

### Case: ECJ – Manfredi v Lloyd Adriatico

Case note by Giorgio Afferni\*

#### I. Introduction

The *Manfredi* judgment of the European Court of Justice (ECJ) deals with the issue of damages for infringements of EC antitrust law.<sup>1</sup> More specifically, it deals with claims for damages brought by consumers against firms that took part in horizontal agreements in restraint of competition. The case at hand of the ECJ is among the many that followed the decision of the *Autorità Garante per la Concorrenza ed il Mercato* (AGCM), which condemned insurance companies for exchanging information on the Italian market of liability insurance for automobile accidents.<sup>2</sup> The ECJ addresses many aspects of the issue of damages, such as the applicability of EC antitrust law, standing, the availability of punitive damages, the level of compensatory damages, and the prescription/limitation of claims.

As far as standing is concerned, the ECJ specifies that consumers are also entitled to sue for damages, thereby confirming a view that was generally accepted after *Courage* with respect to the enforcement of EC Antitrust law,<sup>3</sup> but that is still challenged by some Italian scholars

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- 1 Joined cases 295/04 to 298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (295/04), *Antonio Cannito v Fondiaria Sai SpA* (296/04) and *Nicolò Tricarico* (297/04) and *Pasqualina Murgolo* (298/04) v *Assitalia SpA* 13 July 2006 (ECJ) 37–52. On private enforcement of EC antitrust law see generally J. Basedow, ‘Who will protect Competition in Europe? From central enforcement to authority networks and private litigation’ (2001) II *European Business Organization Law Review* 443 and W. Wurmnest, ‘Private Durchsetzung des EG-Kartellrechts nach der Reform der VO Nr. 17’, in P. Behrens / E. Braun / C. Nowak (eds), *Europäisches Wettbewerbsrecht im Umbruch* (Baden-Baden: Nomos, 2004) 213. In the Italian literature see C. Osti, ‘Contratto e concorrenza’, in V. Roppo (ed), *Trattato del contratto* (Milano: Giuffrè, 2006) VI, 709 ff. For a critical perspective see W. P. J. Wils, ‘Should private antitrust enforcement be encouraged in Europe?’ (2003) XXVI *World Competition* 473, reprinted in W.P.J. Wils, *Principles of European antitrust enforcement* (Oxford and Portland, Oregon: Hart Publishing, 2005) 111.
- 2 AGCM, ‘Decisione n 8546 RC auto’ (2000) *Bollettino* n 30, substantially confirmed by C. di Stato, 23 February 2002, n 2199 (2002) CXXVII *Foro italiano* III-482 with a comment by R. Pardolesi, ‘Sul “nuovo che avanza” in antitrust: l’illiceità oggettiva dello scambio d’informazioni’ and by C. Osti, ‘Brevi puntualizzazioni in tema di collusione oligopolistica’.
- 3 Case 453/99 *Courage v Crehan* [2001] ECR I-6297 (ECJ). F. W. Bulst, *Schadensersatzansprüche der Marktgegenseite im Kartellrecht* (Baden-Baden: Nomos/Beck, 2006) 262 f; N. Reich, ‘The “Courage” doctrine: encouraging or discouraging compensation

with respect to the enforcement of Italian antitrust law.<sup>4</sup> The ECJ does not deal, on the other hand, with the issue of passing on, since consumers harmed by the anticompetitive agreement were direct purchasers from the insurance companies.

## II. The applicability of EC antitrust law

### 1. The background

The first question asked by the *Giudice di Pace* of Bitonto to the ECJ deals with the applicability of Community competition law. It is necessary to briefly describe the background of this question.

Italian antitrust law specifies that the *Corte di Appello* (the ordinary judge of second instance) has the jurisdiction to decide in first instance on the issues of nullity and damages arising out of antitrust cases (Article 33.2 law 287/90). The reason for this exception to the ordinary rules of civil procedure may be found in the idea that the *Corte di Appello* is better suited than the ordinary judge of first instance (*Tribunale* or *Giudice di Pace*, depending on the value of the case) to solve the potentially complex issues that may be raised by antitrust cases. However, this exception does not operate with respect to infringements of EC antitrust law. Therefore, EC antitrust law is ordinarily applied in first instance by the *Tribunale* or the *Giudice di Pace*, depending on the value of the case.<sup>5</sup>

The first claims for damages brought by consumers against insurance companies that took part in the anticompetitive agreement in the market of liability insurance for automobile accidents were based on Italian antitrust law, possibly because the *AGCM* condemned the insurance companies on the basis of this law. Among the several issues that were raised in front of the Italian judges, there was also the issue of jurisdiction. Consumers would have preferred their cases to be adjudicated by the *Giudici di Pace*, possibly because of the lower costs and lesser complexity of the procedure, while insurance companies would have preferred the same cases to be adjudicated by the *Corti di Appello*, possibly in order to discourage most consumers from going to court.<sup>6</sup>

for antitrust injuries' (2005) XLII *Common Market Law Review* 38; J. Stuyck, 'Case note to ECJ – *Courage v Crehan*' (2005) I *European Review of Contract Law* 233f.

4 Cf C. Castronovo, 'Antitrust e abuso di responsabilità civile' (2004) IX *Danno e responsabilità* 469.

5 For the Italian antitrust civil procedure see M. Tavassi / M. Scuffi, *Diritto processuale antitrust* (Milano: Giuffrè, 1998); M. Libertini, 'Il ruolo del giudice nell'applicazione delle norme antitrust' (1998) XXIV *Giurisprudenza commerciale* 1-649. After the modernization of EC antitrust law see M. Scuffi, 'I riflessi ordinamentali ed organizzativi del Regolamento comunitario n. 1/2003 sulla concorrenza' (2004) XXI *Corriere giuridico* 123; G. Ghidini / M. Panucci, 'Le controversie in materia antitrust alla luce del regolamento comunitario n. 1/2003' (2004) XII *Diritto industriale* 61. For a critical perspective see L. F. Pace, *I fondamenti del diritto antitrust europeo* (Milano: Giuffrè, 2005) 177 ff, 446 ff.

6 Cf App Napoli 9 February 2006, n 374 (2006) XI *Danno e responsabilità* 1133, with a comment by S. Bastianon, 'Tutela antitrust del consumatore finale'.

The *Corte di Cassazione*, in its first decision on one of these cases, gave a quite controversial solution.<sup>7</sup> It held that consumers had no standing on the base of Italian antitrust law and that therefore the exception to the ordinary procedural rules set forth by Article 33 of the law should not be applied. However, the *Corte di Cassazione* also held that consumers could sue for damages, under certain circumstances, on the base of Article 2043 *Codice civile*.

This first judgement by the Italian Supreme Court was harshly criticised in the Italian literature because it denied standing to consumers on the basis of the antitrust law itself.<sup>8</sup> However, it was not clear that this decision was really contrary to the interests of consumers, because, as a matter of fact and as subsequent case law showed, it opened to consumers the doors of the *Giudici di Pace*.<sup>9</sup> Yet, the reasons given by the Court were very unsatisfactory, both for the premise, that consumers had no standing on the base of antitrust law, and for the style, very obscure.<sup>10</sup> After this first judgement of the *Corte di Cassazione*, most *Giudici di Pace* accessed by consumers affirmed their jurisdiction and acknowledged the right of consumers under Article 2043 *Codice civile* to be compensated for the damage caused by the anticompetitive agreement.<sup>11</sup>

Later, the *Corte di Cassazione*, questioned a second time on the issue, changed its mind and stated, at joined sections, that consumers do have standing on the basis of Italian antitrust law and that therefore the *Corti di Appello* are the only judges competent to decide such cases.<sup>12</sup>

7 Cass 9 December 2002 n 17475 (2003) VIII *Danno e responsabilità* 390, with a comment by S. Bastianon, ‘Antitrust e tutela civilistica: anno zero’. See also Castronovo, n 4 above, 469; M. Libertini, ‘Ancora sui rimedi civili conseguenti a violazione di norme antitrust’ (2004) IX *Danno e responsabilità* 933; P. Giudici, ‘Private Antitrust Law Enforcement in Italy’ (2004) I *Competition Law Review* 61; G. Afferni / F. W. Bulst, ‘Kartellrechtliche Schadensersatzansprüche von Verbrauchern’ (2005) XIII *Zeitschrift für Europäisches Privatrecht* 143; E. Scoditti, ‘Il consumatore e l’antitrust’ (2003) CXXXVIII *Foro italiano* I-1127.

8 Eg Bastianon, n 7 above, 390; Giudici, n 7 above, 76 f.

9 Cf Scoditti, n 7 above, 1130; Libertini, n 7 above, 933; Afferni / Bulst, n 7 above, 149 f.

10 For a different view see Castronovo, n 4 above, 470.

11 Cf Giu di Pace of Lecce 30 January 2003 (2003) VII *Giudice di Pace* 122; Giu di Pace of Casaria 12 February 2003 (2003) CXXXVIII *Foro italiano* I-2192; Giu di Pace of Roma 21 March 2003 (2003) XI *I contratti* 900; Giu Di Pace of Milano 25 November 2003 (2004) VIII *Giudice di Pace* 124; Giu di Pace of Cesena 10 March 2003 (2003) VII *Giudice di Pace* 118 (compensation denied for lack of proof of causation and of level of damages). For the opposite view cf Giu di Pace of Albano Laziale 21 September 2003 (2004) CXXXIX *Foro italiano* I-466.

12 Cass 7 February 2005 n 2207 (2005) X *Danno e responsabilità* 495. See C. Castronovo, ‘Sezioni più unite che antitrust’ (2005) VIII *Europa e diritto privato* 444; A. Genovese, ‘Risarcimento del danno in favore del consumatore che conclude il contratto attuativo di un’intesa vietata: l’intervento delle Sezioni Unite’ (2005) CIII *Rivista di diritto commerciale* I-120; R. Incardona / C. Poncibò, ‘The Corte di Cassazione takes “Courage”’: a Recent Ruling Opens Limited Rights for Consumers in Competition Cases’ (2005) XXVI *European Competition Law Review* 445.

It is clear then that the question on the applicability of EC antitrust law to the Italian insurance cases is aimed at enabling the *Giudice di Pace* of Bitonto to affirm its jurisdiction on such cases.

## 2. The position of the ECJ

The ECJ does not specify whether EC antitrust law could be applied to the specific case at hand. It merely states the abstract rules that should be applied by the national judge. The ECJ remembers that in order for the Community competition rules to apply to an agreement or concerted practice it is necessary for it to be capable of affecting trade between Member States.<sup>13</sup>

‘It is for the national court to determine whether, in the light of the characteristics of the national market at issue, there is a sufficient degree of probability that the agreement or concerted practice at issue in the main proceedings may have an influence, direct or indirect, actual or potential, on the sale of civil liability auto insurance policies in the relevant Member State by operators from other Member States and that that influence is not insignificant’.<sup>14</sup>

In this regard the ECJ observes that ‘since the market concerned is susceptible to the provision of services by operators from other Member States, the members of a national price cartel can retain their market share only if they defend themselves against foreign competition’.<sup>15</sup> It is well known that an horizontal agreement directed to raise prices at a level greater than the competitive level normally has the effect of facilitating the entrance of new competitors, because it increases the profits that can be made by entering in the market. After having observed that the Italian market for liability insurance for automobile accidents ‘is susceptible to the provision of services by insurance companies from other Member States’,<sup>16</sup> the ECJ states that it is a matter for the national judge to examine whether the mere existence of the agreement or concerted practice was capable of creating a deterrent effect on insurance companies from other Member States without a presence in Italy.<sup>17</sup>

In this respect it should be noted that the agreement between insurance companies was not only about the exchange of information on prices, but also about the exchange of information enabling a better evaluation of the risk and therefore reduced the cost of their insurance operations. Therefore the new entrant would have found himself at a disadvantage in comparison with the insurance companies that were parties to the anticompetitive agreement, because the former would have not been able to acquire this information from a different source and therefore would have been forced to operate his activity under greater

13 Joined cases 295/04 to 298/04, n 1 above, 40. In the Italian literature see F. Munari, ‘Le regole di concorrenza nel sistema del Trattato’, in A. Tizzano (ed), *Il diritto privato dell’Unione Europea* (2<sup>nd</sup> ed, Torino: Giappichelli, 2006) 1451.

14 Joined cases 295/04 to 298/04, n 1 above, 47.

15 Joined cases 295/04 to 298/04, n 1 above, 49.

16 Joined cases 295/04 to 298/04, n 1 above, 50. Cf AGCM, ‘Decisione n 8546/2000’, n 2 above, and AGCM, ‘Indagine conoscitiva sul settore assicurazione autoveicoli (IC-18/2003)’.

17 Cf joined cases 295/04 to 298/04, n 1 above, 51.

uncertainty. If we consider that the admission to the information exchange scheme set up by the incumbents was contingent on their consent, we have to conclude that the agreement had the effect of deterring new insurance companies from other Member States from entering into the Italian market.

### 3. A final comment from the point of view of the Italian law on jurisdiction

In the light of this case history that finally led to the current judgment of the ECJ, one may ask whether the present Italian law on jurisdiction that admits the jurisdiction of different judges depending on the community or national nature of the law infringed should be abandoned. This system is in fact a source of useless complexity in the sense that the party that favours the jurisdiction of the *Tribunale* or *Giudice di Pace* will ask that Community competition law will be applied. On the other hand, the party that favours the jurisdiction of the *Corte di Appello* will ask that the Italian antitrust law will be applied.

It would be preferable instead that the jurisdiction remained unchanged irrespective of the nature, community or national, of the law infringed.<sup>18</sup> Thereby, the adjudication of antitrust cases would be simplified. Moreover, the goal of concentrating the jurisdiction of potentially complex cases such as antitrust cases in the hands of judges with greater experience and knowledge could be pursued more coherently by extending to antitrust cases the jurisdiction of the Special Sections recently created within ordinary Italian courts and already specialized in intellectual property and unfair competition.<sup>19</sup>

## III. Damages for infringement of EC antitrust law

### 1. Punitive damages

The *Giudice di Pace* of Bitonto asks the ECJ whether Community law requires national courts to award punitive damages at a level greater than the advantage obtained by the offending operator, thereby deterring the adoption of agreements or concerted practices prohibited by Community law.<sup>20</sup>

When asking this question the *Giudice di Pace* apparently had in mind the problem of the disgorgement of profits.<sup>21</sup> When a prohibited act such as participation in an anticompetitive agreement enables the defendant to derive a benefit greater than harm caused, liability limited to such harm is not by itself sufficient to discourage the unlawful act. The infringer

18 Also where the principle of equivalence is not infringed as is here the case. cf the Opinion of Advocate General L. A. Geelhoed to these cases, 39 ff.

19 Cf Scuffi (2004), n 5 above, 129 ff.

20 Fourth question of joined cases 295/04 to 297/04 and fifth question of case 298/04, n 1 above.

21 Cf R. Sacco, *L'arricchimento ottenuto mediante fatto ingiusto* (Torino: UTET, 1959); P. Trimarchi, *L'arricchimento da atto illecito*, in P. Cendon (ed), *Scritti in onore di Sacco* (Milano: Giuffrè, 1994) II-1149. Most recently P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento: Università degli studi, 2005) and P. Sirena, 'La restituzione del profitto ingiustificato (nel diritto industriale italiano)' (2006) LII *Rivista di diritto civile* I-305.

is thereby able to profit to the extent of the difference between what he gained by infringing the law and what he is obliged to compensate on the base of the ordinary rules of civil liability. In order to prevent the infringer from making such a calculation, it is possible, at least in theory and under certain conditions, to enable the victim to recover an amount of money greater than the harm suffered. For example, the victim may be entitled to disgorge the profits made by the defendant by infringing the law or, as is the case in some national laws, she may be entitled to recover punitive damages.<sup>22</sup>

It is important to highlight that these remedies, which are directed at punishing the defendant, are justified only when either the conduct or the activity of the defendant are absolutely forbidden. These remedies are not justified, on the other hand, for conduct or activities which are not prohibited but which may give rise to strict liability.<sup>23</sup>

There is no doubt, as far as antitrust law is concerned, that participation in an agreement or concerted practice in restraint of trade is subject to an absolute prohibition and that therefore a punitive remedy is conceivable in the abstract. However, it is necessary also in these cases to keep in mind the risk that the judge, or the administrative authority called upon to apply antitrust law, thinks erroneously that a certain conduct infringes against the law. Similar errors of estimation are more probable in respect of certain kinds of anti-competitive conduct that are difficult to assess, such as predatory practices or vertical agreements. Such mistakes are less probable for the more serious and obvious violations, such as horizontal price-fixing agreements.<sup>24</sup> For this reason, it is normally suggested that punitive damages should be limited to the most serious violations of antitrust law.<sup>25</sup>

The ECJ does not enter into these considerations, but limits itself to observing that the issue of the availability of the punitive damages must be solved on the basis of the national law of each Member State. The principle of effectiveness does not require that every single national law acknowledges this type of damages for the violation of EC antitrust law.<sup>26</sup> The

22 Disgorgement of profits is provided for eg by Art 125.3 *Codice della proprietà industriale*, implementing Art 13 Dir 2004/48 on the enforcement of intellectual property rights. For a possible application to antitrust cf *Commission Staff Working Paper*, SEC (2005) 1732, 115. On punitive damages cf *ibidem*, 116 ff.

23 Cf Trimarchi, n 21 above, *passim*, who applies to disgorgement of profits the fundamental intuition of G. Calabresi / A. D. Malamed, 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) LXXXV *Harvard Law Review* 1089.

24 Cf in the Italian literature A. Frignani / R. Pardolesi / A. Patroni Griffi / L. C. Ubertazzi (eds), *Diritto antitrust italiano* (Bologna: Zanichelli, 1993); V. Afferni (ed), *Concorrenza e mercato* (Padova: Cedam, 1994); F. Gobbo (ed), *Il mercato e la tutela della concorrenza* (Bologna: Il Mulino, 1997) M. Motta / M. Polo, *Antitrust. Economia e politica della concorrenza* (Bologna: Il Mulino, 2004).

25 Cf the Green Paper of the Commission, 'Damages actions for breach of the EC antitrust rules' COM(2005) 672, Question E, Option 16, which foresees punitive damages (double) for horizontal cartels only. Cf in the Italian literature S. Bastianon, 'Il risarcimento del danno antitrust tra esigenze di giustizia e problemi di efficienza. Prime riflessioni sul Libro verde della Commissione' (2006) VIII *Mercato, concorrenza e regole* 321.

26 Joined cases 295/04 to 298/04, n 1 above, 92. Cf also joined cases 46/93 and 48/935 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, 89 (ECJ).

ECJ however remembers that the principle of equivalence does require the acknowledgment of punitive damages for infringements of EC antitrust law, when these damages are available for analogous infringements of national antitrust law.<sup>27</sup>

## 2. Compensatory damages

The *Manfredi* judgement contains also some remarks on compensatory damages that should be awarded in the event of violation of Community competition law. The Court asserts that the principle of effectiveness, if it does not require punitive damages, does require compensation in case of violation of Community competition law both for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*). Compensation for the actual loss alone would not be sufficient, because it could make in some cases the exercise of the right practically impossible or excessively difficult.<sup>28</sup>

It can be observed that a universally valid criterion to estimate the damage that should be compensated in the event of violation of antitrust law does not exist. Rather, it is necessary to distinguish in function of the type of violation and of the type of victim. For example, the damage caused by a cartel must be estimated differently from the damage caused by a predatory practice aimed at excluding a competitor from the market. Moreover, the damage suffered by a firm must be estimated differently from the damage suffered by a consumer.<sup>29</sup>

We will limit our discussion to the damage caused by a cartel, or by other horizontal agreements or concerted practices, to the buyers of monopolized goods or services. There are at least three criteria by which to calculate this damage.<sup>30</sup>

The first criterion consists in compensating, for every good or service purchased, the difference between the price effectively paid (the real price) and the price that would have been paid, if there had not been the violation (hypothetical or competitive price).<sup>31</sup>

The second criterion consists in compensating, together with this difference, also the profits that the victim of the anticompetitive behaviour would have realized by means of the purchase and the resale of a greater number of goods or services. In this respect, it is well known that the existence of a cartel determines, on the one side, that the price paid for every good or service purchased is greater than the competitive price and, on the other side,

27 Joined cases 295/04 to 298/04, n 1 above, 93. Cf also joined cases 46/93 and 48/935, n 26 above, 90.

28 Joined cases 295/04 to 298/04, n 1 above, 95–96.

29 On compensatory damages for antitrust violations cf the *Commission Staff Working Paper*, n 22 above, 112 ff that refers to E. Clark / M. Hughes / D. Wirth, *Analysis of economic models for the calculation of damages* (Bruxelles: Competition DG, 2004) (annex to the Ashurst study on the conditions of claims for damages in case of infringement of EC competition rules). In the European literature see Bulst, n 3 above, 286 ff; F. W. Bulst, 'Private Antitrust Enforcement at the Roundabout', (2006) VII *European Business Organization Law Review* 725–746.

30 Cf Clark / Hughes / Wirth, n 29 above, 17 ff; Bulst, n 3 above, 286 ff.

31 On how to calculate the hypothetical price see Clark / Hughes / Wirth, n 29 above, 17 ff e Bulst, n 3 above, 286 ff.

that the quantity of goods or services effectively purchased is lower than the quantity that would have been purchased with a competitive price (hypothetical quantity). For this reason, in order to put the victim in a position as close as possible to the position in which she would have found herself if there had not been the violation, it would be necessary to compensate the greater price paid for every good or service effectively purchased (actual loss), and the profit she would have made from the resale of a greater number of goods or services (loss of profit).

The third criterion finally consists in compensating the difference between the total profits that would have been made if there had not been the violation and the total profits that have been effectively made given the restriction of the competition. This third criterion differs from the second in the sense that it requires a global comparison between the position in which the victim finds herself because of the violation and the position in which she would have been without the violation. This is the only criterion abstractly able to make the victim whole, ie to put her exactly in the position she would have been but for the violation. However, it is also the criterion that is most difficult to apply in practice.<sup>32</sup>

While the first criterion, based on the difference between the price that would have been paid without the violation (hypothetical price) and the price effectively paid (real price), requires only knowledge of the hypothetical price, the second and the third criteria require also knowledge of how many goods or services the victim would have purchased without the violation (hypothetical quantity), and at what price she would have resold these goods or services (hypothetical resale price).<sup>33</sup>

The *Manfredi* judgement suggests that the principle of effectiveness requires the adoption of the third criterion, or at least of the second criterion of estimation of damages that should be compensated. Only these two criteria allow the victim of the violation to obtain the compensation of the loss of profit. However, in many cases only compensation of actual loss will be practical since the calculation of lost profits will be too complex. More specifically, compensation of loss of profit will only be practical when the victim of the anticompetitive conduct is a competitor of the infringer, and therefore when the anticompetitive conduct consisted in a predatory practice aimed at excluding rivals (boycotting, predatory prices, etc).<sup>34</sup> When, on the other hand, the damage consisted mainly in having paid a monopolistic price, instead of a competitive price, practical reasons suggest that the damage that should be compensated is limited to the difference between these two values with reference to the goods or services effectively purchased.

32 Cf Bulst, n 3 above, 286 ff; Bulst, n 29 above, 737.

33 Cf Bulst, n 29 above, 737 f.

34 Cf Clark / Hughes / Wirth, n 29 above, 35 ff, where the discussion of loss of profits is limited to cases where the plaintiff is a competitor of the defendant.

## IV. Prescription of claims for damages

### 1. The position of the ECJ

Of great interest, both from a practical and a theoretical point of view, is the issue of prescription.<sup>35</sup> The *Giudice di Pace* of Bitonto asks the ECJ if Article 81 EC is to be interpreted as meaning that for the purposes of the limitation period for bringing an action for damages, time begins to run from the day on which the agreement or concerted practice was adopted or the day on which the agreement or concerted practice came to an end.<sup>36</sup> The ECJ answers that, in 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 of harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.<sup>37</sup> The ECJ adds that in that regard, it is for the national court to determine whether a national rule which provides that the limitation period of seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for harm suffered.<sup>38</sup>

The ECJ refers to three different aspects of prescription law in order to verify whether the national regime is contrary to Community law: (i) how long is the period, (ii) when it begins to run, and (iii) whether it may be suspended.<sup>39</sup>

### 2. The Italian law of prescription

In Italian law claims for compensation of damages are subject to different prescription periods depending on whether they are contractual or delictual.<sup>40</sup> For contractual claims the general prescription period is ten years (Article 2946 *Codice civile*, setting forth the ordinary period). For delictual claims, on the other hand, the general prescription period is five years (Article 2947 *Codice civile*).

Prescription begins to run from the day the claim came to existence (Article 2935 *Codice civile*). For claims rising out of delicts, the law specifies that the prescription runs from the day of the fact (Article 2947 *Codice civile*). The day of the fact is usually understood as the

35 Joined cases 295/04 to 298/04, n 1 above, 73 ff. For a comparative analysis of liberative prescription see R. Zimmermann, *Comparative foundations of a European law of set-off and prescription* (Cambridge: Cambridge University Press, 2002) 62 ff.

36 Third question in joined cases 295/04 to 297/04 and fourth question in case 298/04, n 1 above.

37 Joined cases 295/04 to 298/04, n 1 above, 81.

38 Joined cases 295/04 to 298/04, n 1 above, 82.

39 Joined cases 295/04 to 298/04, n 1 above, 78.

40 Generally on prescription see F. Rosselli / P. Vitucci, 'La prescrizione e la decadenza', in P. Rescigno (ed), *Trattato di diritto privato* (Torino: Utet, 1998); P. Vitucci, 'La prescrizione: Art 2934–2940', in P. Schlesinger / F. D. Busnelli (eds), *Commentario al codice civile* (Milano: Giuffrè, 1990).

day of the act which caused the harm.<sup>41</sup> The day of the event, ie the day in which harm occurred, is normally irrelevant.

Finally, prescription in Italian law is only suspended in exceptional cases, such as the existence of close personal ties between the creditor and the debtor, or the incapacity of the creditor (Articles 2941–2942 *Codice civile*). It is important to specify that innocent ignorance of the identity of the debtor/responsible or of the facts giving rise to the claim generally do not play a role in the Italian regime of prescription, neither from the point of view of commencement, nor from the point of view of suspension of the prescription period.

As far as claims for damages in antitrust cases are concerned, it is generally acknowledged both in Italian case law and literature that such claims are to be qualified as delictual.<sup>42</sup> Therefore these claims are subject to a prescription period of five years starting from the day of the act, ie from the day the agreement or concerted practice was adopted.<sup>43</sup>

### 3. The Italian law of prescription and the so-called European standard

It is apparent that such a regime of prescription is generally unsatisfactory and may be contrary to the principle of effectiveness of Community law. In this respect it could be useful to compare the Italian law of prescription with the so-called European standard of prescription.<sup>44</sup> There are indeed different versions of this standard. The most significant are provided by the Directive on product liability and by Part III of the Principles of European Contract Law (PECL).<sup>45</sup>

The Directive on product liability provides that claims for damages are subject to a limitation period of three years starting from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer (Article 10.1 of Directive 85/374).<sup>46</sup> Moreover, claims are subject to a further limitation period of ten years from the date on which the producer put into circulation the actual product which caused the damage (the long-stop period).<sup>47</sup> The goal of the Directive is

41 Cf P. G. Monateri, 'La responsabilità civile', in R. Sacco (ed), *Trattato di diritto civile* (Torino: Utet, 1998) 373 ff.

42 Cass 2207/05, n 12 above. In the literature among many others see Libertini, n 7 above, 237 ff; A. Toffoletto, *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust* (Milano: Giuffrè, 1996) 1 ff; A. Genovese, *Il risarcimento del danno da illecito concorrenziale* (Napoli: Edizioni Scientifiche Italiane, 2005) 27 ff. In favour of the contractual qualification is Castronovo, n 4 above, 473 f.

43 Not surprisingly, both the Italian Government, and one of the insurance companies sued in court (Assitalia) took the view that the starting day of the prescription period is the day in which the agreement has been adopted (the day of the conduct).

44 For this expression see Rosselli / Vitucci, n 40 above, 493.

45 Art 10 Dir 85/374 and Art 14:201 PECL (so-called Lando Principles), respectively. Cf Zimmermann, n 35 above, 76 ff.

46 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*OJEC* 1985 L 210/29-33 [7 August 1985]).

47 On the justification of a long-stop period see Zimmermann, n 35 above, 99 ff.

to strike a balance between the interest of the victim to be able to sue the defendant during a reasonable period of time from the day she acquired or should have acquired certain information deemed necessary to go to court, on the one side, and, on the other side, the interest of the producer to know at the time he puts the product on the market how long he will be exposed to the risk of being sued for damages caused by that product.

The Lando Principles provide that claims for damages are subject to a limitation period of three years (Article 14:201 PECL), beginning from the time of the act which gave rise to the claim (14:203(1) PECL). However, the prescription period is suspended as long as the creditor does not know and could not reasonably know the identity of the debtor or the facts giving rise to the claim including, in the case of a right to damages, the type of damage (Article 14:301 PECL). Moreover, the period of prescription, in the case of a right to damages for pecuniary losses, may not be extended by suspension to more than ten years (Article 14:307 PECL) (equivalent to a long-stop period).

These two regimes differ in certain respects, but share some fundamental goals. More specifically, both regimes give weight to the innocent (ie non-negligent) ignorance of the victim about certain facts deemed necessary to go to court (eg the identity of the defendant and the facts giving rise to the claim). Under both regimes the victim may rely on a three-year period starting from the day she is or should have been informed of these facts.

In Italian law, on the other hand, since the prescription period of claims for damages generally begins to run from the day of the act, it may well be that the person that suffered harm will never be in the position to go to court, for example because he learns the identity of the infringer or the very fact of having suffered harm after the prescription period has already elapsed.<sup>48</sup> This risk is particularly high in the case of damages caused by agreements or concerted practices in restraint of competition. In such cases the victim of the anticompetitive behaviour does not know that wrongful behaviour has caused him loss (ie that he was unjustly induced to pay a price greater than the competitive price) until the existence of the agreement or concerted practice has been made public.

#### 4. Which solutions are open to Italian judges

If we accept the view that the Italian law of prescription, as applied to the issue of antitrust damages, is contrary to the principle of effectiveness of Community law, it should be clarified how the issue of prescription should be solved. The solution cannot be that, since the Italian regime of prescription infringes against Community law, claims for antitrust damages are not subject to any prescription period. Such claims (pecuniary and perpetual) would not fit in our legal tradition.

<sup>48</sup> On the insignificance of so-called impediment of fact in the Italian law of prescription see Rosselli / Vitucci, n 40 above, 497 ff; R. Caponi, 'Gli impedimenti all'esercizio dei diritti nella disciplina della prescrizione' (1994) XL *Rivista di diritto civile* I-721. Most recently see also M. Tesaro, *Decorrenza della prescrizione e autorresponsabilità* (Padova: Cedam, 2006). There are however some exceptions. Most notably Art 1442.1 *Codice civile* for claims directed to avoid a contract in the case of fraud or mistake. See to this regard P. Vitucci, 'La decorrenza della prescrizione nelle azioni di annullamento' (1990) XXXVI *Rivista di diritto civile* II-157.

The first solution open to the *Giudice di Pace* of Bitonto and to other Italian judges that will be faced in the future with similar problems is to characterise as contractual the claims of victims of agreements or concerted practices seeking compensation for damages. Through this characterisation such claims would be subject to a prescription period of ten years beginning from the day the claims came to existence, which could be interpreted as the day the agreement or the concerted practice was entered into or the day the single goods or services were purchased. In any case a prescription period of ten years for a claim of damages for pecuniary losses could not be considered contrary to the principle of effectiveness of Community law. It should be recalled that both the Directive on product liability and the Lando Principles provide that claims for damages for pecuniary losses are subject to a long-stop prescription period of ten years, irrespective of the date the victim acquired knowledge of certain facts that are necessary to effectively exercise the claim. Through the contractual qualification of Community rights to damages for infringement of competition law the Italian law would accord to these rights the same protection accorded by a Directive to other similar rights and today acknowledged as the most appropriate standard within the European legal tradition. In my view, however, this solution should be disregarded. The delictual characterisation of claims for compensatory damages for losses caused to third parties by anticompetitive agreements or concerted practices is almost universally acknowledged. Moreover, deviating from a commonly acknowledged characterisation for the sole purpose of prescription would represent one of those distortions that convinced the drafters of the Part III of the Lando Principles to adopt a uniform period of prescription (three years) for all claims, contractual or non-contractual.<sup>49</sup>

The second and in my view preferable solution would be simply to take advantage of the degree of flexibility inherent in the rule adopted by the Italian legislator when he adopted the 'day of the fact' as the starting day of the prescription period.<sup>50</sup> In other contexts, most notably in cases of latent damage to health, the *Corte di Cassazione* admitted that the 'day of the fact' could be interpreted, by forcing a little the letter of the law, as the day the victim acquired knowledge of certain facts, such as the existence of the harm itself and that the harm was caused by a certain cause and that it could be claimed in court.<sup>51</sup> The goal of the Italian Supreme Court was clearly to overcome the rigour of the rule concerning the commencement of prescription in contexts where its effects would have been too harsh on the victims. It should be recalled now that also harm caused by an agreement or concerted practice in restraint of competition is latent, in the sense that the victim is not able to perceive it as such until certain information is made public.<sup>52</sup> Not surprisingly, in a very recent case the *Corte di Cassazione* admitted that claims for damages caused by infringements of the Italian antitrust law are subject to a prescription period of five years running from the day the agreement or concerted practice has been discovered and not from the day it has been adopted.<sup>53</sup>

49 Cf Art 14:201 PECL, *Comment A* and Zimmermann, n 35 above, 79 ff.

50 Cf Rosselli / Vitucci, n 40 above, 495 ff.

51 Most recently among the may cf Cass 21 February 2003 n 2645 (2003) VIII *Danno e responsabilità* 845.

52 Cf Bulst, n 29 above, 728.

53 Cass 2 February 2007 n 2305 (still unpublished).