness principles; others relied on the bar to unfair contractual terms in consumer contracts; many others relied on simple tort rules. See. Palmieri, *supra*, 1221; Incardina & Poncibo, 'The Corte di Cassazione takes "Courage". A recent ruling opens limited rights for consumers in Competition cases' (2005) 26(8) ECLR 445-450.

66 AGCM Decision No.8546, par. n. 80.

paid.[67] However, not every Giudice di Pace identified such a fraction in such a way: the Giudice di Pace di Sant'Anastasia for instance liquidated 15% of the insurance premium paid, while the Giudice di pace di Casoria liquidated only 10%.[68] A few months after the *Unipol* decision the Corte di Appello di Napoli decided the *Sai* case via its exclusive jurisdiction.[69] The Corte d'Appello was indeed asked as a court of first instance to decide the insurance policy subscriber's damage action based on the AGCM decision against *Sai,* an insurance company who had joined the RCA insurance policy cartel. The court decided the case in a somewhat similar way to the Giudici di Pace; first of all it affirmed that the insurance company's anticompetitive conduct 'had surely injured the plaintiff', then it identified the plaintiff's monetary damage as 'the difference between the RCA insurance policy price paid and the price that would have been offered to the consumer without the illegal horizontal agreement effect' (i.e. the competitive market price), and third it based the whole reasoning on the AGCM's factual findings (i.e. the stability of the undertakings market shares;[70] the presence of a major dominant group of companies and a fringe of smaller ones; the anomalous speeding up of the premium price increase especially in the recent period;[71] the fact that the premium price has increased much more in the Italian market than the European average;[72] the company's lack of ability to reduce the production costs[73] and that the market demand elasticity was very close to zero[74]), finally, it awarded the plaintiff a monetary compensation corresponding to 20% of the premium price paid, equivalent to €19.68. The Court said that such an amount of money has to be considered 'fair' in light of both the AGCM's decision and on the 'nozioni di comune esperienza'.[75] It thus demonstrated that it is not exempt from the embarrassing degree of uncertainty in the identification of the exact quantity of damage suffered by the plaintiff, 'in order to determine the quantum debeatur, the equitable criteria is helpful because of the impossibility of proving the damage suffered [by the plaintiff] in its precise entity'. Such a degree of uncertainty is well known to economists, indeed, it is an extremely difficult task (if not an impossible one) to determine *a posteriori* the 'competitive price' in the market at a precise moment.[76]

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67 Giudice di pace Lecce, decision dated January 30th 2003.

68 Giudice di pace Sant'Anastasia, decision dated September 12th 2003; Giudice di pace Casoria Decision dated February 12th 2003.

69 Corte di Appello di Napoli, decision dated May, 3rd 2005, *Foro it.*, 2005, I, 1880. Commented by Palmieri.

70 AGCM Decision No.8546, par. n. 87 and following.

71 AGCM Decision No.8546, par. n. 71.

72 AGCM Decision No.8546, paragraphs n. 70 and 75.

73 AGCM Decision No.8546, par. n. 77 and following.

74 AGCM Decision No.8546, par. n. 195 and following.

75 Corte di Appello di Napoli Decision dated May, 3rd 2005.

76 Prof. Pardolesi 'Analisi Economica e Diritto Antitrust' Seminario at the Trento Faculty of Law on May 21st 2005. From an economic perspective see: Fisher, 'Economic Analysis and Antitrust Damages' (March 2006), Competition Policy Discussion Paper, electronic version available at http://www.crai.com/Showpubs.asp?Pubid=5044; and Ray & Schwartz, 'Monopoly Overcharges, Pass-

Another underlying question that emerges from this case is the issue of the incentive (if any) for consumers to take private actions under the Italian competition law system. As aforesaid, art 33.2 Law 287/90 introduces an anomaly in the system because by this provision different judges are competent to decide, in first instance, private actions based on a violation of competition law depending on the dimension (national or communitarian) of the rules violated by anticompetitive conduct. Since the *Unipol* decision finally granted consumers damaged by anticompetitive conduct the right to invoke the national competition law provisions, the exclusive jurisdiction clause in favour of the territorially competent Corte d'Appello is also applicable to them.

The whole effect of this statement sounds more like a disincentive to consumers private actions than an incentive to them, mainly because of the structural and procedural characteristics of proceedings before the Corte d'Appello (the ordinary civil second instance Court). In fact, those proceedings are more formal and much more expensive than those before the Giudice di Pace, and may take on average between two and three years to reach a decision; an equivalent period of time (i.e. between two and three years) may be necessary to reach a final decision because of a possible appeal before the Corte di Cassazione. On the other hand, while civil proceedings before the Giudice di Pace may be concluded within a few months, those before the Tribunale may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the Corte di Cassazione) will substantially increase the duration of the process.[77] All these factors, including the long duration of civil proceedings - this still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years[78] - clearly contribute to creating a disincentive to the domestic private enforcement of competition law. Is it a reasonable choice, for those who have suffered a small monetary damage like in the *Sai* case (€19.68), to seek protection under Italian competition law? How many consumers would be so *risk addicted* to accept the real risk that if they lose in Court (e.g. in case of the lack of or insufficient proof of the existence of the cartel, or the lack of or insufficient demonstration of the specific harm and/or the link of causality between the injury suffered and the cartel effect or other anti-competitive behaviour, or the abuse of a dominant position in the market)[79] they may be ordered to pay the counterparty's legal costs? The scenario for the potential plaintiff is (surprisingly) different, and rather more pleasant, if the anticompetitive conduct has violated EC competition rules. In such a case the competent judge to decide the case would be, in first instance, depending on the value of the claim, the Giudice di Pace or the

Through Pricing, and Economic Damages' (March/April 2006) Antitrust Insights, electronic version available at http://www.nera.com/Newsletter.asp?n_ID=31.

77 See Ashurst Italy Report, *supra*.

78 See Marvulli, 'Relazione sull'attività giudiziaria nell'anno 2005', January 27th 2006, available at: http://www.giustizia.it/uffici/inaug_ag/ag2006/cass2006_index.htm#rall.

79 The issue is discussed by Sánchez Graells, 'Discovery, confidentiality and disclosure of evidence under the private enforcement of EU antitrust rules' (2006), available at the web page: http://www.kernbureau.uva.nl/acle/object.cfm/objectID=31F1A5DA-DB84-4448-BDD36D5758666FDC/download=true/salsoz.pdf.

Tribunale. As aforesaid those civil proceedings are more agile, more consumer friendly, less formal and surely cheaper. This different protection under national and EC competition rules is not in contrast with the principle of equivalence. Under this well known principle judicial actions based on EC rules must not be less favourable than those based on domestic rules.[80] The situation here appears to comply with this principle as a claim for damages can be filed either with the Giudice di Pace (in which case it may be argued that preferential treatment is accorded) or with the Corte d'Appello (in which case a claim based on European law is accorded the same treatment as a claim based on national law). In other words, damages actions alleging violations of EC competition rules are afforded substantially more favourable treatment than those actions brought under national competition law. It should be noted however, that private actions under EC competition law also lack adequate incentives for consumers to bring law suits before the Court. Indeed, the issue of incentives for private action has been widely discussed within the so-called *modernization process* of EC Competition Law at Communitarian level.[81]

It should be noted, however, as pointed out by Prof Jesus Alfaro, that in cases like *RCA* exists a concrete 'risk of competition law *isolation* from the legal system as a whole'.[82] In fact, under EC law victims of anticompetitive conduct do 'not have the right to recover his/her damages in the specialized Antitrust courts, but the right (and legal standing) to recover his/her damages in Court'. A civil action to recover damages suffered by anticompetitive conduct can be brought by the injured party in Civil Court under: (i) contractual rules or (ii) in tort. Indeed, in the RCA insurance cartel cases, policy subscribers sued 'their' colluding insurer under the general Civil code rules on the basis of the illegal price paid: in fact by becoming a member of the cartel, the insurers have cheated their customers by obliging them to pay an illegal price. Consequently the consumer's civil action can be brought under the *dolo contrattuale* rules using the Competition Authority decision to prove the actual malice.

4. THE INSURANCE COMPANIES' CARTEL VIEWED FROM LUXEMBOURG: ANALYSIS OF THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN JOINED CASES C-295-289/04

In June 2004 the Giudice di pace di Bitonto submitted to the Court of Justice four references for preliminary rulings concerning the interpretation of Article 81 EC in connection with some procedural aspects of national regulation of damages actions. As aforementioned, the first question concerned the capability of anticompetitive conduct

[80] ECJ decision 33/76 December 16th 1976, *Rewe* (Racc. 1989, 5) and also *Courage* case, *supra*, paragraph 29.

[81] For a critical view of the process of decentralization see, Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part Two: Between the Idea and the Reality: Decentralisation Under Regulation 1' [2003] ECLR 657. See also Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2003) 26 World Competition 473.

[82] Prof Jesus Alfaro in his speech at the Round Table, 'Private enforcement of antitrust law in Europe: perspectives from law and economics', European Association of Law and Economics, 23rd Conference, Madrid, September 14th, 2006.

which infringed national rules on competition to constitute an infringement of Article 81 EC. The other questions submitted focused on: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages;[83] the compatibility of Article 33(2) of Law No 287/90 with EC law;[84] the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81;[85] and, the ability of the national courts to award punitive damages.[86] Each question is further analysed in the following sub-sections in the order they were decided by the European Court of Justice.

4.1 When anticompetitive conduct contrary to national rules on competition may also constitute an infringement of Article 81 EC: the parallel application of national and EC rules on competition

The Court solved the first question on the basis of the different purposes of Community law and national competition law: 'whereas Articles 81 EC and 82 EC regard [the anticompetitive practices] in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of considerations peculiar to it and considers restrictive practices only in that context'.[87] In the view of the Court, such varying aims make possible the parallel application of EC and national competition rules. Indeed, the wording of Article 81 EC necessarily stipulates that Community competition rules relate to the capability of the practice to affect trade between Member States. According to communitarian Court case-law the ability of the practice to affect trade between Member States must be 'appreciable'.[88] This criterion helps to distance community and national competition law despite their naturally overlapping objects. Thus, Community law covers any agreement or any practice which is capable of affecting trade between Member States in a manner which might harm the attainment of a single market, in particular by sealing off national markets or by affecting the structure of competition within the common market.[89] To explain why the anticompetitive conduct challenged by the national Authority could also potentially violate EC competition rules, the Court has used the argument of the difference in

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[83] It is the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04.

[84] It is the second question in Case C-298/04.

[85] It is the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04.

[86] It is the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04.

[87] Cases C-295-298/04, para 38. See also Case 14/68, *Wilhelm and Othrs* [1969] ECR 1, para 3; Cases 253/78, 1/79-3/79, *Giry and Guerlain and o.* [1980] ECR 2327, p. 15, and Case C-137/00, *Milk Marque and National Farmers' Union* [2003] I-7975, p. 61.

[88] See *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty,* OJ 2004, C101/07, paragraphs 12 -13. See in this respect Case 22/71, *Béguelin*, [1971] ECR 949, paragraph 16; See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429, and Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR 223.

[89] See Case 22/78, *Hugin v Commissione*, [1979] ECR 1869, p 17, and Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089, p. 47. See also *Guidelines,* ibid, par 35.

scope, to which the interpretation and application of the condition relating to effects on trade between Member States, has to be to traced back.[90]

Once it clearly established the connection between the two competition law systems, the Court - adhering to its previous case law - solved the question by reminding the national judge that in order to satisfy the 'communitarian' standard, it is necessary that 'with a sufficient degree of probability' the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the commerce between Member States.[91] Such an influence has to be not insignificant and need to be capable of preventing the creation of the internal market within the Community.[92]

Maybe the most interesting part of the Court's solution is its analysis of the capability of the RCA cartel to influence commerce between Member states. The Court gave importance to the fact that the practice had been challenged by the AGCM on the basis of national law. According to communitarian case law, a concerted practice relating only to a single Member State *is* capable of affecting trade between Member States. A concerted practice covering the entire territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up economic interpenetration.[93] The AGCM found that the ten biggest assurance companies active in the Italian RCA assurance market joined the illegal practice, and that among them there were several foreign companies.[94] The cartel's widespread membership alone was not so decisive as to satisfy the criterion of trade between Member States being affected but provided, 'a clear indication that intra-Community trade may have been affected, certainly in combination with the fact that non-Italian undertakings also took part in the agreements'.[95] Such active participation by foreign operators clearly indicated a certain degree of market permeability open to newcomers from aboard. In that regard, according to case-law, since the market concerned was open to infiltration by operators from other Member States, the members of a national price cartel could retain their market share only if they defended themselves against foreign competition.[96] Although there were strong barriers to entry in the RCA market the presence of foreign companies indicates another argument as to the communitarian dimension of the illegal practice. Those barriers (in the view if the Italian Authority arisen primarily due to the need to set up an efficient distribution network and a network of centres for the settlement of accident claims throughout

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[90] Cases C-295-298/04, par 41. See also Advocate General Opinion, Cases C-295-298/04, par 33.

[91] See Case 42/84, *Remia v Commissione* [1985] ECR 2545, p 22, and *Ambulanz Glöckner*, op cit, n 89, p 48.

[92] Case C-306/96, *Javico* [1998] ECR I-1983, p 16.

[93] Cases C-295-298/04, par 45. See also *Guidelines*, par 78 and Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, par 29, *Remia and Others v Commission*, op cit, n 91, par 22, and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, par 48.

[94] AGCM Decision, No.8546, par. 126.

[95] Cases C-295-298/04, par. 44. See Advocate General Opinion, paragraphs 37-38.

[96] Cases C-295-298/04, par. 49. See also Case 246/86, *Belasco*, [1989] ECR 2117, 32-38. On the point see ALFARO, *La Prohibición De Los Acuerdos Restrictivos De La Competencia.Una Concepción Privatística Del Derecho Antimonopolio*, InDret 4/2004, 2004.

Italy) made the provision of insurance services more difficult for newcomers.[97] In cases like this where barriers to entry are not 'absolute', but are nevertheless capable of negatively impacting intra-community commerce, EC competition law is likely to be affected.

In the view of the Court, it is for the national court to decide whether the mere existence of the agreement or concerted practice is capable of having a deterrent effect on insurance companies from other Member States, in particular by enabling the coordination and fixing of civil liability auto insurance premiums at a level whereby the sale of such insurance by those companies would not be profitable (thus rendering such influence 'appreciable'). Thus, in the RCA cartel the anticompetitive effect on commerce between Member States was hidden in the information exchange between competitors and in the subsequent effect of segmenting the internal market and restricting the freedom to provide services.

The Court has therefore answered the first question in Joined Cases C-295-298/04 by stating that an agreement or concerted practice, which infringes national rules on the protection of competition may also constitute an infringement of Article 81 EC where: there is a sufficient degree of probability that the agreement or concerted practice at issue may have an not insignificant, direct or indirect, actual or potential, influence on the sale of insurance policies in the relevant Member State by operators established in other Member States.[98]

4.2 The entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages

This question is of some interest because it focuses on two relevant consequences that anticompetitive conduct has on third parties. The national court asked whether Article 81 EC is to be interpreted as entitling any individual to rely on the invalidity of a practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm. The Court answered the question in the affirmative, basing its arguments on settled case-law on the direct effect of Articles 81 and 82 EC. The European Court of Justice recognised the direct effect of Articles 81 and 82 EC on horizontal relations more than thirty years ago. National Courts in each Member state are therefore obliged to apply these rights.[99] According to settled case-law, the principle of invalidity established in Article 81(2) EC can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under Article 81(3) EC.[100] The Court of Justice answered the first part of the second question by recognising the right

[97] Cases C-295-298/04, par. 50.

[98] Cases C-295-298/04, par. 52

[99] See Case 127/73, *BRT* e *SABAM* [1974] ECR 51, p 16; Case C-282/95P, *Guérin automobiles v Commission*, [1997] ECR I-1503, p 39, and Case C-453/99, *Courage et Crehan*, [2001] ECR I-6297, p 23. On the direct effects principle see Benacchio, *Diritto privato della Comunità europea. Fonti, modelli e regole (III ed.)*, Padova, 2004.

[100] Cases C-295-298/04, par. 57. On this point see Case 10/69, *Portelange*, [1969] ECR 309, p 10.

of any individual to raise an action for breach of Article 81 EC before a national court (simultaneously recognising individuals' right to rely on the invalidity of an agreement or practice prohibited under that Article).[101]

The second part of the question focuses on the right to seek compensation for loss caused by a conduct liable to restrict or distort competition. To answer the question the Court referred to the full effectiveness of Article 81 EC and, in particular, its judgment in the *Courage* case.[102] In the absence of Community rules governing the matter, the Court was forced to design a remedy on the principle of full effectiveness and on the practical effect of the prohibition laid down in Article 81(1) EC. In the Court's view, the effectiveness of Article 81 EC would be limited if it were not open to any individual to claim damages for loss caused to him.[103] It follows that if any individual can claim compensation for harm suffered on the basis of a violation of Article 81 EC, the effectiveness of EC competition rules and the enforcement system of competition law would increase. Legal standing to seek compensation is, of course, conditional on the presence of the causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.[104] In the absence of Community rules governing the matter, the Court relied on the domestic legal systems of each Member State to establish the courts and tribunals having jurisdiction. However, the Court relied on its own legal culture to lay down the detailed procedural rules governing: actions for safeguarding rights which individuals derive directly from Community law, and the concept of 'causal relationship'.[105] When regulating domestic procedure all Member States have to respect the principles of equivalence (measures adopted would not be less favourable than those governing similar domestic actions) and effectiveness (that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law).[106]

The EC principles of equivalence and effectiveness are the *chiave di volta* used by the Court to answer all the other questions relating to procedure raised by the Giudice di Pace in this case.[107]

4.3 The compatibility of Article 33(2) of Italian Law No 287/90 with Article 81 EC

With this question, the national court asked whether Article 81 EC must be interpreted as precluding a national provision, such as Article 33(2) of Law No 287/90, under which third parties must bring their actions for damages for infringement of

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[101] Cases C-295-298/04, par. 59.

[102] See *Courage e Crehan*, op cit, n 99.

[103] Cases C-295-298/04, par. 60. See *Courage e Crehan*, op cit, n 99, par 26.

[104] Cases C-295-298/04, par 61-63.

[105] Cases C-295-298/04, par 64.

[106] Cases C-295-298/04, par. 62-63. See Case C-261/95, *Palmisani*, [1997] I-4025, p 27; and *Courage e Crehan*, op cit, n 99, par 29.

[107] On the EC principles of equivalence and effectiveness see Benacchio, op cit, n 99, p 20 and 99-144.

Community and national competition rules before a court, other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. As aforementioned in § 3 Italian competition Law establishes the exclusive competence of the Corte d'Appello (the ordinary second instance Court) to hear first instance civil actions based on competition law.[108] As recently stated by the Italian Corte di Cassazione, the Article 33(2) rule applies only to actions for damages based on infringement of national provisions protecting competition.[109] Conversely, actions for damages based on infringement of Articles 81 and 82 EC fall, in the absence of express legal provisions, within the competence of the ordinary courts. The fact that different judges are competent to hear first instance actions for breach of national competition law and EC competition law constitutes a structural *anomaly* of the Italian competition law system.[110] Under this system, when establishing the competent judge, litigants have something of a choice depending on whether his/her claim is based *solely* on an infringement of European competition law (in which case the Giudice de Pace or the Tribunale would have jurisdiction) or *partly* thereon (in which case the Corte d'Appello would have jurisdiction, given its exclusive competence to deliver judgments on claims for damages based on infringement of national competition law).[111]

To evaluate the compatibility of this domestic rule with EC competition law, the Court used the test of equivalence, by which the rules which apply to a claim based on European law must not be less favourable than those which govern similar claims under national law. In the Court's opinion the Italian rule establishing the exclusive competence of the Corte'Appello did not infringe the principle. This is because a claim for damages can be filed either with the Giudice di Pace, in which case it may be argued that preferential treatment is accorded, or with the Corte d'Appello, in which case a claim based on European law is accorded the same treatment as a claim based on national law. It should be noted that civil proceedings before the Tribunale (and even more those before the Giudice di Pace) are less expensive, less complex and less formal than those before the Corte di Appello (which do not allow a second instance judgment either). This could be seen as a kind of unwilling discrimination *in melius,* or even an incentive to private enforcement of the EC competition law. In fact, as aforesaid in § 3, the structural and procedural characteristics of proceedings before the Corte d'Appello (the ordinary civil second instance Court) are more formal and much more expensive than those before the Giudice di Pace, and take on average between two and three years to reach a decision. A further equivalent period of time may also be necessary to

[108] See art. 33 II comma Legge 287/90.

[109] See Corte di Cassazione Decision, 2005, n. 2207, cit.

[110] Ghidini & Falce,'Giurisdizione antitrust: l'anomalia italiana' (1999), 317 Mercato, concorrenza e regole; this issue is analyzed by Pascuzzi, 'Commento all'art. 33 l. 297/1990' in Frignani, Pardolesi, Patroni Griffi, Ubertazzi (eds.), *La legislazione Antitrust italiana*, Bologna, 1993.

[111] Since Regulation No 1/2003 entered into force, where national courts, including the Corte d'Appello, apply national competition law, they should also apply Article 81 EC, at least if the criterion of 'trade being affected' has been satisfied. From this it can be deduced that that court similarly has jurisdiction where a claim is also based on the infringement of Article 81 EC.

reach a final decision due to the possibility of an appeal before the Corte di Cassazione. On the other hand, while civil proceedings before the Giudice di Pace may be concluded within a few months, those before the Tribunale may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the Corte di Cassazione) will substantially increase the duration of the process.[112] All these factors, including the long duration of civil proceedings - which still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years[113] - clearly contribute to creating a disincentive effect to the domestic private enforcement of competition law. Accordingly, in light of the principle of procedural authority of Member States, if a national court was called upon to revive observance of the principles of equivalence and effectiveness in relation to Article 33 of Law No 287/90, it could not fail to observe that the legal position based on Community law is better protected, having regard to the guarantee of two levels of jurisdiction, than that based on national law.[114]

The Court has stated that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on infringement of Community competition rules and to prescribe the detailed procedural rules governing those actions. Those provisions shall not be not less favourable than those governing actions for damages based on an infringement of national competition rules and shall not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC.[115]

4.4 The limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC

With this question the national court asked the Court whether Article 81 EC must be interpreted as precluding a national rule which provides that the limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC begins to run from the day on which that practice was adopted. Among the procedural issues that could jeopardise the effectiveness of private enforcement of competition law within the Community, the limitation period is one of the most important because it regulates the access to courts in time. The question put to the Court was, therefore, of extreme interest because the absence of uniform regulation of the matter makes the effectiveness EC competition law enforcement highly vulnerable due to the variety of national solutions.[116] It is important to bear in mind that too short a limitation period would jeopardise the effectiveness of the private enforcement system. Special consideration needs to be given to the relationship between limitation periods and

[112] See Ashurst Italy Report, op cit, n 18.

[113] See Marvulli, 'Relazione sull'attività giudiziaria nell'anno 2005', January 27th 2006, available at: http://www.giustizia.it/uffici/inaug_ag/ag2006/cass2006_index.htm#rall.

[114] Cases C-295-298/04, par. 67.

[115] Cases C-295-298/04, par. 72.

[116] See Advocate General Opinion, par 60.

proceedings before public competition authorities. Longer time limits are favourable for follow-on claims as other parties which feel aggrieved by the impugned anti-competitive behaviour will be more inclined to bring an action if a judgment or decision has already found a breach of competition law. If limitation periods are too short, a claim might already be statute barred once a judgment or decision is finally rendered so that potential claimants are no longer able to bring a case.[117] The obligation in some jurisdictions to present all evidence to the court when filing a claim also has important consequences for the role played by limitation periods. A short limitation period together with an extensive need for collecting evidence could constitute a serious obstacle to the bringing of such competition-based damages cases.[118]

A considerable diversity exists between the Member States as to the rules concerning limitation periods;[119] the absence of Community rules governing the limitation period is partially made up for by the Court via the principles of equivalence (the prescription period has not to be less favourable than that applicable to similar domestic actions) and effectiveness (that it does not render practically impossible or excessively difficult the exercise of rights conferred by Community law).[120] These principles allow the Court of Justice to avoid the dangerous reference *tout court* to national rules which, as already noted, could make private enforcement potentially ineffective. A *tout court* reference could also foster contradictory judgments and create disparities in treatment on the basis of the territorially competent court.

To answer the question the Court scrutinised the prescription rules in Italy. It found that the limitation period would begin to run from the day on which the agreement or concerted practice was adopted. In the Court's view this rule could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposed a short limitation period not capable of suspension.[121] In fact, especially where there are continuous or repeated infringements, it is possible that the limitation period could expire even before the infringement is brought to an end, in which case it would be impossible for any individual who had suffered harm after the expiry of the limitation period to bring an action.[122] The Court answered the question by establishing that in

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[117] See *Working Paper* SEC(2005)1732, p 74.

[118] See, *Working Paper*, ibid, p 14.

[119] According to the *Ashrust* report, some Member States set their limitation periods irrespective of the knowledge of the claimant (i.e. the period starts running from the date on which the infringement occurred) while others allow for a time limit dependent on the subjective knowledge of the potential claimant (i.e. damage was detected or ought - under usual circumstances - to have been detected). Finally, in many Member States (Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, the Netherlands, Austria, Poland, Slovakia and Slovenia) both types of time limits are applied (i.e. there is a subjectively fixed time limit starting from the subjective knowledge of the claimant but also an objectively fixed longer period after the expiration of which no action can be brought irrespective of the claimant's knowledge). The length of limitation periods in general appears to differ substantially and ranges between one and thirty years.

[120] Cases C-295-298/04, paragraphs 76-77 and 81. See also par 62.

[121] Cases C-295-298/04, par. 78.

[122] Cases C-295-298/04, par. 79.

the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

4.5 National courts and the award of punitive damages

With this question, the national court asked whether Article 81 EC should be interpreted as allowing national courts to award punitive damages. Although it focuses on a specific aspect - punitive damages - the question shines light on a *key difficulty* relating to the private enforcement of EC competition law. The quantification of damages can be particularly complex given the economic nature of the illegality and the difficulty of determining the position the claimant would have been absent the infringement, as usually required under tort rules. Within the Community, both the definition of the damage and its quantification in court lack generally recognised models. Differences of approach in relation to lost profits can result in considerably different awards, and a restriction on this could operate as a disincentive to private actions.[123] The choice of a potential plaintiff to bring his case to court is directly influenced by it and in a certain way private enforcement of competition law in the EC depends on the damages award.[124] Especially when the potential plaintiff is a consumer, incentives to bring the case to court are of crucial relevance. As such an incentive many Member States allow for a reduction in the standard of proof required when damages are difficult to quantify. In the few Member States where this reduction does not operate, if the claimant is unable to prove the exact loss, the claim fails.

In every case the amount of the award has to be defined by the national court in accordance with the national legislation and legal culture. In this respect, several definitions are founded on the idea of compensation or recovery of illegal gain. Compensatory damages, especially when the potential plaintiff is a single consumer, might not operate as a good enough incentive for him to bring his case to court even if it had a high probability of success. In the RCA cartel case, for instance, the estimated overcharge for each year of violation was twenty percent. That figure, without taking into account legal fees, was in the vast majority of cases less than €100. The introduction of award mechanisms that could go beyond mere compensation and attack the illegal gains made by the colluding companies would undoubtedly act as incentives to private enforcement of EC competition law. The European Commission's proposal regarding the introduction of double damages for the most serious antitrust infringements (i.e. horizontal cartels) clearly follows this line.[125] Currently, a handful of Member States go beyond the mere compensation model and recognise punitive (Cyprus) or exemplary (Cyprus, Ireland, UK) damages.[126]

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[123] See *Working Paper*, op cit, n 117, paragraphs 125-144.

[124] See Wils, 'Optimal Antitrust Fines: Theory and Practice', op cit, n 14, 197.

[125] See *Working Paper*, op cit, n 117, par 114 -124.

[126] Moreover, it should be noted that in Cyprus, Ireland and the UK exemplary damages, while they exist, are rarely awarded. See *Study on the conditions of claims for damages in case of infringement of EC competition rules*, op cit, n

The question submitted by the national court focused on the possibility of awarding punitive damages, thereby deterring the adoption of agreements or concerted practices prohibited under that article. The Court based its answer on the principles of equivalence and effectiveness. In the same way it solved the three previous questions the Court, in the absence of uniform communitarian regulation on the matter, referred the definition of concrete procedural issues to the domestic legal system. In the Court's view it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.[127]

In the majority of Member States, actions for damages merely compensate the victims for the loss suffered and, generally, do not asses any extra economic advantage. In Italy, punitive damages are foreign to the legal system and to the rationale behind compensation. The latter is designed to make good proven harm suffered by the victim. In no circumstances should damages have a punitive or repressive function, since that function falls within the scope of statute.[128] To grant the full effectiveness of Article 81(1) EC, it is not necessary, according to the Court's settled case-law, to grant to the victim compensation higher then the loss suffered.[129] In that respect the Court has underlined that, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.[130]

The Court's answer was based on the principle of effectiveness and the right of any individual to claim damages on the basis of a violation of competition rules. It follows that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.[131] In the Court's view, the total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of breach of Community law since, especially in the context of economic or commercial litigation, 'such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible'.[132]

The Court of Justice made an interesting final consideration: in its view Community law, 'does not prevent national courts from taking steps to ensure that the protection of

18, p 84. See also Rodger, 'Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages' [2003] ECLR 103.

127 Cases C-295-298/04, par 84. See also case C-46/93 and C-48/93, *Brasserie du pêcheur* and *Factortame*, [1996] ECR I-1029, par. 89-90.

128 Cases C-295-298/04, par 85.

129 See Advocate General's Opinion, par 64-70.

130 Cases C-295-298/04, par. 93.

131 Cases C-295-298/04, par. 95.

132 Cases C-295-298/04, par. 96. See case *Brasserie du pêcheur et Factortame*, op cit, n 127, p 87, and C-397/98 and C-410/98, *Metallgesellschaft* [2001] ECR I-1727, p 91.

the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them'.[133] This appears to be a political suggestion aimed at the creation of a clear incentive for claimants to bring antitrust damages cases; a kind of hidden message addressed to the Commission to follow the suggestion in the *Green Paper* regarding the possibility of 'double damages automatically or conditionally or at the discretion of the court' in case of illegal horizontal cartels.[134]

5. CONCLUSIONS

In *Manfredi*, the Court of Justice solved some of the most debated procedural aspects of civil actions based on a violation of EC competition rules (i.e. the entitlement to rely on the invalidity of a prohibited agreement or practice and the concomitant right to claim damages; the limitation period for seeking compensation for harm caused, and the ability of the national courts to award punitive damages). The decision is consistent with the Court's case law on damage actions based on a violation of EC rules and confirms the judicial origins of the private enforcement of antitrust rules within the European Union. In fact, since the Court of Justice made clear (in *BRT/I* 1974) that national law had to provide remedies for the victims of antitrust infringements, neither the Treaty nor Regulation 1/2003/EC (nor the preceding Regulation 17/62/EEC) have provided any legal rule explicitly granting damages throughout the Community.[135] So far, any procedural and substantive problem related to the *vactio legis* has been solved from Luxemburg trough the application of the effectiveness, equality and proportionality principles.

Deciding *Manfredi,* the Court of Justice does not seem discouraged by the absence of a detailed and uniform EC regulation on private actions. On the contrary, like in *Courage*, each solution seems to fit quite well into the EC competition law system. This is even more evident if one tries to compare the Court's solution of controversial procedural aspects (e.g. time limitation or damages quantification) with the EC legislator's intervention.[136] The virtues of the Court' decision are many: they are coherent with cultural traditions of Member States, they do not contrast with the structure and the scope of private law remedies already in force and, more importantly, they do assure the effectiveness of antitrust rules among the Community.

The decision of the Court of Justice has a great significance also from the domestic antitrust law perspective. The Giudice di Pace has to decide if the RCA cartel harmed commerce between Member States. If it decides in the way the Court clearly suggests, it will have to apply Article 81 EC and assess damages to the plaintiff. As explained

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[133] Cases C-295-298/04, par 94. See also Case 238/78, *Ireks-Arkady/Consiglio v Commission*, [1979] ECR 2955, p 14; and Case C-441/98 and C-442/98, *Michaïlidis* [2000] ECR I-7145, p 31; and *Courage v Crehan*, op cit, n 99, p 30.

[134] See *Green Paper*, op cit, n 14, par 2.3.

[135] See Case 127/73, *BRT* v *SABAM* [1974] ECR 313; Case C-282/95 P, *Guérin automobiles v Commission* [1997] ECR I-1503, p. 39, and Case C-453/99, *Courage v Crehan* [2001] ECR I-6297, p 23.

[136] See *Working Paper*, cit.

above, this mere fact shows a bizarre allocation of competition law cases among Italian Courts. On one hand the Giudice di Pace cannot hear cases based on a violation of domestic competition rules but, on the other, it has to apply EC rules due to the principle of direct applicability. This allocation, as the Court of Justice said, is not contrary to EC law, not because of its efficiency, but because it (involuntarily) favours private parties damaged under EC antitrust rules.

In *Manfredi*, the decision of the Court seems to work like an 'updated anti-virus filter' installed in the antitrust law enforcement system to protect the effectiveness of EC competition rules against the national procedural rules multiple attacks. But it also shows its limits especially on the domestic side of the antitrust law effectiveness. Actually, the scenario is not that 'favourable' to private parties damaged under the Italian antitrust rules. Pursuant to domestic law, in fact, private parties damaged under national rules have to fill their claims to the more expensive Corte d'Appello.

Sadly, without an urgent structural reform designed to make the Italian competition law system more 'private parties friendly', consumers and undertakings damaged under national competition law will continue to ask themselves, far from the Courts, if competition in the domestic market really matters to them.