



ENRICO CAMILLERI

Professore ordinario di diritto privato – Università di Palermo

AN OVERVIEW OF THE PRIVATE ENFORCEMENT OF COMPETITION LAW IN ITALY

SUMMARY: 1. Introduction. – 2. The development of private enforcement. – 3. What is effective and what are the impediments to private enforcement? – 4. Some key issues in light of Directive 2014/104 EU and its implementation. – A. Which entity is liable for damages. – B. Binding effects of decisions of competition authorities. – C. Limitations of actions. – D. Collective actions/pooling of claims. – 5. The (further) missing pieces of the puzzle: causation and quantification of damages: some concluding remarks.

1. – Directive 2014/104/EU “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”¹ (hereafter: Damages Directive) has been transposed in Italy by means of legislative Decree no. 3 of 2017 (hereafter: Decree 3/2017),² which largely reproduces the Directive not only with regard to the structure but also in respect of the wording of the provisions.

As with other Member States, e.g. France,³ Italian lawmakers opted to enact a *lex specialis* for antitrust damages actions and limited the implementation to what was necessary, without any amendment to the codes of Italy, neither to the Code of Civil Procedure nor to the Civil Code, the latter of which contains the general rules of tort law.

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014], OJ L349/1.

² L’Istituto Poligrafico e Zecca dello Stato S.p.A., *Decreto legislativo 19 gennaio 2017, n. 3*, <https://www.gazzettaufficiale.it/archivioCompleto> > 2017 > n°15 del 19-01-2017 > Decreto Legislativo 19 gennaio 2017, n. 3 (accessed 6 June 2019).

³ See, e.g. Laurence Idot, *Private damages actions before and after the Implementation of the Directive: I. France 4, 4 et seq.* (Implementation of the EU Damages Directive into Member State law, Conference, Würzburg, 5 May 2017, Concurrences N° 3-2017).



Although pragmatic at a first glance, such a choice makes the interplay between general rules and principles, on the one hand, and the “special regime” for antitrust damages actions, on the other, somehow harsh. Moreover, from a systematic point of view, that interplay could even turn into a clash where the new set of rules, while having a relevant incidence on the private law remedy concerned (i.e. civil liability), fails to fully overlap with it. This will undermine the interpretative argument “rule-exception” and potentially convert what was meant to be a form of a practical solution into an increasing theoretical problem.

2. – The enactment of the Damages Directive, while urged by the ECJ’s *Pfleiderer* decision and the resulting threats to the strength of leniency programs,⁴ marked the reaching of an important intersection along the “winding road” towards the establishment of an effective antitrust private enforcement mechanism in Europe, complementary to the public one and to its best functioning.⁵

However, while concededly remarkable in many aspects, it will likely prove to be a sort of intermediate destination more than *the* landing place, an approach stage more than an epiphany itself of (US-style) regulation achieved through private litigation, sketched out by the modernization package⁶ in the wake of the ECJ’s case law on the direct effect of EU primary law and the so-called Community-based right to damages.⁷

⁴ See ECJ, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161. Cf. Sven B. Völcker’s note (2012) 49 CML Rev., 695, 716.

⁵ See, e.g., Mario Libertini, ‘*Il ruolo necessariamente complementare di “private” it e “public enforcement” in materia di antitrust*’ in Marisaria Maugeri and Andrea Zoppini (eds), *Funzioni del diritto privato e tecniche di regolazione del mercato*, 171, 174 (Il Mulino 2009).

⁶ See Regulation 1/2003/EC of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002], OJ L 001, Recital 6, assessing as crucial the role played by national courts ‘in applying the Community competition rule’, by deciding disputes between private individuals, ‘for example by awarding damages to the victims of infringements’; see furthermore Art. 6 of the cited Regulation: ‘National courts shall have the power to apply Articles 81 and 82 of the Treaty’. As regards the ‘modernization’ of EU competition law see David J. Gerber, *Two forms of modernization in European Competition Law* (2008) 31 Fordham International Law Journal, 1235. See also Claus Dieter Ehlermann, *The modernization of EC antitrust policy: a legal and cultural revolution* (2000) 37 CML Rev., 537; Barry Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* 52 (3rd ed., Cavendish Pub. Ltd, 2004).

⁷ The expression ‘Community law based right to damages’ is used by Assimakis P. Komninos, *New prospects for private enforcement of EC competition laws* (2002) 39 CML Rev. 447, 449. As to the case law on the direct effect of the EC Treaty norms cf. ECJ, Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; ECJ, Case C-127/63 *BRT v SABAM* [1974] ECR 313; ECJ, Joined Cases C-6/90 and C-9/90 *Francovich v Repubblica*



The reason for such a cautious evaluation involves the nature of the opted-for source of law and its contents; put briefly: what it is and what it says. The following parts of the analysis will focus on both aspects from mainly an Italian law perspective, but some broader preliminary remarks will be offered as well.

The adoption of a Directive was certainly not an obvious choice, when one takes into account where we come from. To that point, there was Regulation 1/2003, which had a fully binding effect and already contained, among others, a specific norm (article 6) conferring competence upon national courts in relation to articles 101 and 102 TFEU,⁸ not to mention its Recital 7, stressing the role played by national courts as regards the protection of subjective rights under Community law, “for example by awarding damages to the victims of infringements”.

That being said, opting for a Directive tells us even more than the switching towards a soft harmonization strategy, since it reveals a background of ambitious plans that remained largely frustrated by the proof of facts,⁹ and it also induces some pessimism regarding the near future.

The reasons why the modernization package¹⁰ was unable to promote private damages actions and overcome the situation of both an astonishing diversity between national legislation and an underdevelopment of available remedies – as remarked by the *Ashurst Report* in 2004¹¹ and as repeatedly stressed six years later by Advocate General *Mazak*

italiana [1991] ECR I-5357, [1993] 2 CML Rev. 66; ECJ, Case C-128/92 *Banks & Co Ltd v British Coal Co* [1994] ECR I-1209, para. 36-45: ‘the principle established in *Francovich* can also be applied to the case of breach of a right which an individual derives from an obligation imposed by Community law on another individual’. The statement about the importance of (private) actions for damages before national courts, related to infringements of EU competition law, has also become a sort of *leit motif* in the ECJ’s jurisprudence concerning the issue: see the landmark decisions of the ECJ, Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courge Ltd and Others* [2001] ECR I-6297 and ECJ, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619. The direct effect of EU competition law rules as well as ‘the right in Union law to compensation for harm resulting from infringements of Union and national competition law’ are clearly emphasized by Recitals 3 and 4 of the Damages Directive.

⁸ Whenever to be applied in combination with or in parallel to national antitrust rules.

⁹ See, e.g., Brien, Idot et al., *supra* n. **Errore. Il segnalibro non è definito.**, at 7, noting that ‘The Damages Directive is an exercise in frustration and a glaring example of how EU competition policy may lose its legitimacy in the eyes of the “European citizen”’. See also the Editorial Comments ‘*One bird in the hand...*’ *The Directive on damages actions for breach of the competition rules* (2014) 51 CML Rev., 1333, 1334.

¹⁰ Beginning with its preparatory document as represented by the European Commission’s Green Paper on Damages actions for breach of the EC antitrust rules, COM (2005) 672 final and the European Commission’s White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final.

¹¹ See Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, *Study on the conditions of claims for*



in his Opinion on the *Pfeiderer* case¹² – are well known and have been accurately analyzed by scholarly opinion,¹³ reasons beginning with a series of obstacles concerning procedural rules at national level.¹⁴

As a Directive is binding just as to the ends, and given that the EU legislature did not opt for a strong “full harmonization approach” similar to that one recently adopted by the EU legislation in the field of consumer rights,¹⁵ the Damages Directive comes along with a high risk of leaving room for persisting differences between national legislation, in spite of its main goal of promoting a level playing field for undertakings and consumers¹⁶ and notwithstanding the duty of consistent interpretation.¹⁷ More remarkably, while mainly dealing with tortious liability,¹⁸ it shows a range of action narrower than that which is necessary by simply introducing “certain rules governing” antitrust damage claims.

damages in case of infringement of EC competition rules: comparative report (Ashurst 2004).

¹² Case C-360/09 *Pfeiderer*, *supra* n 4, Opinion of AG Mazák, at para. 40: ‘Regulation No 1/2003 and the case-law of the Court have not established any de jure hierarchy or order of priority between public enforcement of EU competition law and private actions for damages. While no de jure hierarchy has been established, at present the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 101 TFEU. Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term “private enforcement”’. The lack of uniformity in national legislation has been underlined by ECJ in its *Manfredi* decision: *see* Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 7, para. 72.

¹³ *See*, e.g., Andreas Heinemann, ‘Remedies in Antitrust Law’ in Thomas M.J. Möllers and Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* 450 (Cambridge University Press 2009).

¹⁴ *See*, e.g., Enrico Camilleri, *A decade of EU antitrust private enforcement: chronicle of a failure foretold?* (2014) 10 ECLR 531, 537.

¹⁵ *Cf.* Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011], OJ L 304/64, Art. 4. Pursuant to Damages Directive Art. 5, para. 8: ‘Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence’.

¹⁶ *See* Damages Directive Recitals 7-10.

¹⁷ *See* ECJ, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

¹⁸ Which is supposed to be the most versatile among the private law remedies for achieving the pursued goals and which is at least in part recalled by Damages Directive Recital 5, pursuant to which ‘Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation’.

JUS CIVILE



As consequence, the Directive is based on a non-exhaustive, even sketchy, soft harmonization approach, one whose key feature may be synthesized as “I’d like to, but I can’t”. Caught between policy and actual facts (i.e. normative data), it searches for an advanced equilibrium between the principles of effectiveness and equivalence, on the one hand, and of national autonomy, on the other; as Recital 11 makes quite clear: “In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States” but in compliance with the “principles of effectiveness and equivalence”.

To sum up, although ultimately in line with the norms of the Treaties (particularly article 5 TEU and articles 103 and 114 TFEU, which provide the Directive’s legal basis¹⁹) and despite the introduction of somehow useful measures, the Directive’s deficiencies – although in part unavoidable at the present stage – threaten to affect the effectiveness of private enforcement considerably.

It is certainly true that a softly harmonized regime – one made up of principles and rules such as the exclusion of any overcompensation for private claims, the assessment of binding effects of NCAs decisions, immunity measures for leniency applicants, a series of rebuttable presumptions softening the burden of proof on claimants, the law of limitation, basic rules on joint and several liability and, lastly, an opening up of both defensive and offensive recourse to a passing-on argument – represents something new, needed and, in the end, positive.²⁰ Nonetheless, the Directive remains to a large extent uncompleted.

It is uncompleted from the antitrust law viewpoint since, beyond any declaration of principle, it deals with certain kinds of violations only, mainly cartels and to some extent exploitative conduct in general.

Uncompleted from the private law viewpoint since, as noted above, it flattens (better: impoverishes) private antitrust enforcement to just tortious liability, without taking into account other tailor-made remedies such as injunctions or interim relief.²¹

Last but not least, even uncompleted from the tort law viewpoint since crucial issues remain sometimes untouched despite being evoked (as is the case for causation), sometimes sideways brushed (as is the case for the proof of harm suffered by individuals and

¹⁹ See Damages Directive Recital 54.

²⁰ See, e.g., Pier Luigi Porcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar Publishing 2018).

²¹ See for critical remarks, F.G. Wilman, *The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for* (2016) 53 CML Rev. 887, 909.



for quantification of damages) and sometimes unmentioned although impending as a stone guest (as is the case for collective redress mechanisms).

3. – Since the most probative test aimed at verifying the aforementioned critical remarks cannot help but being the field of national legislation, the Italian one offers useful food for thought.

Despite the fact that one of the ECJ's leading decisions on private antitrust enforcement (the *Manfredi* case²²) originated as a follow-on action filed before an Italian court which subsequently submitted it to the ECJ for a preliminary ruling, and notwithstanding a (sort of) class action regime already being in force, the number of private actions registered to date in Italy, even if rising in recent years, has proven to be very limited both in absolute terms and on a comparative basis with other jurisdictions, such as Germany, UK and the Netherlands.²³

The reasons for the minimal amount of actions are manifold and involve either civil procedure or substantive law rules, as well as the main features of the harm that a victim may suffer from third parties' infringement of competition law rules, irrespective of the fact whether he/she is a competitor or not, a direct or an indirect purchaser, a business or a consumer.²⁴ The combination of these factors have made the Italian jurisdiction less plaintiff-friendly and attractive than other jurisdictions in Europe, with the side effect of deterring private parties from bringing actions for antitrust damages, if not even triggering a forum shopping phenomenon.

As unanimously recognized, antitrust cases are fact-intensive.²⁵ Therefore, as soon as we think about the ideal dialectic between the subjects who may be potentially involved in a downstream damage claim, the emergence of an informative asymmetry soon throws a shadow over the chances for the injured party to sue.

²² Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 7.

²³ See, e.g., Roberto Chieppa, *Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM* (2016) 24 *Il Diritto Industriale* 314, 321; Massimo Scuffi, *Riflessioni a margine della Dir. 104/2014 (e del D.lgs 3/2017) sull'azione di classe* (2017) 25 *Il Diritto Industriale* 5, 8.

²⁴ See, e.g., Alexander Italianer, *Competition Law within a framework of rights and the Commission's proposal for a Directive on antitrust damage actions* (12th Annual conference of the Association of European Competition Law Judges (AECLJ), Luxembourg, 14 June 2013) http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf (accessed 23 April 2019).

²⁵ See, e.g., Alexander Bruns, 'Private Enforcement of Competition Law: Evidence' in Jürgen Basedow, Jörg Philipp Terhechte and Ludos Tichý (eds), *Private Enforcement of Competition Law* 127, 130 (Nomos 2011). See also Damages Directive Recital 45.

JUS CIVILE



The occurrence of anticompetitive behavior, which is to say the main source of the harm suffered, does in fact represent the very first element to be proved for access to the remedy in tort. It should also be noted that besides not being easily detectable as to its material dimension – at least whenever hidden by the conspiracy of silence between the co-infringers in cases of collusive misconduct – that behavior counts as a violation of competition law rules insofar as a series of other conditions are fulfilled, most of which are based on economic data.

Such premise is now clearly pointed out by Recital 14 of the Damages Directive, stating that whereas the assessment of any antitrust infringement rests on “a complex factual and economic analysis ... t]he evidence necessary to prove a claim ... is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant”.

That being said, the Italian legislation made – and to some extent still makes – things even worse off for a plaintiff by imposing on him a heavy burden of proof and by making it difficult to access the specific and necessary information for bringing an action in tort.

Pursuant to article 2697 of the Italian Civil Code (hereafter: Italian CC), the party who claims a right has the burden to prove the facts supporting his or her claim (“onus probandi incumbit ei qui dicit”); therefore, in the absence of specific norms²⁶ – like those recently adopted by the Damages Directive, introducing some rebuttable legal presumptions – the injured party has to prove the defendant’s (illegal) conduct, the qualified harm suffered (“danno ingiusto”) and the existence of a causal link between the conduct and the harm: in other words, the injured party has to prove the existence of the whole set of conditions required for the remedy in tort to be invoked, pursuant to article 2043 Italian CC.

On the other hand, according to the Civil Procedure Code (hereafter: Italian CPC), neither does the claimant have a comprehensive right to demand disclosure nor can the judge order it without any limit. Pursuant to Article 210 Italian CPC and 94 of the *provisions for the implementation of the Italian CPC* (region decreto No. 1368/1941), a disclosure may be granted upon application of a party only for a precisely identified document and only to the extent that it is necessary. Disclosure remains in any case precluded when it may cause a serious harm to the party that has to disclose the document.²⁷

²⁶ See, e.g., Marco De Cristofaro, *Innovazioni e prospettive nella dimensione processuale che sta al cuore del private antitrust enforcement* [2018] *Le Nuove Leggi Civili Commentate* 523, 531, 533.

²⁷ See Marcella Negri, *Disclosure of documents that lie in the control of the parties: IV. Italy* 12, 18 (Implementation of the EU Damages Directive into Member State law, Conference, Würzburg, 5 May



Further elements, mostly pertaining to the main features of domestic tort law, have also concurred to interfere with private antitrust claims, beginning with the rules on causation and on quantification of damages. Since, however, they remained untouched by the Damages Directive, the assessment as to whether they still remain problematic in the cases at issue should be postponed to the analysis of those provisions recently introduced (or at least of some of them).

For now, it suffices to say that the combined effect of the typical informative asymmetry between the potentially involved parties and the strict regime on proof has led to a “claimant-adverse environment” for antitrust damages actions in Italy, a situation at high risk of even “imped[ing] the effective exercise of the right to compensation guaranteed by the TFEU”.²⁸

It is however worth noting that the Italian courts, mainly the Corte di Cassazione, have tried to soften such a posture and strengthen the alignment of, on one hand, substantive/procedural rules and, on the other, the push towards the availability of tort remedies in antitrust cases as have emerged at the European level.

Two decisions especially deserve to be mentioned in this regard. In the first one, which dates back to 2005, the Court of Cassazione abandoned its restrictive attitude and recognized the existence of a legally qualified interest in the competitive structure of the market, thereby entitling, for the very first time, all market players – either consumers or rival undertakings – to enforce the remedy in tort for the protection of that interest, once violated by specific monopolistic conduct.²⁹ In the second one, from 2015, the Court favoured in a stand-alone action an extensive interpretation of the Italian rules on proof in order to be consistent with the Damages Directive, although not yet implemented at that time, and simply required that the plaintiff provided serious, plausible circumstantial evidence of the alleged anticompetitive conduct of the defendant.³⁰

Though positive, the emergence of such a posture from the courts was however surrounded by the uncertainties that are typical of “judge-made law”. Decree 3/2017 should therefore provide for a much more stable framework.

As aptly observed by scholarly opinion, within the Directive, and therefore within the

2017, Concurrences N° 3-2017).

²⁸ As feared by Damages Directive Recital 14: ‘strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU’.

²⁹ See Corte di Cassazione, no. 2207, 4 February 2005, [2005] *Giurisprudenza italiana* 1675, later confirmed also by Corte di Cassazione, no. 2305, 2 February 2007, [2007] *Foro italiano* 1097.

³⁰ See Corte di Cassazione, no. 11564, 4 June 2015.



implementing norms, the procedural dimension occupies centre stage.³¹ And in fact, just moving from those obstacles to the private antitrust enforcement that I have emphasized above as emblematic under Italian law, useful new legal provisions quickly come to one's attention.

First of all, there is the introduction of a series of rebuttable presumptions in favour of the plaintiff. Pursuant to article 12(2) Decree 3/2017 (in conformity with Article 14 of the Damages Directive), the passing-on of the overcharge from the defendant to the plaintiff (i.e. the indirect purchaser) is presumed whenever certain detailed conditions are fulfilled; even more remarkably, pursuant to article 14(2) of the same provision (in conformity with article 17 of the Damages Directive), the existence of a harm caused by a cartel is presumed as well. In both cases the presumptions are rebuttable.³²

Secondly, as regards the disclosure of evidence, the measures enshrined in article 5 of the EU Damages Directive, implemented through article 3 Decree 3/2017, have had the result that antitrust damages actions are governed by a less strict rule than article 210 Italian CPC, mentioned above: to mention just the main features of the (new) special regime, the party seeking disclosure is no longer requested to provide an *ex ante* precise description of the sought document/evidence, and the judge's order of disclosure, even if within the limits of a proportionality test, may concern even "relevant categories of evidence" once the plausibility of the claim is verified.³³

4. – A. – Following the methodological indications provided by the editors, I will now focus on a list of selected issues that are pivotal for the best promotion of private antitrust enforcement and arguably critical in terms of their potential impact on domestic legislation.

The first issue to be dealt with concerns the identification of the entity liable for competition law infringements.

³¹ Cf. De Cristofaro, *supra* n. 26, at 529.

³² See Enrico Camilleri, *Il risarcimento del danno per violazioni del diritto della concorrenza: ambito di applicazione e valutazione del danno* [2018] *Le Nuove Leggi Civili Commentate* 143, 159; Mario Todino, *Il danno risarcibile* [2015] *AIDA* 15, 23.

³³ In order to prevent 'fishing expeditions'. See, e.g., Giuseppe Finocchiaro, *La disciplina dell'esibizione delle prove nei giudizi risarcitori per violazione delle norme antitrust in attuazione della Dir. 2014/104 UE* [2018] *Le Nuove Leggi Civili Commentate* 415; Paolo Comoglio, *Note a una prima lettura del d.lgs n. 3 del 2017. Novità processuali e parziali inadeguatezze in tema di danno antitrust* [2017] *Riv. Trim. Dir. e Proc. Civ.* 991; see Marcella Negri, *supra* n. 27, at 18; Marco De Cristofaro, *Onere probatorio e disciplina delle prove quale presidio di efficienza del private antitrust enforcement* [2015] *AIDA* 100; Andrea Giussani, *Direttiva e principi del processo civile italiano* [2015] *AIDA* 251.



Article 2(2) Damages Directive states: “infringer means an undertaking or association of undertakings which has committed an infringement of competition law”. This definition was carried over verbatim by Italian lawmakers in article 2(1) (a) Decree 3/2017.

On first reading, the aforementioned definition simply echoes the cartel prohibition (article 101 TFEU) and its typical subjective profile (namely: “agreements between undertakings, decisions by associations of undertakings”), so that one may argue that the liable legal entity cannot be anything but the cartel, as such and along with the co-infringers, within the mechanism of joint and several liability recently introduced.³⁴

An in-depth analyses, however, reveals also a secondary, hidden meaning so as to take into account the economic unit doctrine as elaborated in the wake of some leading cases.

As it is well known, according to the ECJ’s interpretation, the application of article 101 TFEU should be excluded for intra-corporate group agreements, to the extent that the companies at issue have such an intense and close economic relationship as to form a single economic entity.³⁵

At the same time, in the *Akzo Nobel* judgment, the Court made clear that the meaning of “undertakings”, for the application of administrative fines in relation to Article 101 TFEU, “must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal”. Moreover, the Court stated that whenever “such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement” while “the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently (...) but carries out, in all material respects, the instructions given to it by the parent company”.³⁶

³⁴ See Damages Directive Art. 11 and, as for Italy, Art. 9 Decree 3/2017. It should be noticed that the ECJ has adopted a functional approach, according to which it is stated that ‘in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity’: See ECJ, Case C-41/90 *Klaus Höfner and Fritz Elser and Macrotron GmbH* [1991] ECR I-1979, para. 21.

³⁵ See, in the sense of the autonomy between the companies of a group maintaining complete economic independence ECJ, Case C-22/71 *Béguelin Import Co. and Others And S.A.G.L. Import Export, Nice and Others* [1971] ECR 949. See, for the opposite, ECJ, Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECR I-8237, paras 55-58. As for the doctrine see, e.g., Richard Whish and David Bailey, *Competition Law*, 93 (ninth ed., Oxford University Press 2018).

³⁶ See ECJ, Case 48/69 *Imperial Chemical Industries v Commission of the European Communities* [1972] ECR 619; see also Case No. C-97/08 *Akzo Nobel and Others v Commission*, *supra* n. 35, paras 55-58; ECJ, Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía*



Against this background, different scenarios need to be distinguished:

It could be that, notwithstanding the existence of a parent company, the subsidiary has definite economic autonomy; under these circumstances, the latter is, when participating in a cartel, the infringer to be sued.

It may also happen that where a cartel involves just those companies whose relationship embodies a single economic unit, the cartel itself indeed disappears, sometimes being superseded by a different kind of infringement consisting of an abuse of dominant position, in the wake of *Viho* decision.³⁷

Finally, the situation may arise where a cartel does involve two or more undertakings, one of them being part of an economic unit in which the subsidiary acted. In such a case, the conduct of the subsidiary can be imputed to the parent company so that both companies are jointly and severally liable.

As mentioned above, the last scenario does frequently occur in connection with the application of administrative fines, thus in cases pertaining to the sphere of public enforcement.³⁸

That being said, the question to answer now is whether such an “economic unit” doctrine, also applies in cases of civil liability for harm caused by anticompetitive conduct. In other words, is to be clarified whether the claimant is able to sue also the parent company of a cartel (subsidiary) by invoking the existence of a legal unit between them, its being alleged or presumed³⁹ that the latter did not decide independently upon its own conduct on

Española de Petróleos SA [2006] ECR I-11987. The ECJ has declared that the autonomous parent company’s responsibility exists whenever is proved that it exercised a decisive influence over the subsidiary: see also ECJ, Joined cases C-293/13 and C-294/13 *Fresh Del Monte Produce Inc v. European Commission* [2015] ECLI:EU:C:2015:416, para. 75. It is, furthermore, worth highlighting the judicial tendency towards an extensive application of the economic unit doctrine, up to covering situations where the ‘direction and control’ of an undertaking over another is exercised by means of contract services, as in cases of ‘hub and spoke’ cartels: see, e.g., ECJ, Case C-542/14 *SLA ‘VM Remonts’ (formerly SLA ‘DIV un KO’) and Others v. Konkurences padome* [2016] ECLI:EU:C:2016:578. Cf. Ioannis Apostolakis, *Antitrust liability in cases of indirect contacts between competitors: VM Remonts* [2017] 54 CML Rev., 605-630.

³⁷ ECJ, Case C –73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457, paras 15-17.

³⁸ The situation referred to in the text typically produces consequences in the quantification of fines applicable since, according to Article 23, second paragraph, Regulation 1/2013, the threshold of 10% of an undertaking’s worldwide turnover needs to be referred to the entire group’s turnover: see, e.g., Whish and Bailey, *supra* n. 35, at 99; Ivo Van Bael and Jean-François Bellis, *Il diritto comunitario della concorrenza* 991 (Giappichelli 2009). As to recourse to the economic unit doctrine for the application of administrative fines in Italy see, e.g., Federico Ghezzi and Mariateresa Maggiolino, *L’imputazione delle sanzioni antitrust nei gruppi di imprese, tra responsabilità personale e finalità dissuasive* [2014] *Rivista delle società*, 1060; Federico Ghezzi, *Impresa e sanzioni nella prassi applicativa dell’Autorità garante della concorrenza: qualche problema teorico* [2016] *Giur. comm.* I 812.

³⁹ See Case C-97/08 *Akzo Nobel and Others v Commission*, *supra* n. 35, at para. 60: ‘in the specific case



the market but strictly carried out the instructions received by the parent company.

The arguments in favour of the application of the economic unit doctrine to antitrust damages actions – in order to identify the liable person – have been part of an intense doctrinal debate since even before the enactment of the Directive. It has been argued that, consistent with the application of administrative fines, an action for damages could be brought against either a parent company or against the subsidiary, however both jointly and severally liable.⁴⁰

An explicit and authoritative endorsement of this approach comes now from the very recent ECJ case of *Vantaan v. Skanska*.⁴¹ The Court, in fact, made once more clear that the concept of an “undertaking”, within the meaning of Article 101 TFEU, “must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal”, and also that “when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical”.⁴² Furthermore, and with a greater importance for our discussion, the ECJ has stressed that “the concept of “undertaking”, within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.”⁴³

Now, looking at the issue at hand from the Italian perspective, it seems that particularly in the aftermath of the implementation process of the Damages Directive, the favourable arguments for an extension of the economic unit doctrine to antitrust damages claims have in fact been strengthened by the wordings of the rules – either European or Italian (“undertaking or association of undertakings”) – along with the principle of coherent interpretation of EU law.⁴⁴

where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary’.

⁴⁰ See Wish and Bailey, *supra* n. 35, at 94.

⁴¹ See ECJ, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others* [2019] ECLI:EU:C:2019:204.

⁴² See *ibid* paras 37-38.

⁴³ See *ibid* para. 47.

⁴⁴ Persuasive Giorgio Afferni, *Il risarcimento dei danni per violazioni del diritto della concorrenza: prescrizione e responsabilità solidale* [2018] *Le Nuove Leggi Civili Commentate* 171, 190.

JUS CIVILE



To the extent that, for the application of an administrative fine, the existence of an economic unit between two or more (natural or legal) persons implies that unit being held responsible for the infringement – which is to say that the parent is (also, jointly and severally) responsible whenever its control over the subsidiary that participated in the anticompetitive conduct was strict and pervasive – the same should hold true as to the duty to compensate damages for harms caused to third parties.

No special proof concerning the parent company’s fault should be required, since its responsibility arises from the mere exercise of a decisive influence over the subsidiary, so that the *thema probandum* will be the existence of that influence, at least whenever it could not be presumed.

B. – The potential impact of administrative decisions on subsequent claims for damages is a great theme of the debate as regards private antitrust enforcement, in Europe as well as overseas.⁴⁵

The rule on the binding effect of an infringement decision of a competition authority has its roots in the information asymmetry between the harmed party (the potential claimant) and the infringer (the potential defendant), and it promises to be the most effective instrument for overcoming this asymmetry, at least in follow-on actions. However, while already in force in respect of the Commission’s infringement decisions, pursuant to article 16(1) Regulation 1/2003,⁴⁶ it has remained a controversial issue in terms of a full extension to NCA decisions at all, finding strong obstacles in national law, including the relevant Italian legislation.

Already within its White Paper, the EU Commission expressed some critical remarks regarding the widespread reluctance to ascribe a binding effect to decisions having a final character; therefore, it suggested to adopt a rule according to which national courts, whenever having to take decisions on damage claims, subsequent to an NCA’s final decision finding an infringement of articles 101 and 102 TFEU, “cannot take decisions running counter to any such decision or ruling”.⁴⁷

Almost ten years later, that rule has been finally adopted as part of a soft harmoniza-

⁴⁵ See Section 5(a) of Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53).

⁴⁶ In the wake of the decision of the ECJ in Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*. [2000] ECR I-11369, paras 51 et seq.

⁴⁷ See European Commission, White Paper on Damages actions, *supra* n. 10.



tion regime. Article 9 Damages Directive reads that: “Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law”. A narrower effect is then promoted for cross-border decisions, since national legislation should allow the claimant to produce them as “prima facie evidence”, this being a compromise between the first draft of the Directive – in favour of the attribution of a full binding effect – and the widespread concerns that are raised by the (not undisputed) conformity of administrative decisions and court proceedings vis-a-vis the principles of a fair trial and a right of defense pursuant to article 47 European Charter of Fundamental Rights and article 6(1) ECHR.⁴⁸

Looking at this rule from the Italian law perspective, it can be said that its underlying principle is not entirely novel, although it is disputed.

Beginning with a leading decision of the Court of Cassazione from 2009,⁴⁹ Italian courts have already recognized NCA infringement decisions as strong evidence in subsequent damage claims, referring to a “prova privilegiata”, this being in-between “merely admissible evidence subject to judicial appreciation and something less than conclusive evidence, owing to the fact that the defendant could theoretically adduce evidence in rebuttal”.⁵⁰ Furthermore, the courts have also grounded some presumptions based on this “evidence”, these concerning other elements of tortious liability, such as the existence of the harm and the causal link between the anticompetitive misconduct and the harm itself.⁵¹

Without dealing with the inconsistencies between such a broad use of presumptions

⁴⁸ See European Commission, Proposal for a Directive of the EU Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, Art. 9. See the comments by Jens-Uwe Frank, *Binding effects of decisions of national authorities: I. Introduction with some comparative remarks from a German perspective* 37-38 (Implementation of the EU Damages Directive into Member State law, Conference, Würzburg, 5 May 2017, Concurrences N° 3-2017); Marcella Negri, *L'efficacia delle decisioni amministrative nel processo civile* [2018] *Le Nuove Leggi Civili Commentate* 476, 518.

⁴⁹ Cf. Corte di Cassazione, no. 3640, 13 February 2009.

⁵⁰ Oliver Remien, *Limitation Periods: I. Introduction* 47, 48 (Implementation of the EU Damages Directive into Member State Law, Conference, Würzburg, 5 May 2017, Concurrences N° 3-2017). A critical position towards the referenced approach is expressed by Aldo Frignani, *La difesa disarmatanelle cause follow-on per danno antitrust. La Cassazione in Guerra con se stessa* [2013] *Mercato Concorrenza e Regole* 429.

⁵¹ Among others see Corte di Cassazione, no. 10211, 10 May 2011.



for assessing crucial elements of a tort law remedy, it should be noted that the main concerns have been expressed with regard to basic principles of the Italian legal system: the rigid separation between administrative and judicial power, on the one hand, and the full autonomy that is granted to the latter, on the other (grounded either on article 24(2) or article 101(2) Italian Constitution). And this is not to mention those concerns related to articles 47 European Charter of Fundamental Rights and 6(1) ECHR, particularly in the wake of the ECtHR cases *Menarini* and *Grande Stevens*.⁵²

In general terms, the judge – being subject to the law only, pursuant to Article 101(2) Italian Constitution – should be totally free to evaluate the relevant facts, or at least not bound to a specific reconstruction of them provided by an administrative decision.⁵³

This premise is of paramount importance in understanding the rationale behind the way how Italian lawmakers have implemented Article 9 Damages Directive.

Article 7(1) Decree 3/2017, at least in its first part, provides an almost faithful translation of its European counterpart, by declaring as binding – in subsequent damages actions – an NCA infringement decision, provided that it is final, that it was confirmed by the reviewing court or that it was not challenged in due time.

Continuing on with our reading of the article, we then find a compromise – or an attempt at one – which was caused by the uncertainties that have been identified above: Pursuant to Article 7(1) second part, the binding effect of an administrative decision rests on the fact that – before becoming final – it can be challenged before a court having full jurisdiction over the matter; the administrative court’s judicial review covers either the facts upon which the challenged decision is grounded or the “technical assessments which are not characterized by a substantial margin of appreciation”.⁵⁴

Such a formulation is, however, not fully persuasive and does not dispel all doubts since it seems to exempt from a full review those economic assessments that are at the basis of competition law enforcement;⁵⁵ that is why, although the last paragraph of the

⁵² See ECtHR, no. 43509/08, *Menarini Diagnostics v Italia*, 27 October 2011; ECtHR, no. 18640/10, *Grande Stevens and Others v Italy*, 4 March 2014. See also the critical remarks expressed by Gianroberto Villa, *La Direttiva europea sul risarcimento del danno antitrust: riflessioni in vista dell’attuazione* [2015] *Il Corriere Giuridico* 301, 306; Giuseppe Guizzi, *La sentenza CEDU 4 marzo 2014 e il sistema delle potestà sanzionatorie delle Autorità amministrative indipendenti: sensazioni di un civilista* [2014] *Il Corriere giuridico* 1321; Giussani, *supra* n. 33, at 251 et seq.

⁵³ For insightful remarks see Giussani, *supra* n. 33, at 252 and footnote 3.

⁵⁴ See Negri, *supra* n. 48, at 494 et seq.

⁵⁵ See Gianroberto Villa, *L’attuazione della Direttiva sul risarcimento del danno per violazione delle norme sulla concorrenza* [2017] *Il Corriere giuridico* 441, 445-446. For the opposing view see Nicoletta



Italian transposition states (as does article 9 Damages Directive) that the “binding effect rule” comes “without prejudice to the rights and obligations of national courts under Article 267 TFEU”, some scholars argue that the courts may exercise a *refusal to apply*-power, whenever they find that the concerned decision is manifestly illegal.⁵⁶

Moreover, some remarks are needed as to the borders, either objective or subjective, set on the binding effect of NCA decisions.

First, the Directive and its implementation rule refer to infringement decisions only; this means that no binding effect can be ascribed to other kinds of decisions, such as commitment decisions.

Second, according to the indications contained in Recital 34 Damages Directive, the Italian legislature has circumscribed the binding effect to the nature of the infringement and its material, personal, temporal and territorial scope, as determined by the competition authority or the review court. It follows that other crucial issues for the damages claim, like causation and the assessment of an individual harm suffered by the plaintiff, are left to the regular rules on the burden of proof, as integrated by the special regime of rebuttable presumptions that is traced by articles 14(2) and 17(2) Damage Directive (articles 12(2) and 14(2) Decree 3/2017).

Third, as to the subjective perimeter, the Italian provision is clear in restricting the binding effect of the infringement decision to the infringer only. The rationale behind this rule is quite clear: it ensures that the binding effect is limited to the person that has been involved in the prior administrative proceeding.

Some interpretative tensions are easily foreseeable in the wake of the ECJ’s *Kone* decision:⁵⁷ in cases of umbrella pricing, while the ECJ has stated the liability of the cartelist, it has not excluded that the cartelist(s) could, after being held liable for the damages suffered by the rival undertaking’s contractual counterpart who paid an umbrella price, later bring an action against that competitor for its conduct. In this event, such an action will be a sort of stand-alone action in the sense that the cartelist(s) will not benefit from any NCA infringement decision concerning the umbrella pricing conduct, held by the rival.⁵⁸

A final remark deserves to be made with regard to decisions of foreign NCAs: they

Rangone, *D.lgs 19 gennaio 2017, n. 3: profili amministrativistici* [2018] *Le Nuove Leggi Civili Commentate*, 255, 265-266.

⁵⁶ See Negri, *supra* n. 48, at 494 et seq., 499; Marcella Negri, *Binding effect of decisions of national authorities: III. Italy* 37, para 26 (Implementation of the EU Damages Directive into Member State Law, Conference, Würzburg, 5 May 2017, Concurrences N° 3-2017).

⁵⁷ ECJ, Case C-510/11 P *Kone AG and Others v European Commission* [2013] ECLI:EU:C:2013:696.

⁵⁸ See Giussani, *supra* n. 33, at 253.

JUS CIVILE



have no binding effect and the European legislature refers to them as constituting “prima facie evidence”. This concept is unknown to the Italian law of evidence; therefore, and wisely, Italian lawmakers opted for the term “proof”. Cross-border decisions are thus an admissible (simple) means of proof among other means and are subject to the free judge’s persuasion.⁵⁹

C. – The issue of limitation is a sensitive subject matter since it is capable of impeding the exercise of the right to compensation or significantly jeopardizing the level playing field between market participants from State to State, even triggering forum shopping.

It shall suffice here to mention the concerns expressed by the ECJ in its *Manfredi* judgment,⁶⁰ which nevertheless recalled the Member States’ competence on the issue, “provided that the principles of equivalence and effectiveness are observed”; and suffice it also to mention the suggestions contained in the Commission’s White Paper⁶¹ on achieving the proper balance between legal certainty and the effectiveness of the right to sue.

As clearly stressed in the *Manfredi* case, having the limitation period commence from the day on which the agreement or concerted practice is adopted could make it impossible to exercise the right to seek compensation for the harm caused, and such a risk becomes greater as the length of the limitation period becomes shorter, particularly when it is not capable of being suspended.⁶² These were precisely the main features of the Italian law in force at the time that decision was handed down.

Pursuant to article 2947 Italian CC, the right to compensation in a tort liability case had a limitation period of five years, starting from the day when the *fact* occurred. This wording traditionally gave rise to a strict interpretation, according to which the limitation period should be understood as running from the day when the harm was provoked.

However, just a few years after the *Manfredi* case, the Italian Court of Cassazione adopted a less rigid reading of the prescription rule, done by emphasizing a coordination between article 2947 Italian CC and the general legal provision, contained in article 2935 Italian CC.

⁵⁹ See, e.g., Chieppa, *supra* n. 23, at 306; Rangone, *supra* n. 55, at 268.

⁶⁰ See Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 7, at paras 77-82.

⁶¹ See European Commission, White Paper on Damages actions, *supra* n. 10.

⁶² See Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 7, at para. 78.

JUS CIVILE



Pursuant to the latter article, the limitation period begins to run from “the day when the right can be exercised”; a “dies a quo” that the Court held to be the moment when the person having the right to sue has a concrete chance, if acting diligently, to learn about the occurrence of the *harm*, its relevance in legal terms⁶³ and the identity of the tortfeasor.⁶⁴

That being said, and apart for a couple of explicit provisions – concerning the express relevance of an ongoing or terminated administrative investigation/proceeding, on the one hand, and the prerequisite that the violation causing the harm has ended before a right to sue is enforceable, on the other – it can be observed that the Italian law in force prior to the Damages Directive seemed to be already quite in line with the cornerstones of the harmonized regime laid down in this European instrument.

Pursuant to article 10 Damages Directive, the European text requires Member States to adopt legislation prescribing that the commencement of the limitation period is fixed “not before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know” specific circumstances regarding the behaviour (and the fact that it constitutes an infringement of competition law), the fact that the infringement caused harm and the identity of the infringer.

Furthermore, the Directive fixes a minimum length of five years, and there are also specific legal provisions for suspending the limitation period once the competition authority takes action for the purpose of the investigation.

Moving back to Italy, article 8 Decree 3/2017 provides a faithful translation of the Directive’s provision, along with an exercise “at the minimum level allowed” of the only discretionary power conferred upon the States: the length of the limitation period. That is because Italian lawmakers fixed it at five years – in conformity with the general provision on tortious liability – and decided moreover not to fix any “absolute limitation period”, although this is encouraged in Recital 36 Damages Directive.⁶⁵

Yet appearances are sometimes deceiving, and as soon as we go beyond such a minimal approach and the general overall coherence, a concern arises in the wake of the implementation process. Specifically, while article 10 Damages Directive simply lists facts and the circumstances that the entitled person need to know – or should be aware of – before having the chance to exercise the right to claim damages, the Italian transposition

⁶³ Which is to say, about its being a ‘danno ingiusto’ under article 2043 CC.

⁶⁴ Cf. Corte di Cassazione, no. 2305, 2 February 2007 regarding an antitrust claim for damages following the detection of a horizontal prohibited cartel between car insurance undertakings.

⁶⁵ See, e.g., Villa, *supra* n., at 441.

JUS CIVILE



(article 8 Decree 3/2017) requires that these facts be fulfilled in a cumulative manner; the resulting negative outcome – undeniably undermining the certainty of law – is that, properly in cases of stand-alone actions, the full discovery of these elements (i.e. the *dies a quo* for limitation) could even occur a considerable time after the violation at issue was committed, a risk that is all the greater because Italy has not adopted an “absolute limitation period”.⁶⁶

D. – The Damages Directive lacks any provisions on collective redress. It contains rules neither on class actions nor on representative actions. Along with the exclusion of any overcompensation laid down in article 3(3) Damages Directive, this gap deepens the rift between the emerging European model of private antitrust enforcement and the overseas benchmark, i.e. the US system, where a combination of treble damages and the availability of an opt-out class action creates a positive combination of (optimal) deterrence and adequate incentives to sue. While the adoption of a merely compensatory regime is a deliberate, final choice, coherent with the function (compensatory) and characteristics of the tort remedy in Europe,⁶⁷ the current reference made by the newly harmonized rules to individual actions – or at least their silence on aggregate litigation – mainly hides the difficulties of an ongoing planning stage.⁶⁸

The importance of collective redress as a sort of flywheel for private antitrust enforcement has been stressed many times by the European Commission, through a series of documents and initiatives: the Green and White Papers *on Damages actions for breach of the EC antitrust rules*, the Green Paper of 2008 on *consumer collective redress*, not to mention the public consultation of 2011 “*Towards a more coherent European approach to collective redress*”.

Particularly in the White Paper on Damages actions, the Commission stressed how “[i]ndividual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individu-

⁶⁶ See Afferni, *supra* n. 44, at 171-178; see also Vincenzo Meli, *Introduzione al D.lgs 19 gennaio 2017 n. 3, di attuazione della Dir. 2014/104/UE sul risarcimento dei danni per violazione della normativa anti-trust* [2018] *Le Nuove Leggi Civili Commentate* 119, 138.

⁶⁷ See Heinemann, *supra* n. 13, at 637.

⁶⁸ On the issue in general terms, see, e.g., Christopher Hoodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart Publishing 2008); See also Thomas M. J. Möllers and Bernahrd Pregler, *Civil law enforcement and collective redress in economic law* [2013] *Europa e Diritto Privato*, 27, 55.



al action for damages by the costs, delays, uncertainties, risks and burdens involved”; a remark whose importance is even greater today in light of the option, chosen by the Directive, in favour of an offensive use of passing-on and also the explicit extension of standing requirements to indirect purchasers.⁶⁹

Given, however, that collective redress mechanisms can play a pivotal role for the entire enforcement of individual rights conferred by the EU law, the European Parliament, in 2012, adopted the resolution “*Towards a Coherent European Approach to Collective Redress*” and claimed for a wider harmonization process, one to be achieved through a “horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights”. Undeniably an ambitious goal, one whose result has at least in the short run been the weakening of any harmonization process on collective redress, as shown by the mere adoption of a Commission Recommendation (the Commission Recommendation 2013/396 “on common principles for injunctive and compensatory collective redress mechanisms”) – thus, while waiting to take two steps forward, one step back – or aside – has been taken instead.⁷⁰

Notwithstanding the lack of a harmonized regime at EU level, some countries have already adopted some sort of collective redress mechanisms, and Italy is one of them.

Pursuant to article 140 bis of the Italian Consumer Code (Legislative Decree n. 206 of 2015) (hereafter: Italian ConsumerC), an opt-in class action is in fact available for grant-

⁶⁹ The choice on passing-on that is made by the Damages Directive is, as known, dissonant with the US model, whereas, in the wake of two leading Supreme Court decisions, indirect purchasers have no standing to bring (individual/class) damages actions: *Hanover Shoe Inc v United Shoe Machinery Corp.*, 392 US. 481 (1968); *Illinois Brick Co. v State of Illinois*, 431 US 720 (1977). See, e.g., William M. Landes and Richard Posner, *Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick* [1979] 46 Univ. Chic. L. Rev. 602, 608; Gregory J. Werden and Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations – An Economic Analysis* [1984] 35 Hastings Law Journal 629 et seq.; Herbert Hoverkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 615 et seq. (2nd ed., West Group 1999). For critical remarks see, however, Stephens Calkins, *An Enforcement Official’s Reflections on Antitrust Class Action* [1997] 39 Ariz. Law Rev. 413, 424; Adam Thimmesch, *Beyond Treble Damages: Hanover Shoe and Direct Purchaser Suits After Comes v Microsoft Corp.* [2005] 90 Iowa Law Rev. 1649 et seq.

⁷⁰ For critical remarks about the choice made see, e.g., Josef Drexler, ‘Private and Public Enforcement of EU Competition Law’ in Hans-W. Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement. European Economic Law in a Global Perspective* 135, 156 (Hart Publishing 2016). See also the comments contained within Directorate-General for International Policies, *Collective Redress in Antitrust: study*, IP/A/ECON/ ST/2011-19-PE75.120, 12, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> > Collective redress > Study on legislative action in the area of collective redress in the field of antitrust (accessed 24 April 2019).



ing damages (or restitution) in cases where consumers' homogeneous rights are violated by a series of conduct, including anticompetitive conduct.⁷¹ Accordingly, the domestic implementation of the Damages Directive, pursuant to article 1 Decree 3/2017, explicitly extends its range of application to antitrust damages claims brought in the form of aggregate litigation.

Meanwhile, on 3 April 2019, the Italian Parliament approved (Ddl 844/19), a new comprehensive regulation on class actions whose entry into force is postponed until twelve months after the date of publication in the *Gazzetta Ufficiale*. The new regime consists of several articles amending the Italian CPC (art. 840 bis – 840 sexiesdecies) and is intended to replace the still valid article 140 bis of the Italian ConsumerC). The new class action abandons its exclusive reference to consumers, becoming instead a general technique of aggregate litigation for damages or restitutionary claims arising from any violation (including antitrust violations) of homogeneous individual rights of the class members, and it is available against undertakings, either private and public, the latter as entrusted with the operation of public services.

Of course, it is impossible to say anything as regards the practical impact that the new rules will have on antitrust private enforcement. In any event, since most of the new rules share many of their main features with the regime laid down in art 140 bis of Italian ConsumerC, several critical remarks already valid for the latter will apply to the former too, strengthening the argument that the Italian model is not – as of now – an efficient substitute for the missing EU class action.

As clearly pointed out by the DGIP's Study on Collective Redress in Antitrust, we should first note that an opt-in mechanism, even though it has the advantage of limiting the risks of unmeritorious actions, entails a low participation rate. Low rates are a significant drawback to effective antitrust law enforcement, being no less problematic than the absence of economic incentives to sue (i.e. punitive damages) combined with the typical occurrence of parceled and low-value damages.⁷² Moreover, along with legal standing being restricted to individual consumers,⁷³ a further bottleneck stems from the need for

⁷¹ See, e.g., Enrico Camilleri, *Azione di classe a tutela dei consumatori e comportamenti anticoncorrenziali: criticità (e velleità) di un tentativo di trade-off* [2010] AIDA 415 et seq.

⁷² Directorate-General for International policies, *supra* n. 70, at 13. By contrast, the Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013], OJ L201/60, Art. 21-24, is in favour of the 'opt-in' method.

⁷³ Such a circumscription of the legitimate claimants to consumers implies, of course, the exclusion of intermediate buyers/sellers.



homogeneity of claimants' rights, this being a premise for recognizing the existence of the class and, thus, the admissibility of the action brought.

The "homogeneity" prerequisite – still required by the amendments of 2019 – in fact gives rise to judicial uncertainty between (i) a rigid interpretation, according to which the same kind of individual consequences (types of harms), originating from an antitrust violation,⁷⁴ are needed and (ii) a more recent, open approach, according to which homogeneity should be conceived simply in relation to the same origin of individual harm, without thereby precluding a differentiation into sub-classes as regards nature and amount.⁷⁵

Further drawbacks refer to the damages awarded. Pursuant to article 140 bis(12) Italian ConsumerC, in the event of success, claimants may obtain a judge's equitable estimation of the damages or the establishment of a homogeneous criterion to be applied for quantification. In both cases, even if with different *nuances*, the outcome of the lawsuit is a "ball-park figure" evaluation, at high risk of yielding under-compensation and therefore at risk of dissuading more than incentivizing individual adhesion, especially given that it implies relinquishing the right to bring individual actions (either for damages or restitutions) that are grounded on the same facts as the collective claim. The same critical remark seems also valid with reference to the new discipline introduced by the Italian CPC, at least when reading the vague formulation of Article 840 sexies (sub letters a and h).

If these elements are not disheartening enough, the overall picture on Italian class actions for antitrust infringement is worsened even further by the implementation of the Damages Directive: pursuant to article 18 Decree 3/2017, actions for damages, either individual or collective, can be brought only before the specialized sections ("sezione specializzata in materia di impresa") of three Tribunals: Milan, Rome and Naples. The rationale behind this provision is to ensure a high expertise from the courts, given the complicated legal and economic issues involved in these type of claims. The negative side effect of this choice of lawmakers is, however, to make the existing bottleneck even narrower.

5. – There are two more missing pieces to the puzzle of EU antitrust private enforcement, two pieces that have been disregarded or are least not adequately dealt with by the new harmonized regime on damage claims, despite being pivotal for its optimal functioning in practice: causation and quantification of damages.

⁷⁴ See, e.g., Tribunale di Milano, ord. 8 November 2013, *Altro consumo-Bianchi (e altri) c/Trenord s.r.l.*

⁷⁵ See Corte d'Appello di Milano, no. 2828, 25 August 2017, overruling Tribunale di Milano, ord. 8 November 2013; Corte d'Appello di Torino, 30 June 2016; Corte d'Appello di Milano, ord. 3 March 2014.



Causation is a structural constituent element of tortious liability, an element whose role within the framework of the remedy is to ensure that the tortfeasor is liable only for the harm that is the immediate and direct outcome of his/her conduct.⁷⁶

In terms of antitrust damages actions, the importance of the causation nexus becomes even greater than in traditional tort actions since – as is common in cases of pure economic loss – there is a typical dispersion of losses through the market and “the victims are not only competitors, but also rivals, suppliers and firms operating in complementary markets”.⁷⁷

Moreover, the wider the range of interests that the violated norm is meant to protect, the more crucial the need will be to use the causation requirement as tool to control the floodgates and access to the remedy. This effect is even stronger in competition law since it is meant to protect general interests (such as a competitive structure or the competition on a given market) within which a set of more specific interests are represented.

The distortion of a competitive market is often an event causing multiple injuries. One anticompetitive action may simultaneously cause damages to competitors, to companies operating at different market levels and to final consumers. Therefore, in order to prevent that a violation of such a general interest also implies an unmanageable number of follow-on damages actions, the link between a specific anticompetitive conduct and the harm that can be described as directly related to this conduct needs to be stringent.

The ECJ has many times stressed the pivotal role played by the causation requirement for antitrust damages claims, despite pointing out that this issue is governed by national law given the lack of a common European doctrine on the issue.⁷⁸ However, notwithstanding this awareness, or perhaps exactly because of it, the Damages Directive does not introduce any specific provision on causation, while the Italian implementation only indirectly refers to it in the context of the quantification of damages; pursuant to article 14 Decree 3/17: *Compensation for damages caused by a violation of the law of competi-*

⁷⁶Isabelle C. Durant, ‘Causation’ in Helmut Koziol and Reiner Schulze (eds), *Tort Law of the European Community* 63 (Springer 2008).

⁷⁷See, e.g., Pedro Caro de Sousa, *EU and national approaches to passing on and causation in competition damages cases: a doctrine in search of balance* (2018) 55 CML Rev. 1751, 1780; see also Ioannis Lianos, Peter Davis & Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* 103 (Oxford University Press 2015).

⁷⁸See, as leading cases on the issue, Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 7, at para. 61-64; Case C-510/11 *Kone and Others v Commission*, *supra* n. 57, at paras 22-24; Case C-360/09 *Pfeiderer*, *supra* n. 4, at para. 28; ECJ, Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] ECLI:EU:C:2012:684, para. 43. See also ECJ, Case 48/72 *Brasserie de Haecht v Wilkin II* [1973] ECR 77. For a wider analysis of the ECJ’s posture on the theme see Caroline Cauffman, *The DCFR and the Attempts to Increase the Private Enforcement of Competition Law: Convergences and Divergences* (2010) 18 ERPL, 1079-1105.



tion due to the injured person must be determined according to the provisions of articles 1223 (...) of the Italian CC.⁷⁹

That being said, causation is commonly conceived as having a twofold meaning: On the one hand there is “causation-in-fact”, which is used in order to establish a link between the wrongful conduct of the tortfeasor and the harm suffered by the victim (the standard usually applied to determine this link is the “but-for” test). On the other hand there is “legal causation”, which is used in order to limit the extent of an attributable harm for which the tortfeasor can be held liable⁸⁰ and which is oriented on two main functions: the explanatory and the attributive functions,⁸¹ the fulfillment of which rest on the use of several tests and formulas that express concepts regarding proximity, foreseeability, scope of the rule etc.

The combined effect of both these meanings makes clear the distance between the scientific and the legal discourse on causation, the former aiming at the prediction of future events, given specific antecedents, and therefore mainly pertaining to an *ex ante* evaluation; the latter aiming at the attribution of responsibility to an agent in light of his/her actions or omissions, which is to say a typical *ex post*, counterfactual analysis.

This usual interplay between causation in fact and legal causation proves, however, to be much more complex in antitrust cases as the more removed the harm (pecuniary loss) suffered in the supply chain is, the weaker the causal link between that harm and the wrongful conduct (antitrust infringement) that is supposed to be its direct cause, to the point of the link disappearing entirely, especially whenever a contract works as a diaphragm between the conduct and the event.

The latter situation typically occurs in the context of cartels and downstream contracts, where the tension – if not the divergences – between an economic approach and a legal approach to causation can be easily described.

And in fact, even if from an economic point of view the harm suffered by a contractual counterpart – independent of whether a direct counterpart or even an indirect pur-

⁷⁹ Art. 1223 of the Italian Civil Code is a norm explicitly provided for a breach of contract, but it is also applicable to tort law; it reads as follows: ‘The compensation for damage ... must therefore include the loss suffered by the creditor as loss of income, as it is an immediate and direct consequence thereof’.

⁸⁰ See, e.g., Ioannis Lianos, *Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe*, CLES Research Paper Series 2/2015, <https://www.ucl.ac.uk/cles/sites/cles/files/cles-2-2015.pdf> (accessed 24 April 2019); Lianos, Davis & Nebbia, *supra* n. 77, at 75. As for the Italian law of torts see, e.g., Massimo Franzoni, ‘*Dei fatti illeciti: artt. 2043-2059*’ in Francesco Galgano (ed.), *Commentario del Codice Civile Scialoja-Branca*, 84 (Zanichelli 1993).

⁸¹ See, Antony Honoré, ‘*Causation in the Law*’ in Edward n. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2010 edn).



chaser, supplier or client – is directly linked to the upstream restrictive agreement, from a private law viewpoint that harm, consisting for example of an inflated price, is but the direct effect of the contract itself. And the contract will not only be the result of a meeting of minds involving the counterpart's will; rather, it is the only "fact" capable, as such, of causing the harmful event. More precisely, while the contract can be described as the sole proximate cause of the harm (i.e. the cause in the absence of which the effect would not have happened), upstream antitrust infringement is but a secondary one (i.e. an event in the absence of which the effect would not have been prevented).

Italian jurisprudence has, particularly in more recent years, tried to handle this critical issue by embracing a wide use of rebuttable presumptions: according to some decisions taken by the Court of Cassazione,⁸² mainstream economic analyses provide a reliable ground for presuming that a cartel is the direct cause of a damage to the whole market, once its existence has been proved. This is a rebuttable presumption, of course, in the sense that the defendant can prove the interruption of any causal link between the antitrust infringement and the harm.

It should be noted that such an interpretation is quite disputed in Italy since it subverts the general rule about the burden of proof and, above all, since it relies excessively on a probabilistic method – the "more likely than not" rule – working better as regards causation in fact than for legal causation, the latter requiring a specific, individualized evaluation of the facts.⁸³

These queries have now been even further sharpened by the Damages Directive and its implementing rules. It suffices to mention that article 3 Damages Directive stresses – consistent with the case law of the ECJ – that "any natural or legal person who has suffered harm caused by an infringement of competition law" has to be able to claim and obtain full compensation for that harm, a formula that, in light of the Directive, involves indirect purchasers of the infringers⁸⁴ as well as third parties that have been harmed by an "umbrella price".⁸⁵

⁸² See, among the others, Corte di Cassazione, no. 11904, 28 May 2014; Corte di Cassazione, no. 9116, 23 April 2014.

⁸³ Roberto Pardolesi, *Note minime in tema di nesso di causalità* [2014] *Concorrenza e mercato* 317, 321.

⁸⁴ As regards the likelihood that damages claims could really be brought by indirect purchasers, it has been rightly observed that "[i]n the overwhelming of cases, damages actions are brought by direct purchasers" whereas it is "extremely rare that they are introduced by indirect purchasers": see Lianos, Davis & Nebbia, *supra* n. 77, at 104. On "indirect purchasers" standing within the framework of the Damages Directive and the Directive's national implementation in Italy, see Enrico Camilleri, *Il trasferimento del sovrapprezzo anticoncorrenziale nella Direttiva 2014/104/UE* [2015] *AIDA* 32; Francesco Mezzanotte, *Il trasferimento del sovrapprezzo anticoncorrenziale* [2018] *Le Nuove Leggi Civili Commentate* 215.

⁸⁵ This in the wake of the Kone case: Case C-510/11 *Kone and Others v Commission*, *supra* n. 57.



In any event, particularly in the latter cases, the antitrust violation really seems to be too remote from the harm, so that a finding of liability appears to heed a policy directive more than the main features of a tort remedy. In other words, the remedy in tort seems capable of intercepting the closest harm caused by the wrongful conduct, but it cannot encompass the whole perimeter within which the distorting wave propagates.

That being said, we may wonder which kind of damage it is that we are presuming. Which harm we are talking about? What is in fact “more likely than not” is that an antitrust infringement, and more precisely a cartel, inflicts damage on the market as a whole and not a parceled individual harm. And this is twice as true as soon as we refer to exclusionary practices.⁸⁶

This remark introduces the last critical point that deserves to be underlined: the issue of quantification of damages.

In granting the right to a full compensation, the Directive evokes either the *damnum emergens* and the *lucrum cessans*. Pursuant to article 3(2) Damages Directive: “Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest”.

This reading recalls Mommsen’s *Differenztheorie*; a theory, however, whose application in antitrust cases proves to be highly inadequate since the quantification of damages (suffered by third parties) rests on complex, counterfactual analyses that are properly based on economic data.

As commendably observed overseas, “[t]he marriage between economics and ... antitrust policy becomes rocky when it reaches the law of damages (...) the law of damages has the much more difficult task of quantifying injury; the difference between saying that a certain practice is harmful and quantifying the amount of harm can be significant”.⁸⁷

Now, in order to soften this burden of proof for plaintiffs, the Directive introduces at least two rebuttable presumptions: that of article 17(2), according to which “[i]t shall be presumed that cartel infringements cause harm” and that contained in article 14, regarding the presumption of the passing-on of overcharges: “In the situation referred to in par-

⁸⁶ See, e.g., Mario Libertini, *La determinazione del danno risarcibile nella proposta di Direttiva comunitaria sul risarcimento del danno antitrust. Alcune osservazioni preliminari* [2014] *Concorrenza e Mercato* 265.

⁸⁷ See Herbert Hovenkamp, *A Primer on Antitrust Damages*, University of Iowa Legal Studies Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685919 (accessed 24 April 2019).



agraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.”

In any event, these presumptions apply to cartels only, whereas they are not capable of capturing other infringements, like exclusionary or exploitative conduct; moreover, they provide a provisional answer to the question whether the harm does exist, without saying anything as to the main quantification of damages suffered. The plaintiff and the judge should therefore handle on their own this issue. They could of course refer to soft law texts like the Commission’s Guidelines on the quantification of damages, but the complex economic assessments involved suggest that the Court requires specialized assistance, either from an NCA or from other institutions or persons.

The two likely outcomes are both negative: either an equitable estimation (with the implied risks of over-estimations or under-estimations) or a sort of *damnum in re ipsa*.⁸⁸ In any case, what results is something that is far from the proclaimed goal of full compensation, something that is instead, as stressed regarding the causality nexus, a forced application of tortious liability.

In conclusion, although paradoxical at a first glance, it seems that the Damages Directive on non-contractual liability even worsens the interplay between competition law (goals) and private law remedies. It is an interplay whose critical attributes have been clearly summarized in querying whether competition policy is “a tool to protect the competitive process and to serve the public goals or primarily an instrument of consumer protection” .⁸⁹ It is, as well, self-evident that agreement on the first alternative –

⁸⁸ Which is, in any event, strongly opposed by the Court of Cassazione: *see*, e.g., Corte di Cassazione, no. 1931, 25 January 2017; Corte di Cassazione, no. 207, 08 January 2019.

⁸⁹ *See* Josef Drexl, Beatrix Conde Gallego et al., *Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law, on the White Paper by the Directorate-General of Competition on Damages Actions for Breach of EC Antitrust Rules* [2008] IIC 799. For critical remarks *see* also Jürgen Basedow, ‘Recognition of Foreign Decisions within the European Competition Network’ in Jürgen Basedow, Jörg Philipp Terhechte and Ludos Tichý (eds), *Private Enforcement of Competition Law* 169, 171 (Nomos 2011). *See* also Heike Schweizer, ‘Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81’ in Josef Drexl, Laurence Idot & Joël Monéger (eds), *Economic Theory and Competition Law* 134, 145 (Edward Edgar Publishing 2009).

JUS CIVILE



thereby also following some hints from the ECJ itself⁹⁰ – would make clear the inconsistencies in the scope of private law tools (remedies) as deputed to solve conflicts between particular interests.

The fact is that the Damages Directive, beyond any apparent paradox, simply corroborates this thesis, by fashioning a sort of allotrope of the classical private law remedy in tort, an allotrope in relation to which what is written as “private interest” should be regarded as general (public) interest:⁹¹ that one towards the regulation of markets.

The time when antitrust private enforcement development was supposed to be a fly-wheel for a European private law – parallel to or at least harmonious with the most advanced projects for a “codification” of the latter, such as seen with the DCFR⁹² – really belong to a past phase in the process of European integration.

⁹⁰ See ECJ, Joined Cases C-468/06 and C-478/06 *Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139, paras 65-66.

⁹¹ See, e.g., Marie-Anne Frison-Roche, *Efficient and/or Effective Enforcement*, in Josef Drexler, Laurence Idot & Joël Monéger (eds), *Economic Theory and Competition Law*, 211 (Edward Edgar Publishing 2009).

⁹² See, e.g., Cauffman, *supra* n. 78.