ITALY

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I. Introduction

Italy adopted its competition law at the end of 1990 (Law 10 October 1990 No. 287 - "*Norme per la tutela della concorrenza e del mercato*" (hereafter "Law 287/90"). The Italian legislator notably (i) provided for the institution of the national competition authority, *Autorità Garante della Concorrenza e del Mercato* ("AGCM")[1]; (ii) set forth two provisions (namely Articles 2 and 3) which are the equivalent of Articles 81 and 82 EC; (iii) chose to split the task of dealing with competition matters between the civil judicial authority and the administrative authority depending on the (private or public) nature of the interests to be protected and (iv) as for private enforcement of national rules only, decided to grant directly to the ordinary second instance court (i.e. the *Corte d'Appello* territorially competent) exclusive jurisdiction on actions for nullity and damages for breach of national competition rules as well as for actions aimed at obtaining *interim* measures (Article 33.2).

Prior to the enactment of Law 287/90, Articles 81.1 and 82 were directly applied by national courts. Anti-competitive acts and conducts were examined under the general provisions prohibiting unfair competition provided for by Article 2598 and ff. of the Civil Code.

Even after the enactment of Law 287/90 and, in particular of Article 33.2, the following categories of disputes continued (and still continue) to be dealt with by the courts in accordance with ordinary general rules. These are: (i) disputes arising from breach of EC competition rules; (ii) disputes arising from the provisions of the Civil Code in general and of Article 2598 and ff. in particular; (iii) disputes arising from violations of matters related to competition issues falling within the scope of Law 287/90 but governed by *ad hoc* legislation.

Except for the exclusive jurisdiction of the *Corte d'Appello* provided for by Article 33.2, damages actions for breach of competition rules are governed by the general substantive and procedural principles established by the Civil Code and the Code of Civil Procedure.

As far as we are aware[2], as of today there are no examples in national case law of successful claims for damages for breach of Articles 81 and 82 EC. We are aware of one unsuccessful action where damages were claimed for breach of Article 82 EC. There have been a number of cases in which the nullity deriving from the infringement of Article 81 EC was claimed by the defendant in actions brought for the performance of a contract and was used as a shield to rebut the plaintiff's claims to contract performance.

We are aware of only three examples of successful damages actions brought for breach of national competition rules, pursuant to Article 33.2 of Law 287/90. The first decision of Italian courts which awarded damages to the claimant pursuant to Article 33.2 was issued on 18 July 1995/24 December 1996 (the first date relates to the partial judgment of condemnation to undetermined damages and the second date to the final judgment which

1 According to Article 20 of Law 287/90, the *Banca d'Italia (*Bank of Italy) acts as competition authority, vested with all the powers set out in the same Law 287/90, when the banking market is concerned. Considerable debate exists in Italy at Parliament and doctrine level on the elimination altogether of this exception from Law 287/90.

2 All the information contained in this report on existing case law is based on internal searches only. Court decisions, although published by way of deposit with the court's chancellery, are not readily available. Access is facilitated when courts' decisions are published in law journals and reviews or referred to in search-tools (available on the web or CD roms): however, this is normally the case only for some most significant decisions selected by scholars and in general for the decisions of the *Corte di Cassazione*. No central database listing courts' decisions exists in Italy.

awarded damages), the second one was delivered on 20 January 2003 (in actual facts the court of Roma delivered three twin judgments on the same day and grounds in favour of three different plaintiffs and against the same defendant so that they will be considered as a single one for the purposes of this report – see section V) and the third decision was delivered on 11 July 2003. The first two cases were decided after that the AGCM had found undertakings concerned to be in breach of Article 3 of Law 287/90 (i.e. abuse of dominant position), whilst the third decision related to a cartel case which was not investigated by the AGCM.

There have been other unsuccessful actions brought pursuant to Article 33.2 of Law 287/90, some of which cast light on the interpretation of Law 287/90. Two were brought (again for alleged abuse of dominant position) before the *Corte d'Appello* of Torino and were decided on 6 July 2000 and on 7 August 2001, respectively. The third one was brought before the *Tribunale* of Cagliari and decided on 23 January 1999 (again for abuse of dominant position). A fourth case was brought before the *Corte d'Appello* of Milano in connection with a cartel case and was decided on 22 March 2000. All these four cases were brought independently from the existence of the AGCM's proceedings. All the aforesaid actions involved undertakings.

There are also a significant number of *interim* proceedings started on the basis of Articles 2 and 3 of Law 287/90. Most of them, however, were unsuccessful or in any event did not go beyond the *interim* phase.

The reason of the failure of the proceedings brought (both in the *interim* and in the ordinary phase) mainly lies in the failure of the plaintiff to discharge the burden of proving the infringement.

A significant number of claims for damages have been successfully brought before the lower court (*Giudice di Pace*) by policy-holders against insurance companies which had been found guilty of breach of national competition rules by the AGCM. Such claims have triggered a restrictive interpretation of Article 33.2 of Law 287/90 by the supreme court (*Corte di Cassazione)* and have given rise, *inter alia*, to an amendment of the procedural law and to a lively debate on private enforcement of national competition rules by consumers.

II. Actions for damages – status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

Damages actions for breach of competition rules are governed by the general rules of the Civil Code on tort liability and (to a certain extent) on contractual liability and of the Code of Civil Procedure[3], as specified below. In this report, reference will be made to these general rules, unless otherwise specified.

According to the prevailing doctrine and to settled case-law, the liability deriving from a breach of competition rules is primarily tortious in nature (see in this connection also point D(i) below and footnote 33). Therefore, the general provision which any person may rely upon as the basis of the claim for injury suffered from breach of either national or EC competition law is article 2043 of the Civil Code regarding tort liability. Article 2043 reads as follows (in Italian and in English):

3 It should be noted that on 24 October 2003, the Italian Government approved a bill of law for the Parliament to empower the same Government with the legislative authority to enact an extensive reform of the Code of Civil Procedure (*Disegno di Legge recante delega al Governo per l'attuazione di modifiche al codice di procedura civile*). A parliamentary restricted committee worked for the joining of the governmental bill of law with five other bills of law, submitted by Members of Parliament individually, for the reform of the Code of Civil Procedure. A unified text of reform was approved by the restricted committee on 7 July 2004 (hereinafter the "Procedural Reform"). The proposed bill of law is of course subject to further amendments. Some of the procedural aspects expounded in this report might be affected by the Procedural Reform. Where appropriate, the prospective changes to the civil procedure will therefore be highlighted in subsequent footnotes.

Article 2043 Civil Code

"Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno"

"*Any act committed either with intent or with fault causing an unjustified injury to another person obliges the person who has committed the act to compensate damages*"

As far as contractual liability is concerned, the contract itself constitutes the legal basis for bringing an action for damages. As a matter of fact, according to Article 1372 of the Civil Code, "*il contratto ha forza di legge tra le parti*" (in English "*the contract has the effect of law as between the parties*").

Both in tort and in contractual liability based damages claims, monetary compensation of damages is available pursuant to Article 1223 of the Civil Code. Please see in this connection points D(i) and G(a)(i).

In addition to the general applicable rules, Article 33.2 of Law 287/90[4] (see also following section) explicitly provides for a legal basis for actions for nullity and for damages with exclusive reference to breach of national competition rules (i.e. Articles 2 and 3 of Law 287/90 which are the equivalent of Articles 81 and 82 EC). Indeed, according to Article 1.1 of Law 287/90, the scope of this law is limited to those violations of competition provisions "*which do not fall within the scope of Articles 81 and 82 of the EC Treaty, of equivalent provisions of ECSC Treaty, of EC Regulations and of any Community deeds having equivalent legal effects*". Article 33.2 of Law 287/90 reads as follows (in Italian and in English):

Article 33.2 Law 287/90

"*Le azioni di nullità e di risarcimento del danno, nonché i ricorsi intesi ad ottenere provvedimenti d'urgenza in relazione alla violazione delle disposizioni di cui ai titoli dal I al IV sono promossi davanti alla Corte d'Appello competente per territorio*"

"*Actions for nullity and for damages as well as actions for obtaining interim relief in connection with violation of the provisions set forth in Titles from I to IV are brought before the Corte d'Appello having territorial jurisdiction*"

Damages actions for breach of EC competition rules are based on the principle of direct applicability by Italian courts of Articles 81.1 and 82 of the EC Treaty and, like damages actions for breach of national competition law, are considered to give rise to tort liability (pursuant to Article 2043 of the Civil Code)[5].

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

According to the general provisions of the Code of Civil Procedure, the structure of the Italian civil court system is the following.

Civil proceedings may be brought before the "*Giudice di Pace*" or the "*Tribunale*" that, based on their respective jurisdiction to be determined by the value of the claim, decide in first instance.

The first instance decisions issued by the *Giudice di Pace* may be appealed before the *Tribunale* whilst those issued by the *Tribunale* may be appealed before the "*Corte d'Appello*". Specific exceptions to the right to appeal are provided for by

4 Article 33.2 of Law 287/90 is regarded by some authors as establishing a rule of jurisdiction, rather than a substantive basis for bringing competition based damages actions. This substantive basis can already be found primarily in the general rules of the Civil Code on tort and contract liability.

5 See Libertini, M., *Il ruolo del giudice nell'applicazione delle norme antitrust* (1998), Giurisprudenza Commerciale I, 677; Tavassi, M. – Scuffi, M., *Diritto processuale antitrust (*Giuffrè *1998).*

Article 339 of the Code of Civil Procedure. For example, judgments decided in equity (including those delivered by the *Giudice di Pace*) may be appealed only before the *Corte di Cassazione*.

The "*Corte di Cassazione*" is the supreme court of appeal in respect of judgments of the *Corte d'Appello* and of the *Tribunale* when this latter acts as a second instance court. In principle, the *Corte di Cassazione* has no jurisdiction on the merits of the case but only on matters of law ("*questioni di legittimità*") such as those concerning *errores in procedendo* or *errores in judicando.*
Matters of major importance and some other issues specifically provided for by the Code of Civil Procedure are decided by the *Sezioni Unite* of the *Corte di Cassazione* which is a special division where judges (nine instead of five) from the other court's divisions sit jointly.

Pursuant to Articles 7 and 9 of the Code of Civil Procedure, the respective jurisdiction of the *Giudice di Pace* and of the *Tribunale* is determined on the basis of the value of the claim. In particular, for the purpose of this report[6], it should be noted that the *Giudice di Pace* has jurisdiction for claims with a value not exceeding ε2,582.28[7]. If however the value of the claim does not exceed ε 1,100, the *Giudice di Pace* shall decide the case on an equitable basis ("*secondo equità*"), as provided under Article 113 of the Code of Civil Procedure. The scope of the *Giudice di Pace's* authority to decide in equity has been substantially limited and redefined by the judgment of the *Corte Costituzionale* no. 206 of 5 July 2004[8].

Indeed, as a consequence of an amendment of Article 113 of the Code of Civil Procedure enacted by Law Decree 8 February 2003 No. 18, subsequently converted into Law No. 63 of 7 April 2003 (before this amendment the threshold for the judge to decide in equity was set at 1,032.91), the *Giudice di Pace* may decide - on an equitable basis – claims not exceeding ε 1,100 provided that they do not relate to contracts governed by uniform standard terms and conditions (so-called "consumer contracts"- for further comments on this amendment to Article 113 of the Code of Civil Procedure, please also refer to relevant paragraph hereinbelow). Any other claim of a value higher than ε 2,582.28, or the value of which is not determined,must be brought before the *Tribunale*[9].

All the above general provisions of the Code of Civil Procedure on jurisdiction also apply in case of damages actions for breach of competition rules, except for what is

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6 Indeed, in relation to certain causes of action listed in the procedural law, none of which is relevant to competition based claims, the *Giudice di Pace* has also jurisdiction for claims not exceeding ε 15,493.70 or without limits.

7 The Procedural Reform provides that the value of the claim for which the *Giudice di Pace* will have general jurisdiction should be raised up to ε 7,500.

8 Indeed, the "equitable basis" provision of Article 113 of the Code of Civil Procedure has so far been interpreted by the case-law (*Corte di Cassazione Sezioni Unite* judgment of 15 October 1999, no. 716) so as to substantially authorise the judge to base the decision on an "intuitive" type of reasoning. In particular, the *Giudice di Pace,* as an exception to the ordinary applicable rule, was allowed to decide the case without being bound either by the specific provisions of ordinary law applicable to the case or by the general principles embedded in such provisions or even by the general principles of the legal system. The judge instead would find himself the best rule applicable to the specific case at hand, by applying the so-called "*giustizia del caso concreto*". In other terms, the judge was authorised to intuitively find himself the most suitable solution of the concrete case by using what is called the "*equità formativa*" ("forming equity"). According to this interpretation, the only limit applicable to the equitable judgment would be that the decision should not run counter the Constitutional and EC law principles, which prevail over the ordinary law provisions. Contrary to the (so far) settled interpretation of the "equitable" criterion set out in Article 113 of the Code of Civil Procedure, the *Corte Costituzionale* in its judgment of 5 July 2004 stated that the concept of equity, if construed (again based on the current case-law interpretation) "*…as a source* [for the judgment] *autonomous and alternative to the law, would inevitably run counter to the* [constitutional] *principles…*". The *Corte Costituzionale* then goes on stating that *"In a system characterised by the principle of legality…, in which the law is the main instrument of realisation of the constitutional principles, the only function that the equitable judgment may be attributed is that of identifying, with reference to the concrete case, the possible unwritten rule of judgment allowing for a solution of the controversy fitter to the specific characteristics of the case, provided that the same general principles embedded in the applicable written law be respected…*".Cases decided on an equitable basis by the *Giudice di Pace* may not be appealed before the second instance court but only before the *Corte di Cassazione* and exclusively on limited grounds (violation of the Constitutional and general principles of the Italian legal system).

9 Under the Italian procedural law, competent courts may in general be identified on the basis of three features of the action brought: the type of claim (*competenza per materia*), the value of the claim (*competenza per valore*) and certain territorial links (*competenza per territorio*). Except for the provision of Article 33.2 of Law 287/90, in the restrictive interpretation currently given by the *Corte di Cassazione* (please see above the main text of the report), the law does not identify any specific court as having jurisdiction on damages actions for breach of competition rules. Therefore in this type of actions the value of the claim is the principal criterion on the basis of which the competent court (i.e. either the *Giudice di Pace* or the *Tribunale*) should be identified.

specifically set forth under Article 33.2 of Law 287/90. This Article provides that the *Corte d'Appello* has jurisdiction for actions of nullity, actions aimed at obtaining *interim* relief and claims for damages arising out breach of national competition rules. Pursuant to Article 33.2 of Law 287/90, the *Corte d'Appello* - territorially competent – decides on matters of breach of national competition rules as court of first instance[10]. Since its decisions may be challenged only before the *Corte di Cassazione*, this constitutes an exception to the ordinary rule which provides that the *Corte d'Appello* acts as second instance court[11]. The competence of the *Corte d'Appello* is strictly limited to breach of provisions provided for by Law 287/90. Therefore the *Corte d'Appello* does not have jurisdiction, under Article 33.2 of Law 287/90, on those matters which may be related to competition matters governed by Law 287/90, such as unfair competition, or other matters, such as intellectual property, telecommunications and sub-contracting, governed by *ad hoc* legislation.

This being the only exception (strictly limited to violations of national competition rules provided for by Law 287/90) with reference to general rules on jurisdiction, the *Giudice di Pace* and the *Tribunale* have jurisdiction - as first instance courts - on damages actions for breach of EC competition rules, according to general applicable rules of the Code of Civil Procedure (see also footnote 9).

Moreover, the specific *Corte d'Appello* or the specific *Giudice di Pace* or *Tribunale* having jurisdiction for damages actions based on the above rules are identified on the basis of certain territorial criteria set out in Articles 18 to 36 of the Code of Civil Procedure (see also point C(ii)).

On the basis of the recent developments of the case law it may be noted in particular that - notwithstanding the limited value of claims that can be brought before the *Giudice di Pace* - his role has recently proven important in the private enforcement by consumers of national competition rules.

In particular, by judgment dated 9 December 2002 No. 17475[12], the *Corte di Cassazione,* basing itself on a strict interpretation of Article 33.2 of Law 287/90, *de facto* denied the standing of consumers in respect of damages actions for breach of national competition rules pursuant to Article 33.2 of Law 287/90. According to the *Corte di Cassazione*, under said Article 33.2 the *Corte d'Appello* would have exclusive jurisdiction for damages actions for breach of national competition rules as long as such actions are brought by and between undertakings and not by consumers. The *Corte di Cassazione* however also affirmed that such (restrictive) interpretation of Article 33.2 does not imply that the way to consumers damages actions deriving from an upstream restrictive agreement between undertakings is barred. In this respect the court stated that individuals may still bring damages actions related to a breach of national competition rules on general (tort) rules to the extent that they prove that a given right of theirs, other than those protected by Law 287/90 which relates to undertakings' rights, was harmed (see section V for a summary of the decision). These actions to be brought before the courts which would be competent by virtue of the value of the claim and territorial criteria, according to the ordinary rules of the Code of Civil Procedure (i.e. the *Giudice di Pace* or the *Tribunale*)[13].

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10 As pointed out by Tesauro, G., (*Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues* (2001) European Competition Law Annual 267) "*The legislature has conferred the private enforcement of competition rules on Courts of Appeals in recognition of the fact that a higher court is better placed to deal with disputes involving complex economic assessments. This choice also reflects an effort to avoid judicial fragmentation and to secure uniformity and specialisation, through the appointment of a small number of courts with a regional jurisdiction*". Currently in Italy there are 26 *Corti d'Appello* distributed among the 20 Regions (a few bigger Regions have more than one *Corte d'Appello*) in which the territory of Italy is divided for administrative purposes.

11 The jurisdiction of the *Corte d'Appello* as court of first instance has given rise to challenges of Article 33.2 before the *Corte Costituzionale* for alleged violation of some constitutional principles with specific reference to the exception to the principle of double level of jurisdiction; such challenges were all unsuccessful: see in this respect, Tavassi, M. – Scuffi, M., *Diritto Processuale Antitrust*, (Giuffrè 1998), 185-187.

12 *Corte di Cassazione*, judgement of 9 December 2002, No. 17475, Axa Assicurazioni c. Isvap e Camillo Larato.

13 This judgment of the *Corte di Cassazione* has been criticised by most of authors (see, amongst others, Bastianon, S., *Antitrust e tutela civilistica*: *anno zero* (2003) 4 Danno e Responsabilità at 393- 398; Colangelo, G., *Intese restrittive e legittimazione dei consumatori finali ex art. 33 legge antitrust* (2003) 2 Il Diritto Industriale at 172-177; Colangelo, G., *Intese restrittive della concorrenza e legittimazione ad agire del consumatore* (2003) 12 Danno e Responsabilità at 1181-1184; Finocchiaro, M., *Solo con la questione di legittimità costituzionale si può contestare la strada scelta dal legislatore*, in Guida al Diritto, 8 February 2003, 73 and ff.; Palmieri, A., *Intese restrittive della concorrenza e azione risarcitoria del consumatore finale: argomentazioni "extravagantes" per un illecito inconsistente*, Foro Italiano, 2003, I, 1122 and ff; Pardolesi, R., *Cartello e contratti dei consumatori: da Leibniz a*

This judgment of the *Corte di Cassazione* originated from one of the numerous successful actions for damages brought all over Italy before the territorially competent *Giudice di Pace* by policy-holders against their respective insurance companies to claim repayment of a 20 per cent overcharge. These actions were brought as a consequence of the AGCM's decision No. 8546 of 28 July 2000[14], which found that 39 insurance companies had breached article 2 of Law 287/90 thereby causing an average increase of premiums equal to 20 per cent for third party liability car insurance. Most of the *Giudici di Pace* awarded damages to the plaintiffs to a value of 20 per cent of the premiums paid. Such decisions were in many instances justified on the basis of Article 113 of the Code of Civil Procedure which, as aforesaid, provided that the *Giudice di Pace* would decide - on an equitable basis - claims not exceeding ε 1,032.91 (now ε 1,100).

It should be noted that the interpretation of Article 33.2 given by the *Corte di Cassazione* with its judgment No. 17475/02 might, as mentioned, be superseded by the *Sezioni Unite* of the *Corte di Cassazione* (please refer to last paragraph of footnote 13). Moreover the same decision was subsequently disregarded by a *Giudice di Pace*, again in the context of an action brought before himself by a policy holder as a consequence of the cartel in the car insurance market sanctioned by the AGCM. On such occasion, the *Giudice di Pace* denied his jurisdiction to decide on the damage action brought, which, according to the judge, would instead be for the competent *Corte d'Appello* to handle pursuant to Article 33.2 of Law 287/90[15].

As a direct consequence of the numerous successful actions brought before the *Giudice di Pace,* the Government adopted on 8 February 2003 an emergency decree (i.e. Law Decree 8 February 2003 No. 18 "*Disposizioni urgenti in materia di giudizio necessario secondo equità*", then converted into Law No. 63 of 7 April 2003,) which amended Article 113 of the Code of Civil Procedure. In particular, this law decree amended Article 113 by enjoining the *Giudice di Pace* from deciding in equity claims whenever they relate to consumer contracts, amongst which third party liability car insurance contracts are to be included.

Article 113 of the Code of Civil Procedure, as amended by the aforesaid law decree (as converted into Law No. 63 of 7 April 2003), has been challenged by some *Giudici di Pace*[16] before the *Corte Costituzionale* contending that the decree conflicts with several constitutional principles. As pointed out above (please refer to point B(i)) the first decision on the legality of Article 113 of the Code of Civil Procedure was issued by the *Corte Costituzionale* on 5 July 2004.By this decision the *Corte Costituzionale*, on the one hand, redefined, as aforesaid, the equitable

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Sansone? (2004) Foro it. at 469-475; Giudici, P., *Private Antitrust Law Enforcement in Italy* forthcoming (2004) 1(1) Comp L Rev at www.clasf.org/CompLRev who also provides a description of the background of the car insurance case. This author has in particular underlined that denying standing to consumers under Article 33(2) of Law 287/90 would probably violate the EC Treaty as interpreted by the Court of Justice in the *Courage* case and that "*if consumers are denied standing in antitrust litigation, the whole concept of private parties as private general attorneys acting in support of the public interest can be forgotten in Italy*" (at 20)).
To our knowledge, the only scholar to have praised the Corte di Cassazione's judgment is Castronovo, C. (*Antitrust e abuso di responsabilità civile* (2004) 5 Danno e responsabilità 469). In brief, this author observes that *de iure condito* competition law does not recognise a right to damages to consumers who have (either directly or indirectly) been harmed by the undertakings' breach of Law 287/90. In particular, consumers could not take action in tort. The remedy available to consumers would only be the partial nullity of the contract entered into with the undertakings (or the middleman), i.e. the nullity of the clause affected by the restriction of competion with the ensuing restitution of any extracharge paid.
In connection with the above, it should be noted that on 17 October 2003, by way of order No. 15538, a division (other than that which decided on 9 December 2002) of the *Corte di Cassazione* before which a judgment of the *Giudice di Pace* (ruling on a similar subject matter as that decided on 9 December 2002) was appealed, referred the case to the President of the *Corte di Cassazione*, as a matter of high importance due to the implications deriving from the solution on competent jurisdiction and thus on the scope of actions pursuant to article 33.2 of Law 287/90, so that the President may decide on the advisability to refer said case to the decision of the *Sezioni Unite*. Therefore, a judgment of the highest judicial authority is awaited in Italy on a crucial aspect of antitrust private enforcement.

14 The AGCM's decision was then confirmed both by the competent administrative court of appeal (*TAR Lazio*) on 5 July 2001 and by the supreme administrative court (*Consiglio di Stato*) on 23 April 2002.

15 See *Giudice di Pace* di Albano Laziale, judgment of 10 September 2003, in *Foro It.* I (2004) at 481-486.

16 Moreover, it should be noted that the *Giudice di Pace di Bitonto* referred to the Court of Justice of the European Communities all cases pending before him as a consequence of the above mentioned actions brought by policy-holders against their respective insurance companies for preliminary ruling on several issues of interpretation of EC law including – amongst others – whether Article 33.2 were in contrast with EC competition rules (joint cases C-438/03, C-439/03, C-509/03 and C-2/04). The Court of Justice by order of 11 February 2004 declared these preliminary references as inadmissible under EC law.

criterion by limiting the judge's discretion: even when deciding in equity the judge should now refer to the general principles of law applicable to the matter; on the other hand, the *Corte Costituzionale* rejected as inadmissible the issue of the legality of the new provision of Article 113 of the Code of Civil Procedure, which prohibits the judge to decide in equity claims relating to consumers contracts.

It should finally be pointed out that an author has indicated how the intricate situation of courts having jurisdictions on damages actions for breach of competition rules could be made worse having regard to the exclusive jurisdiction of administrative tribunals ("TAR") in the field of public services litigation, pursuant to Article 33 of Legislative Decree 80/1998[17]. According to this position, damages actions for breach of competition rules in the public services sector could be brought before the competent administrative tribunal and not before the ordinary courts. It should however be noted that we are not aware of court precedents in this respect.

Please also refer to the following paragraph as to the possibility that in the near future the situation of courts with jurisdiction on damages actions for breach of competition rules be rendered more complex in the field of intellectual property rights related litigation.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no special or specialised courts for bringing damages actions for breach of competition rules. The institution of special courts is indeed prohibited under Article 102.2 of the Constitution. This provision, however, allows for specialised divisions of ordinary courts.

A doctrinal debate exists in favour of specialised divisions for competition based damages actions. The argument in favour of the setting up of specialised divisions lies in the technical expertise expected from judges to handle cases on breaches of competition rules. This argument is proposed by analogy with the Legislative Decree 168/2003 reforming the Italian judicial system governing the enforcement of intellectual property rights which has identified specialised divisions of Italian courts as having exclusive jurisdiction on such subject matters[18].

Recently the *Ministero delle Attività Produttive* (Ministry of Productive Activities) was submitted a draft of a consolidated text of rules governing certain intellectual property rights (*Codice dei diritti di proprietà industriale*). This text includes a provision (Article 142), pursuant to which the specialised divisions of Italian courts having exclusive jurisdiction on intellectual property rights would also have exclusive jurisdiction on those cases of violation of national competition rules related to the exercise of intellectual property rights. The same Article 142 of the draft text also provides that cases assigned to the specialised divisions for intellectual property rights shall be handled according to the special procedure, which differes from the ordinary one in many respects, applicable to litigation in corporate matters (so called "*contenzioso societario*")[19]. This Article 142 also provides that three judges should sit in these divisions for the relevant decision.

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17 See Scuffi, M., *Orientamenti consolidati e nuove prospettive nella giurisprudenza italiana antitrust* (2003) 4 Rivista Diritto Industriale 99.

18 See Scuffi, M., *I Riflessi ordinamentali ed organizzativi del Regolamento Comunitario* n. 1/2003 sulla concorrenza, in Corriere Giuridico, 1, 2004, 123-134.

19 It is worthwhile stressing that the envisaged reform, if passed into law, would render the situation of the courts having jurisdiction on competition law matters even more fragmented than it is. As a matter of fact, pursuant to the wording of Article 142, as proposed, the existing specialised divisions for intellectual property litigation would be vested with exclusive jurisdiction to decide on cases of breach of competition law related to the exercise of intellectual property rights only to the extent that the competition law of which violation is alleged is the national one. This appears to imply that if instead a violation of EC competition law is at stake, then the ordinary courts would in any event be competent, regardless of whether the competition law issue is related or not to an intellectual property issue. As a result, and bearing in mind the pending issue of consumers' standing reported in the main text, Italy could turn out to have three different "fora" with jurisdiction on competition law related damages claims with an increased uncertainty. In particular, the following courts could have jurisdiction: (i) the *Corte d'Appello* for claims based on a violation of national competition rules if brought by and between undertakings, (ii) the IP rights specialised divisions if a breach of national competition law is claimed and such breach is related to the exercise of IP rights (here again the issue of the standing of consumers before such specialised divisions could be an issue) and, (iii) the ordinary first instance courts (*Tribunale* or *Giudice di Pace*) for claims based on national competion

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions?

In general terms, any natural or legal person allegedly injured by an unlawful act/conduct of a third party is entitled to claim damages. The main procedural pre-requisite is that the person bringing the action can show an interest (*interesse ad agire*), as provided under Article 100 of the Code of Civil Procedure, which reads as follows (in Italian and in English):

Article 100 Code of Civil Procedure

"*Per proporre una domanda o per contraddire alla stessa è necessario avervi interesse*"

"*In order to bring an action or to resist the same it is necessary to have an interest in it*"

The *interesse ad agire* is mainly a formal feature of the action, according to which the plaintiff is required to state in court the facts giving rise to his right together with the facts which would encroach upon such right[20]. This principle can also be summarised as the duty for the plaintiff to allege in full his claims. Standing is granted once this duty is fulfilled. On the other hand, standing is not dependent upon the plaintiff substantiating his claim. Lack of evidence would only be relevant for the decision on the merits of the case (i.e. to either reject or uphold the claim).

No specific reference to identification of (natural or legal) persons having title to claim damages for breach of national competition rules is provided for by Article 33.2 of Law 287/90.

As stated above, however, the judgment of the *Corte di Cassazione* of 9 December 2002 has *de facto* denied the standing of individual consumers to bring actions for nullity of contracts and for relevant damages before the Court of Appeal pursuant to Article 33.2 of Law 287/90[21]. As aforesaid, the prevailing doctrine has criticised this decision.

The issue of standing of individual consumers pursuant to Article 33.2 of Law 287/90 is still open due to the recent order of the *Corte di Cassazione* dated 17 October 2003, No. 15538[22].

(ii) What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

With reference to the external aspect of jurisdiction (conflict of law rules), as far as conflicts between Italy and non EU member States are concerned, jurisdiction is established pursuant to Law No. 218/1995 (setting out the Italian conflict of law rules). In essence, this law provides for the applicability of the connecting factors set out in the Brussels Convention of 1968 to conflict of jurisdiction issues arising

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rules (if brought by consumers) or on EC competition law (in any event and regardless of the identity of the claimant and of whether there is also an IP right issue).

20 For example, an action of a merely declaratory nature would not validly be brought if the plaintiff limits himself to stating his right and does not also recite the facts, as may be imputed to the defendant, which would challenge his right. Likewise, in a competion based damages action, it would be necessary for the plaintiff to affirm how his rights were possibly violated by the anti-competitive conduct of the defendant.

21 In a similar way, the *Corte di Cassazione* decided *incidenter tantum* with a judgment dated 4 March 1999 No. 1811 with reference to (former) articles 85 and 86 of the EC Treaty. In particular, the *Corte di Cassazione* stated that " *Articles 85 and 86 of the EC Treaty are aimed at protecting free competition among undertakings…The direct addressees of said provisions are undertakings, which are entitled to avail themselves of those provisions in order to achieve the effective freedom of competition: the individual end consumer could only de facto, in an indirect way, take advantage of the general benefits of free competition, whilst he may not be deemed to be directly vested with the standing to claim in court alleged violations* [of competition law] *put into effect by an undertaking or by a group of undertakings*".

22 See footnote 13, last paragraph.

between Italy and non-member States, both in relation to contractual and tort liability based actions[23].

Conflicts of jurisdiction arising between Italy and other EU member States are governed by Regulation 44/2001, directly applicable in Italy without the need for intervening national legislation.

As to the internal aspect of jurisdiction (i.e. jurisdiction within Italy), the criteria for identifying the competent court within Italy are provided for by Articles 18-36 of the Code of Civil Procedure. In broad terms, the main connecting factors identified therein refer to: i) the residence or domicile of the defendant; ii) the place where the obligation object of the dispute arose or is to be fulfilled; iii) the sit of the court as identified in the contract. These rules are, of course, subject to a number of exceptions, including one applicable for the event that a State administration is a party to the proceedings: in this case the competent court is identified having regard to location of the State legal counsel (*Avvocatura dello Stato*) offices nearest to the court which would be competent under the general rules.

(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

In Italy there is no general provision of law allowing for collective claims and class actions. This is subject to the following remarks and is likely to be repealed by a new provision of law in the near future. In particular, the following should be noted.

Under limited circumstances, representative organisations and public bodies have standing to request cease-and-desist orders and – according to the prevailing case law - to claim damages vis-à-vis acts of unfair competition. These organisations and bodies are: professional associations (i.e. associations representative of undertakings) pursuant to Article 2601 of the Civil Code and the chambers of commerce pursuant to Article 2.5 of Law No 580/1993.

In addition, as a result of the implementation of EC Directive 93/13 on unfair terms in consumer contracts through Law No. 52/1996, a new set of provisions was introduced in the Civil Code on unfair terms in consumer contracts. One of these provisions is Article 1469-sexies of the Civil Code on remedies available with respect to unfair terms in consumer contracts, which, in particular, provides that associations of consumers and of professionals as well as the chambers of commerce may take action against sellers or suppliers or their associations recommending the use of such unfair terms. These actions are limited to orders restraining the use of same contractual terms, whilst damages may not be claimed.

After that Article 1469-sexies of the Civil Code was introduced by Law No. 52/1996 (which, as aforesaid, implemented EC Directive 93/13) the Parliament enacted Law No. 281/1998, which provides for the general principles on rights of consumers. Scholars deem that this Law No. 281/1998 has substantially supplemented the existing provisions of the Civil Code introduced by Law No. 52/1996, including Article 1469-sexies[24]. To this effect, the same doctrine deems that the associations of consumers to which Article 1469-sexies of the Civil Code refers are those associations that qualify under Law No. 281/1998.

Article 3 of Law No. 281/1998 entitles certain consumers associations, as may be identified under same law (please see hereinbelow), to take action to protect consumers' collective interests within the limits of the rights specifically recognised to consumers under Article 2 of same Law No. 281/1998 (i.e. right to health protection, to safety and quality of goods and services enhancement, to be kept informed and to receive fair advertising, to receive proper education as consumers, to enter into fair and transparent contractual relationships, to have consumers'

23 Law 218/1995 also deals with the issue of applicable law. This law explicitly refers to the Rome Convention of 1980 for the determination of the law applicable to contractual obligations, whilst, as for non-contractual obligations, it refers to the law of the State where the infringement occurred or where damage occurred, unless the parties involved are all nationals and residents of the same State, in which case the common State's law will apply.

24 See Graziuso, E., *La tutela del consumatore contro le clausole abusive* (Giuffrè, 2002).

associations protected and improved and to have public services provided in accordance with satisfactory quality and efficiency) and within which the right to the protection of competition is not explicitly included. Under Law No. 281/1998, consumers associations have standing only to request cease-and-desist orders against conducts which may harm consumers interests (as identified above) and court orders that correct or eliminate the effects of such harmful conducts (including the publication of the court's decision in the press). Consumers associations are however not recognised standing to claim damages.

The consumers associations that qualify under the existing Law No. 281/1998 are those associations which are listed in a special register kept by the *Ministero delle Attività Produttive* provided that they: (i) have been formed by way of notarial deed and have been existing for at least three years; (ii) are organised on the basis of democratic rules and have as their exclusive purpose the protection of consumers, excluding any profit-making activity; (iii) keep a list of the associates, updated on a yearly basis, with the indication of contributions paid directly to the association for the purposes provided for by the by-laws; (iv) have a number of associates not below 0.5 per thousand of the national population and presence in the territory in at least five regions, with a number of associates not below 0.2 per thousand of the inhabitants of each region; (v) prepare an annual financial statement of income and expenditures with indication of the contributions paid by the associates; and (vi) keep accounting records, in compliance with the applicable accounting rules.

Moreover, it should be noted that Law No. 281/1998 has *de facto* implemented EC Directive 98/27 on consumer injunctions, although this latter has then been formally implemented by Legislative Decree of 23 April 2001 No. 224 (which substantially supplemented some provisions of same Law No. 281/1998).

A bill of law - headed "*Disposizioni per l'introduzione dell'azione di gruppo a tutela dei diritti dei consumatori e degli utenti*" (approved by the *Camera dei Deputati* on 21 July 2004 and now under the *Senato*'s examination as the result of the consolidation of two different bills of law respectively identified under No. C.3838 and No. C.3839) - is pending before Parliament to introduce by way of a general provision a sort of "class action". The draft bill proposes the introduction of an action (which the official report accompanying the bill expressly defines as "class action" using the English expression although such use is not technically appropriate because the action proposed in the bill of law differs from the US type class action – please also see hereinbelow) in favour of consumers, free of court fees. This new provision would be introduced by amending the current provision of Article 3 of Law No. 281/1998. In particular, consumers associations that qualify under the existing Law No 281/1998, together with professional and investors associations and the chambers of commerce, would have standing to bring actions in the interest of individual consumers, including actions for damages caused by a series of separate offences ("*illeciti plurioffensivi*" i.e mass torts)committed in the context of contractual relationships governed by standard terms and conditions under Article 1342 of the Civil Code. In this respect, the bill of law explicitly mentions contracts relating to consumer credit, banking and insurance contracts, financial instruments, investment and savings management services, as examples of contracts which would typically give rise to this type of claims, still provided that the violation of the rights of a plurality of consumers can be shown. Although not explicitly stated in the law, the proposed law on "class-actions" would appear to apply to consumers damages actions based on violations of competition rules, still provided that the claim relates to competion rules being allegedly breached in the context of contractual relationships governed by standard terms and conditions. Indeed, the *antitrust* offence is typically considered to give rise to "mass torts" ("*illecito plurioffensivo*" i.e. a tortious behaviour capable of injurying an undetermined number of individuals) of the type considered in the law. The qualification of the law appears to be aimed at limiting the standing of consumers association to claim damages: the standing of consumers association is acknowledged to the extent that the same tortious behaviour has injured the rights

of a plurality of consumers and end users and has been committed in the context of a contractual relationship governed by standard terms and conditions[25].

As aforesaid, it should be noted that this bill of law, although expressly presented by the Members of Parliament who proposed it as introducing a "class action", is only partially equivalent to the traditional "class actions" as existing in the common-law systems. The main difference lays in that the Italian "class action", as it is presently designed, would be split into two phases: i) the first phase, which may be brought only by consumer associations, would be aimed at obtaining a judgment which should decide on the existence of the damage and should identify the criteria that each consumer should meet to be entitled to the individual award of damages in the second phase; ii) the second phase (which should be preceded by a mandatory non contentious settlement procedure to be carried out by professional mediators) brought by individual consumers (presumably before the *Giudice di Pace*) to obtain a customised quantification of damages suffered, subject to the positive assessment by the second phase judge that the criteria identified in phase one are satisfied by the individual consumer[26].

This bill has been drafted as a reaction to the new text of Article 113 of the Code of Civil Procedure, as mentioned in point B(i).

On a more general basis, it should be noted that pursuant to Article 103 of the Code of Civil Procedure, it is possible for a plurality of persons to sue or to be sued in the same proceedings, provided however that the different claims brought are connected by their title or their object or that, in any event, the decision depends, either in whole or in part, on the solution of identical issues.

D. What are the procedural and substantive conditions to obtain damages?

When compensation of damages is sought in court, the plaintiff must prove:

- the existence of the damage (so called "*an debeatur*");
- the causal link between the defendant's conduct and the damage;
- the defendant's fault (which as stated in point D(iii) below need not be proven when the liability is contractual in nature);
- the amount of the damage suffered (so-called "*quantum debeatur*").

(i) What forms of compensation are available?

Pursuant to Article 1223 of the Civil Code, which is applicable both in tort and in contractual liability based damages claims, monetary compensation of damages is available. In particular, "*danno emergente*" ("actual damage") and "*lucro cessante*" ("lost profit") may be compensated pursuant to the provision of the aforesaid Article 1223 of the Civil Code. In this respect, please refer to point G.

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25 Although not explicitly spelt out in the bill of law, in essence the requirement in question appears to refer to the case where the injury caused by the tortuous behaviour, although affecting a plurality of individuals, is uniform in nature, so that each affected individual may claim damages for a portion of the same uniform injury. This would be the case of the damages actions started by policy-holders as a consequence of the AGCM's finding of a cartel in the car insurance sector.

26 Recently Consolo, C., (*Fra nuovi riti civili e riscoperta delle class actions, alla ricerca di una "giusta" efficienza,* (2004) 5 Corriere Giuridico 55,) has pointed out that the introduction of "class actions" in Italy would be beneficial to consumers as it could deter certain behaviours which can be of great harm to consumers (the author refers in particular to the recent default of big Italian companies which seriously harmed individuals that invested their savings in bonds and to the car insurance cases reported in the main text). This author however criticises the two-phase procedure envisaged in the pending bill of law on "class actions", as being an inefficient tool because before the individuals can institute the phase two proceedings for the customisation of damages, they should wait the (presumably very long) time necessary for the first phase judgment to become final (i.e. no longer subject to appeal). Another author (Fava, P. *L'importabilità delle class actions in Italia* (2004) 1 Contratto e Impresa 166) emphasises that the pending bill of law on "*class actions*" appears to limit the applicability of this tool to mass torts in so far as they derive from contracts governed by standard terms and conditions pursuant to Article 1342 of the Civil Code, with a gap of protection resulting for small claims not connected to such contracts. In this respect, consumers' small claims based on breaches of competition rules could fall outside the scope of the envisaged law on "class actions" when not related to contracts governed by standard terms and conditions. The same author further notes that the pending bill of law appears to introduce a sort of mandatory class action, which in his view could be corrected by introducing opt-in and opt-out mechanisms. These (and other) adjustments could in the author's view overcome the doubts expressed by other scholars as to the compatibility of the proposed class-action with the principles set out in Article 24 of the Constitution, which would prohibit the *ultra partes* effects of the judgment and would leave each individual at liberty to choose whether to take action or not (principle of availability of action).

As for other forms of compensation, it should be noted that doctrine and case law have dealt with the issue of whether pursuant to Article 33.2 of Law 287/90, the *Corte d'Appello* may impose, as an additional remedy to the monetary compensation of damages, final cease-and-desist orders, positive injunctions, or other remedies, in those cases where monetary compensation would be insufficient or inadequate a remedy. Such issue derives from the fact that there is no explicit provision of Law 287/90 authorising the *Corte d'Appello* to impose cease-and-desist orders, positive injunctions or other remedies in decisions relating to breach of national competition rules[27]. The power to impose restraining orders is expressly attributed by Article 15 of Law 287/90 only to the AGCM, which has been interpreted as an implicit exclusion of same power for the ordinary judicial authority. Some scholars however suggest to apply by analogy to actions for breach of competition rules Article 2599 of the Civil Code, which specifically provides that the judgment upholding claims for acts of unfair competition shall also impose cease-and-desist orders onto the party found in breach of rules on unfair competition[28].

Other (few) authors deem that cease-and-desist orders in relation to ascertained violations of competition rules are admissible on the basis of the general provision of Article 2058 of the Civil Code providing for specific redress in favour of the plaintiff in tort liability actions aimed at restoring the *status quo ante*[29]. Another part of the doctrine deems that in the silence of the law the *Corte d'Appello* may not impose cease-and-desist orders in the judgment[30].

The prevailing case law seems to follow this latter position, by denying the power of the *Corte d'Appello* to impose cease-and-desist orders in judgments delivered pursuant to Article 33.2[31].

Article 120 of the Code of Civil Procedure provides that "*Whenever the publication of the judgment may contribute to compensate the damage, the judge upon the party's motion may order that it be done at the losing party's cost by way of publication in one or more newspapers…*". This is a general rule providing for a specific form of compensation of damages in addition to monetary compensation, which is in principle applicable to damages actions for breach of competition rules. The courts' decision to order the judgment's publicity at the defendant's costs is essentially discretionary in nature. Usually the publication order of the decision pursuant to Article 120 of the Code of Civil Procedure is granted upon the judge having considered the gravity of the infringement and whether the infringement is still ongoing at the time judgment is delivered. For example, in the *Bluvacanze* v. *Ventaglio-Turisanda-Hotelplan* case, brought before the *Corte d'Appello* of Milano for breach of national competition rules pursuant to Article 33.2 of Law 287/1990 (judgment of 11 July 2003)[32], the court rejected the plaintiff's request for a publication order on the grounds that defendants resulted to have already brought the infringement to an end at the time of the judgment.

A minority part of the doctrine holds that the liability arising from the breach of competition rules would be, at least in certain instances, contractual in nature[33],

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27 As has been pointed out, article 33(2) was poorly drafted, due to the lack of any reference to restraining or positive injunctions and to restitution under unjustified enrichment rules (see Giudici, P., *supra* footnote 13).

28 See Nivarra, L., *La tutela civile: profili sostanziali*, in Diritto Italiano antitrust. Commento alla legge 10 ottobre 1990, n. 297, a cura di Frignani, A., Pardolesi R., Patroni-Griffi, A., Ubertazzi, L.C., II, Zanichelli, 1993).

29 See Libertini, M., *Nuove riflessioni in tema di tutela civile inibitoria e di risarcimento del danno*, in Riv. Crit. e Dir. Priv. 1995, 385; Libertini, M., *Il ruolo del giudice nell'applicazione delle norme antitrust*, in Giurisprudenza Commerciale, 1998, I, 665; Scuffi, M., *L'evoluzione del diritto antitrust nella giurisprudenza italiana*, in Antitrust fra diritto nazionale e diritto comunitario (Giuffrè-Bruylant 1998) 51.

30 Tavassi, M., Scuffi, M. *Diritto Processuale Antitrust* (Giuffrè, 1998), 286; Valdina, *Prime osservazioni sulla tutela cautelare antitrust*, in Foro it., 1993, I, 3380.

31 See Caputi, G., *Il Diritto Privato e le Regole antitrust, un rapporto ancora problematico*, in (2002) 10 Diritto e Formazione.

32 In Foro it. (2004) I 597 and Il diritto industriale n. 2/2004.

33 As reported under point A(i) in the main text, the large majority of scholars and the settled case-law qualify as tortious the liability deriving from a breach of competition rules. It has been held that this would be the case even when the source of the damage for the plaintiff is a contract entered into with the undertaking in breach of competition rules. An author has convincingly stated that "*The fact that, in the period during which the unlawful behaviour is being implemented, a contract is entered into … does not necessarily call into question the applicability of article 2043 c.c.* [on tort liability]*, since the unlawfulness and the damage never derive (exclusively) from a contract (although "unbalanced") as they do not (exclusively) derive from a behaviour (although "abusive") of the undertaking with market power… The unlawfulness and the damage on the contrary derive from the undertaking's*

which would enable the plaintiff to seek also remedies other than monetary compensation. This would particularly be the case for the refusal to deal by a dominant firm. According to this doctrine, in this case the existence of an obligation on the dominant firm to supply goods or services would not give rise to tortuous but rather to contractual liability. The plaintiff could therefore seek compensation of damages on the basis of the principles of contractual liability, which depart from those of tortuous liability mainly in that the fault of the party in breach of the contract is presumed and there is no need for the plaintiff to prove the "unjust" nature of the damage suffered (*danno ingiusto*). Moreover, according to this position, the plaintiff, in a case of a dominant's firm refusal to deal could seek the specific redress provided for by Article 2932 of the Civil Code, according to which "*If a person obliged to execute a contract does not perform this obligation, the other party… may obtain a judgment producing the same effects of the non executed contract*" or even a direct condemnation to supply the goods or services in question[34]. It should however be noted that so far the courts which have dealt with breach of competition rules in general, and with cases of refusal to deal by a dominant firm in particular, have always qualified as tortious the liability arising therefrom (see in particular the *Telsystem v. SIP* and *Telecom v. Albacom* cases referred to in this report).

(ii) Other forms of civil liability (e.g. disqualification of directors)?

There are no other forms of civil liability. In particular, there is no automatic liability or disqualification for the directors of a company found guilty of breach of competition rules. In principle, and under specific circumstances, the undertaking found to have breached competition rules may bring liability actions against its directors (Articles 2392-2393 of the Civil Code). This action may also be brought in the name of the company by a minority of the shareholders as represent 20 per cent. of the corporate capital, or the higher percentage provided for by the by-laws not to exceed one third of the corporate capital (this percentage is reduced to 5 per cent. of the corporate capital or the lower percentage provided for by the by-laws for companies having recourse to equity investment ("*società che fanno ricorso al mercato del capitale di rischio*" – see Article 2393-bis of the Civil Code).

In abstract, the possibility to claim damages from the directors guilty of misconduct in the management of the company is also opened to creditors of the company, to individual shareholders and to third-parties. The terms in which these types of creditors/individual shareholder/third party actions are framed under Articles 2394 and 2395 of the Civil Code appear, however, to render in practice unlikely that individual liability actions may successfully be brought against the company's directors as a consequence of a breach of competition rules.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

There is no specific reference in Law 287/90 in this respect. Therefore, general rules also apply to the issue at hand.

Tort liability is based on fault on part of the defendant- In principle, and subject to certain exceptions, the defendant's fault must be proved by the plaintiff. In this respect, Article 2043 of the Civil Code specifies that damages are awarded to the extent that the harmful act is, at least, a faulty one. Intent is not necessarily required for a finding of liability.

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behaviour on the market considered as a whole and of its effects, (of course) in so far as those effects are caught by the provisions of Law 287/1990" (Caputi, G., *Il diritto privato e le regole antitrust, un rapporto ancora problematico* (2002) 10 Diritto e Formazione 1377). It should also be noted that in certain instances damages actions may cumulatively be brought both on a tortious and on a contractual basis. This is particularly the case when "…*the same act simultaneously violates not only rights deriving from the contract but also rights existing independently from the contract*" (*Corte di Cassazione*, judgment of 19 January 1996 no. 418).

34 See Albertini, L., *Le violazioni antitrust davanti al giudice civile: tra cautela e merito, tra giurisdizione ordinaria ed amministrativa* (2003) 1 Giurisprudenza Commerciale 84 and ff. This author also qualifies as contractual the liability of a dominant firm imposing unfair prices or discriminatory conditions. This breach of law could be cured by way of the automatic replacement of the unfair conditions with fair conditions pursuant to Articles 1339 and 1419 of the Civil Code.

Some authors have pointed out that the statutory rebuttable presumption of fault provided for by Article 2600 of the Civil Code[35] in connection with unfair competition actions, which are considered as falling within the wider category of tort liability, applies by analogy to damage actions for breach of competition rules[36], when these actions are brought, as it has been and would presumably be in most cases, on a tortious basis. In such event, the statutory rebuttable presumption implies that if a breach of competition rules has been shown, then there is no need to prove fault. This opinion is criticised by some other authors[37] and has not been explicitly confirmed by court precedents. Indeed, none of the court precedents which have found a breach of national competition rules and have awarded damages has explicitly dealt with the issue of fault or intent. The silence of these courts precedents on the subjective elements of the unlawful act/conduct has been interpreted by some authors as an inclination of Italian courts which decided on damages actions for breach of competition rules to consider fault proven *in re ipsa* based on the intrinsic characteristics of the unlawful act/conduct[38] (so-called "objective fault"). In other terms, the prevailing doctrine appears to hold that competition rules identify a standard model of conduct, the departure from which entails fault.

The qualification of fault as objective in damages actions for breach of competition rules would supersede the need to identify a given degree of care, failing to exercise which negligence, and thus liability, will be deemed to exist. This is so, also considering that competition rules may by their very nature be breached exclusively by undertakings. In this respect, account should also be taken of the definition of "awareness" as an element of fault given by the case-law of the EC courts (although in the context of public enforcement of competition rules), according to which it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (e.g. Case T-142/89, *Boel c. Commission*, [1995] ECR II-00867 at point 116). In any event, it would be consistent with the general principles of Italian law on liability of undertakings, both in contract and in tort (see in particular Article 1176.2 of the Civil Code along with Article 2050) to expect from undertakings a higher degree of care in the conduct of their businesses, adequate for the type of activity, failing to exercise which, fault can be deemed to exist.

In contractual liability based claims, on the contrary, fault need not be proved by the plaintiff.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests

The general procedural rules governing the attribution of the burden of proof in private litigation cases is set out in Article 2697 of the Civil Code, which reads as follows (in Italian and in English):

Article 2697 Civil Code

"Chi vuol far valere un diritto in giudizio deve provare i fatti che ne costituiscono il fondamento.
Chi eccepisce l'inefficacia di tali fatti ovvero eccepisce che il diritto si è modificato o estinto deve provare i fatti su cui l'eccezione si fonda"

35 Article 2600 of the civil code reads as follows: " *When acts of unfair competition are ascertained, fault is presumed*".

36 Orlandi, M., *La risarcibilità del danno causato da una violazione delle norme comunitarie antitrust* (2000) 4/5 Giurisprudenza di merito 990; Tavassi, M., Scuffi, M., *Diritto Processuale Antitrust*, (Giuffrè, 1998); Libertini, M., *Il ruolo del giudice nell'applicazione delle norme antitrust*, (1998) Giurisprudenza Commerciale, parte I, at 674-675; Nivarra, L., *Diritto antitrust italiano,* a cura di Frignani, Pardolesi e altri (Zanichelli, 1993).

37 Caruso, A., *Colpa nell'illecito antitrust*, (1998) Danno e Responsabilità, vol. 2, at 128-130; Bastianon, S., *L'abuso di posizione dominante*, (Giuffrè, 2001).

38 See, in particular, *Corte d'Appello* of Roma, judgment of 20 January 2003, *Albacom v. Telecom*, in Foro It., 2003, at 2474; see also Salvi, C., *La Responsabilità civile*, Trattato di dir. Priv. Iudica-Zatti, Giuffrè, Milano, 1998, 109 and ff.

"*Whomsoever intends to enforce a right in court shall prove the facts supporting the claim*.
The party challenging the validity of those facts or claiming that the enforced right has changed or is exhausted shall prove the facts on which such objection is based"

According to the above provision, the burden of proof rests on the plaintiff and the burden of disproving the plaintiff's allegations rests on the defendant.

All forms of evidence are in principle available to the parties to damages actions for breach of competition rules (see however point E(a)(iii) for the limitations concerning types of evidence parties may resort to in order to prove the existence of contracts). The judge's decision may also be founded on presumptions.

Presumptions are defined by Article 2727 of the Civil Code (in Italian and in English):

Article 2727 Civil Code

"L*e presunzioni sono le conseguenze che la legge o il giudice trae da un fatto noto per risalire ad un fatto ignorato*"

"Presumptions are *those consequences that either the judge or the law may draw from a known fact to re-ascend to an unknown fact*"

Article 2727 of the Civil Code draws a distinction between presumptions that may be introduced by the parties and presumptions provided for by operation of law (so-called "legal presumptions"). In their turn, legal presumptions are distinguished between rebuttable and non-rebuttable presumptions. In principle, in damage actions for breach of competition rules no legal presumptions are available to the parties[39].

(ii) Standard of proof

No standard of proof is provided for under Italian procedural and substantive rules. In this connection, two general principles should be noted.

The first general principle is known as that of "*tipicità delle prove*" (types of acceptable evidence): this means that the parties may prove the facts supporting the respective claims/objections only by availing themselves of the means of evidence explicitly contemplated by law, which form a *numerus clausus*.

The available means of evidence include: witnesses, documentary proof, presumptions, confession and declaration under oath (confession and declaration under oath may be rendered exclusively by the parties to the proceedings). No atypical evidentiary proof (i.e. evidentiary proof not included in the aforesaid list, such as, for example, "affidavits") other than that is admitted by procedural law.

The second basic principle is that the judge is free to evaluate the evidence submitted by the parties (Article 116 of the Code of Civil Procedure).

This principle is subject to some exceptions: certain evidence has in fact a legal value which binds the judge in the assessment of facts that are proven thereby. In particular, the judge must deem as fully proven those facts that are the object of confessions or declarations under oath[40], or which result from a public deed (in this latter respect only with reference to those facts or parties' declarations that the public officer drawing the deed declares to have happened in his presence).

39 See however the issue of applicability by analogy of article 2600 establishing a presumption of fault for unfair competition actions mentioned under Section D(iii).

40 A specific procedure is provided for by the Code of Civil Procedure for the triggering of a confession or of a declaration under oath.

Another limit to the principle of free evaluation of the evidence by the judge concerns presumptions. According to Article 2729 of the Civil Code, presumptions are admissible only provided that they are "*serie, precise e concordanti*" (serious, precise and consistent)[41].

Presumptions are means of evidence enabling the parties to prove the foundations of their claims in the event that they have provided only indirect evidence of those foundations. As stated above, pursuant to Article 1227 of the Civil Code, the parties may prove the unknown facts by way of a deductive reasoning, based on other facts of which evidence was indeed provided. This is known as the *prova logica* ("logic evidence"), which allows for the judge to base his decision on a probabilistic reasoning taking account of the *id quod plerumque accidit* rule (i.e. of what is normally found to happen under similar circumstances).

The *Corte d'Appello* of Milano has given a clear example of the use of presumptions as means of proving the infringement in the *Bluvacanze* case. In such instance, the court found that the defendants, some of the principal Italian tour operators, had engaged in a concerted practice aimed at denying Bluvacanze, a retailer of travel packages, access to the offer of their travel packages. The concerted practice was deemed by Bluvacanze to constitute a retaliation to Bluvacanze's commercial policy to grant its clients a 10 per cent flat discount on any travel package sold. The discount was subsidised by Bluvacanze with part of the commission (between 13 and 13.5 per cent) it would gain on each travel-package sold. Bluvacanze contended that other retailers complained vis-à-vis Bluvacanze's aggressive policy and that, as a consequence, the defendants agreed*, inter alia*, to shut down Bluvacanze's access to the codes which would enable the on-line reservation of the defendants' travel packages. Bluvacanze did not provide any direct evidence of the tour operators' common restrictive intent. It did however provide indirect evidence of the agreement, in the form of documents and testimonies, from which the court inferred, through a probabilistic reasoning, the defendants' unlawful intent to retaliate against Bluvacanze's pricing policy. In particular, the court stated that:

> "*…in order to prove the agreement, it is sufficient to demonstrate a set of consistent and conclusive circumstances, which speak for …the existence of a concert aiming at excluding from or barring access to the market to a competing undertaking, even though, as in the present case, this latter is situated at a different level of the distribution chain … It would be naïve to expect that evidence of an agreement be found in a written document, it being possible to use any means of evidence, including presumptions, which are admissible under our legal system, provided that they are "serious, precise and consistent", according to the expression used in Article 2729 of the Civil Code. The judge's discretionary evaluation inferring from a known fact the unknown fact is to be carried out according to a reasoning based on the id quod plerumque accidit… In the present case…it is evident that the intent of the tour operators was to prevent Bluvacanze from continuing its policy of granting flat discounts to its clientele for the sale of the "travel packages" prepared by the same tour operators. There is a number of elements speaking for this conclusion and namely the press campaign implemented immediately before the access codes were shut down, the mailing of the letters and the contemporary implementation of the same action … As it will be shown, the witnesses heard in the course of the proceedings have provided significant confirmation of the judges' belief*".

The burden of proof is in principle easier to discharge in the context of *interim* proceedings. As a matter of fact, in order for an interim measure to be accorded by the court, it is sufficient that the claimant proves the so-called *fumus boni iuris* together with the *periculum in mora*. The first requirement is satisfied when the claimant is able to show, based on a *prima*

41 According to the *Corte di Cassazione* (judgment of 6 August 2003 No. 11906) the requisite of "*seriousness*" is satisfied by a probabilistic reasoning; the requisite of "*preciseness*" is satisfied when the known facts, from which the probabilistic reasoning ensues, are not vague but clearly determined; the requisite of "*consistency*" is satisfied when the various known facts on which the presumption is based lead to an univocal conclusion.

facie assessment, that his claim is founded. The *periculum in mora* requires that the claimant shows the urgency for a court's interim decision, i.e. that by the time necessary for the court to judge on the merits, the claimant's right might be irremediably damaged. According to the case-law, the summary nature of these proceedings do not allow the court to grant remedies of an irreversible nature.

(iii) Limitations concerning form of evidence

Within the limits of the aforesaid principle of "types of acceptable evidence", all forms of evidence are in principle available to the parties in damages actions for breach of competition rules. *De facto,* documentary evidence is the core evidence on the basis of which private antitrust litigation cases have been decided by Italian courts[42].

In this context, individuals may be called to testify in court. The general limit as to which individuals may be called to testify is set under Article 246 of the Code of Civil Procedure. According to this provision, not only the parties to the proceedings but also "*persons having an interest that could justify their joining in the same proceedings*" are barred from testifying in court.Based on this provision, the prohibition from testifying in court is an exception to the general rule that allows for any individual to be heard as witness. The fact that the intended witness has connections with either party to the proceedings does not *per se* bar the witness from testifying. In such case the judge will then evaluate the credibility of the deposition and whether the possible connections may negatively affect such credibility. As aforesaid, this however does not constitute an impediment to the testimony. In this respect, the *Corte di Cassazione* has stated that the prohibition of Article 246 of the Code of Civil procedure is triggered only when "*…there is a concrete and actual interest which, pursuant to article 100 of the Code of Civil Procedure* [please refer to point C(i) above], *would legitimate the participation of the witness as a party in the proceedings*" whilst "*the mere existence of a de facto interest, which per se is capable of influencing the truthfulness of the deposition, concerns exclusively the witness' credibility*" (judgment of 21 August 2003 no. 12317).

The above principle, when applied to individuals called as witnesses by a corporate entity to which they are closely connected (e.g. employees of the same entity), would bar the individual from testifying in limited cases. In particular, the prohibition would apply to the individual that, pursuant to the general powers granted to him by the company's by-laws, acts towards third parties as the company's legal representative (e.g. the Chairman of the board of directors – see *Corte di Cassazione* 17 July 1998 no. 7028). Likewise, the director of a company may not be called as witness if, in the specific proceedings in which he should testify, he acted as representative of the company (i.e. appointed the company's counsel in the proceedings upon delegation of the board). However, the same director may be called as witness in different proceedings in which he did not act as the company's representative (*Corte di Cassazione*, judgment of 11 November 1996 no. 9826). .
The case-law allows for the company's employees to testify in proceedings to which the company is a party as well as for the shareholders of a limited liability company to testify in proceedings between the company and a third party.

Individuals subject to professional secrecy may legitimately refuse to testify in court.

The taking of evidence abroad, and, in particular, the examination of witnesses residing abroad, is governed by the EC Regulation No. 1206/2001 on the Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters and by the Hague Conventions of 1 March 1954 and of 18 March 1970, ratified in Italy by Law 3 January 1957 No. 4 and Law 24 October 1980, No. 745 respectively, for witnesses residing in non-EU member States.

42 Scuffi, M., *Orientamenti consolidati e nuove prospettive nella giurisprudenza italiana antitrust*, (2003) Rivista di Diritto Industriale, parte I, at 107-108.

Witnesses residing abroad may also be called to testify directly before the Italian courts but, according to the *Corte di Cassazione* (judgment of 19 November 1993, No. 11446), they have the right to demand that they be examined in their place of residence.

It should be noted that certain limitations apply in respect of the proof of contracts through witness statements. In broad terms, contracts of a considerable value (the identification of which is substantially left to the discretion of the judge) along with covenants which are alleged to supersede an existing written contract, in principle may not be proved through witnesses or presumptions. This is subject to certain exceptions. Moreover, contracts for the validity of which the law requires the written form may not be proved through witnesses or presumptions (see Articles 2721-2729 of the Civil Code).

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court

Italian civil proceedings are based on the "*principio della domanda*" (demand principle) and of "*disponibilità delle prove*" (availability of evidence). These principles respectively require that the judge decide the case within the limits of the plaintiff's allegations (as possibly extended by the defendant's counterclaims) and on the basis of evidence produced or requested by the parties to the proceedings. The possibility that the judge delivers his judgment based on evidence taken by means other than the parties' submissions is in principle excluded (see Article 115.1 of the Code of Civil Procedure).. In general courts do not have major autonomous investigative powers.

Some limited exceptions to the principle of *disponibilità delle prove* allowing for the judge to gather evidence *ex officio* are however provided for. The judge's powers to gather evidence *ex officio* are exceptional in that the judge may never act instead of the parties or inspite of the parties' inertia: as a general rule, whenever the parties to the proceedings are in a position to produce or indicate evidence or to apply for a disclosure order pursuant to Article 210 of the Code of Civil Procedure (see paragraphs below in this connection), the judge may not by his own initiative collect evidence. In other words, the general principle that may be carved out is that the judge's powers to prompt *ex officio* investigative activities is not alternative to the parties' initiative. The judge may supplement the parties fact finding activity, only after that the parties have exhausted all the means of evidence available to them, but still within the limits of the *thema probandum* established by the parties' allegations.

The exceptions to the principle of *disponibilità delle prove* include the possibility for the judge's decision to be founded on "*facts that are common knowledge*" (article 115.2 of code of civil procedure). Moreover, pursuant to Article 118 of the code of civil procedure, the judge may *ex officio* order inspections on the body or on property of the parties to the proceedings or on third parties provided that the inspection is indispensable (i.e. the evidentiary proof may not be acquired otherwise) for the judge to know the facts of the case and that it may be carried out without causing serious damages to the party/third party. In general the inspection order is rarely used by judges. The inspection order may *ex officio* be issued by the judge only as an "*extreme instrument of knowlegde*" (*Corte di Cassazione* judgment of 15 June 1976 no. 2360), which, as such is strictly subject to the lack of appropriate means of evidence, including the disclosure order pursuant to Article 210 of the Code of Civil Procedure, of which the parties may avail themselves[43].

43 The prevailing case-law excludes in particular that the judge may *ex officio* order the inspection of documents, whenever the parties are in a position to apply for a disclosure order pursuant to Article 210 of the Code of Civil Procedure (see *Corte di Cassazione* judgment of 27 March 1996 no. 2760, which ruled on the Cinzano case also mentioned in the main text in relation to the disclosure order pursuant to Article 210, and *Corte di Cassazione* judgment of 19 November 1994 no. 9839). Contrary to the case law, a scholar has recently held that the *ex officio* inspection order may be issued by the judge in relation to documents in the possession of the party or of third parties (see Carli, A., *Onere della prova, principio del contraddittorio e prova testimoniale disposta d'ufficio* (2003) 3 Contratto e Impresa 1049).

The judge may also *ex officio* request public administration bodies, such as the AGCM, for information pursuant to article 213 of the Code of Civil Procedure, provided however that the information requested is strictly related to the activity of the public administration. Similarly to what provided for the inspection order, the judge's request for information to public administration bodies may not substitute for the parties' burden of proof. In particular, the judge may use this power only if it is necessary to gather information strictly related to the activity or to documents of the public administration body, which are not in the possession of the parties to the proceedings (see *Corte di Cassazione*, judgment of 12 December 1988 No. 6734 and judgment of 12 April 1999 No. 3573). If applied to private antitrust litigation, this principle would in particular imply that the AGCM may not express opinions or undertake investigations on behalf of the judge.

Another example of investigative powers that the judge may exercise *ex officio* is provided for by Article 281-*ter* of the Code of Civil Procedure. This Article provides that the judge may *ex officio* order that witnesses be heard, drawing up the specific list of questions they should be asked, whenever the parties in their allegations of facts have made reference to individuals who appear to know the facts of the case. Recent doctrine has however pointed out that judges have in practice very seldom made use of this power and that, on the other hand, this provision could be in contrast with the principle of "equality of arms" in judicial proceedings established in Article 111 of the Constitution[44].

Italian procedural law does not provide for pre-trial discovery.

The general applicable rule is that evidence must be gathered in court, following the parties' initiative pursuant to the aforesaid "*principio della domanda*" and "*principio della disponibilità delle prove*".

Aside from the above, a limited exception to this general rule is contained in a set of rules enabling a person to secure evidence before initiating proceedings by requesting the judge to take evidence in the form of a testimony and of description of the state of a place or of the quality or condition of things, this latter through an expert appointed by the judge or through a judicial inspection (see Articles 692 and ff. of the Code of Civil Procedure). This possibility is open to the intended plaintiff when the risk exists that, by the time proceedings start and evidence is admitted, the witness has passed on or the place/thing to be inspected is altered[45]. In any event, the evidence taken before the initiation of the proceedings does not affect the judge's assessment on the admissibility of same evidence in the course of the proceedings: the judge remains free to decide on the admissibility of the evidence.

In the course of duly instituted proceedings, a party may request the judge to order the other party or third parties to disclose specifically identified documents, which are not in the possession of the requesting party. The issuance of such an order by the judge is subject to a number of conditions. In particular, the requesting party must identify the document(s) of which disclosure is sought (Article 94 of the rules implementing the Code of Civil procedure)[46] and must provide evidence of the fact that the document(s) is (are) in the possession of the other party or of the third party[47]. The judge may issue the order if he deems that disclosure is indispensable (i.e. facts cannot be proved by means other than the document(s) to which the disclosure order refers - see *Corte di Cassazione* judgment of 13 April 2000 No. 4801) and provided that production does not harm the other/third party's legitimate interests (e.g. does not result in the disclosure of

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44 Carli, A., *Onere della prova, principio del contraddittorio e prova testimoniale disposta d'ufficio* (2003) 3 Contratto e Impresa 1049.

45 It is interesting to note that, according to the latest available version of the Procedural Reform (that of 7 July 2004),, the pre-trial fact finding procedure described in the text might be widened in scope. As a matter of fact, the Reform envisages that the expert may be appointed in the pre-trial phase upon either party's motion, not only for the securing of evidence (as it currently is), but also for the "*ascertainment and determination of a credit deriving from a breach of contract or from a tortious event*". The expert appointed will attempt to settle the controversy between the parties. If the settlement is successful, the relevant agreement will be sealed by a court decree and become enforceable. Otherwise the expert's report may be deposited in court, once proceedings have been duly instituted.

46 *Corte di Cassazione*, judgment of 27 March 1996 No. 2760.

47 Also presumptions are sufficient to this end - *Corte di Cassazione*, judgment 4 April 1997 No. 2935.

professional secrets or does not result in the disclosure of the other/third party's information bearing no relation to the object of the dispute[48]).

The requirement that document(s) of which disclosure is sought must be identified by the requesting party is interpreted by the courts having regard to the specific circumstances of the case and to the facts which the requesting party intends to prove thereby. In general, courts are wary of the use of the disclosure order, aiming particularly at avoiding that it be used as a substitute for the party's burden of proof (see *inter alia Corte di Cassazione,* judgment of 13 June 1991, No. 6707). The "prior identification" requirement should also be read in conjunction with the above-mentioned requirements of indispensability of the disclosure, that the requesting party provide evidence that the other/third party is in the possession of the document[49] and the principle, incorporated in Article 2711.2 of the Civil Code (see below), that the document(s) relates to the dispute in question. In other words, a party requesting the judge to order to the other/third party the production in court of certain documentation should identify such documentation to the degree of preciseness necessary to enable the judge to verify that the three conditions to which the request is subject (i.e. indispensability, prove of possession and relation to the dispute) are satisfied. As pointed out above, this test may be passed also by having recourse to presumptions.

The *Corte di Cassazione* has explained how the requirement of prior identification of documents should be interpreted in a case where the Italian tax administration resisted the claim of Cinzano (an Italian company specialising in the marketing of alcoholic beverages) for reimbursement of customs duty on the import of whisky from the UK, which Cinzano claimed were levied by the State in breach of the EC Treaty. The tax administration objected that Cinzano's demand for reimbursement of custom duties could not be upheld, as the plaintiff had passed the same duties onto its customers by way of an overcharge on the sale price. In order to substantiate the "passing on" defence, the tax administration requested that Cinzano be ordered to produce in court all of its accounting books and records, of its financial statements relating to the years in which the import took place and of the sales invoices Cinzano had issued to its customers. The tax administration's request was rejected both in first and second instance as being generic and of a merely "explorative" nature (i.e. aimed at searching for evidence beyond the limits set out in Article 210 of the Code of Civil Procedure) and its claim consequently rejected as lacking evidence. The *Corte di Cassazione* partially overturned the second instance judgment on the following grounds: "*The court's decision that the request for a production order should be rejected as being generic, is fit in relation to the request of production indiscriminately referred to the accounting books and records of Cinzano (request which in addition is akin to the hypothesis of integral production of said books and records, permitted under Article 2711 of the Civil Code only in certain limited circumstances, different to those under scrutiny). The same court's decision is however flawed where it rejects the request for an order of production of specific documents, or of documents which in any event may be easily identified, such as Cinzano's financial statements and sales-invoices relating to the goods in question… In examining the tax administration's request, the court should have considered… that the requisite of prior identification of the contents of a document of which production is sought should be referred to the peculiar characteristics of the controversial issue, which does not necessarily imply the prior*

48 It is substantially up to the judge's discretion to evaluate whether the disclosure may result in a serious harm to the other/third party's interests. In this respect, it is unclear whether, under the provision of Article 210 of the Code of Civil Procedure, the risks that business secrets be disclosed as a result of the judge's order may be considered by the judge as a "serious harm" and thus a sufficient reason not to order disclosure of documentation. In this connection, the provision in question appears a faulty one, as it does not explicitly provides for the possibility that the judge, in ordering the production of the other/third party's documents, takes all measures as may be appropriate to ensure the protection of the other/third party's confidential information. A specific provisions to this end has been instead inserted in Articles 58-bis of the trademark law and Article 77 of the patent law (see footnote 51). On the contrary, the general provision of Article 210 of the Code of Civil Procedure seems to rather pose the alternative between a flat denial of the order, on the grounds that it may cause "serious harms" to the other/third party (possibly consisting in the disclosure of business secrets) and an order of full disclosure.

49 The requirement that the requesting party provides evidence (also by way of presumptions) that the document of which production is sought is in the possession of the other party/third party is explained by the *Corte di Cassazione* with the necessity to avoid that the enforcement of the order be easily frustrated by the addressee of same order. The *Corte di Cassazione* has in particular noted that, should such evidence not be provided "*…the order would be of little use, as it could with impunity be ignored by the addressee without giving rise to the possibility to draw inferences from such behaviour*" (judgment of 4 April 1997 No. 2935).

and detailed description of what a document is expected to show, such requirement [of prior identification] *being satisfied by any indication which renders it possible to evaluate the importance of the document in relation to the thema probandum* [i.e. to facts to be proved]" (judgment of 27 March 1996, No. 2760 – emphasis added)[50].

The judge is prohibited from ordering the disclosure in bulk of categories of documents and, in particular, of accounting books and correspondence of undertakings, unless this is required in the context of a number of actions specifically listed in Article 2711.1 of the Civil Code. These actions form a *numerus clausus*, amongst which damage actions for breach of competition rules are not included. The second paragraph of same Article 2711 however empowers the judge to order, also *ex officio*, the disclosure of the accounting books of a company in order to extract the records relating to the controversy[51].

The same principles highlighted above should apply with respect to the order to produce documentation located outside the jurisdiction of the court. To the best of our knowledge, there are no court precedents in this respect. It should however be noted that, once the jurisdiction of an Italian court has been established, the proceedings shall be governed by the national procedural rules (i.e. by the Code of Civil Procedure), pursuant to Article 12 of Law No. 218 of 31 May 1995 (the national conflict of law rules), which explicitly provides that "*civil proceedings taking place in Italy shall be governed by Italian law*". The provision of Article 210 of the Code of Civil Procedure should be deemed as procedural in nature and, therefore, would apply also to the order to disclose documentation located abroad. This implies, in particular, the burden for the requesting party to "identify", to the degree of preciseness specified above, the documentation of which disclosure is sought. In this context, and again although in the absence of precedents to our knowledge, a judicial order of disclosure of evidence obtained through discovery in a foreign jurisdiction would not be precluded only in so far as the "prior identification" requirement is fulfilled. This in particular would seem to render problematic (if not to exclude at all) the possibility that the judge may order the disclosure "in bulk" of evidence obtained through discovery in a foreign jurisdiction[52].

In this respect - and although not directly relevant for the issue of the ability for the Italian judge to order disclosure of documentation obtained through discovery abroad – it should be noted that Italy (together with other continental European states) has shown its distrust vis-à-vis pre-trial discovery. As a matter of fact, Italy availed itself of the reservation allowed by Article 23 of the Hague Convention of 18 March 1970 on the taking of evidence in civil matters. This article, in particular, provides that "*Each signatory State may, upon signing, ratification or adhesion,*

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50 Based on this principle, it is possible to conclude that the prior identification requirement is fulfilled whenever the request identifies the documentation in the narrowest (most specific) possible way relative to the specific facts to be proved. Therefore, if, as in the case scrutinised by the *Corte di Cassazione*, the defendant intends to prove the "passing on" of any overcharge to the plaintiff's customers, a request for a judicial order that the plaintiff produce *all sales invoices of a specific product issued in a given period of time to the plaintiff's final customers* could be deemed to duly fulfil the prior identification requirement. The production of invoices would in such instance also appear indispensable for proving the passing on, it would clearly be related to the object of the controversy and would be supported by a strong presumption that the requested documentation is in the possession of the party to which the order is addressed.

51 A significant exception to the general rules on the order to produce documents as explained in the text is provided for in connection with patent and trademark infringement actions by the patent (Royal Decree No. 1127 of 29 June 1939 as amended) and trademark law (Royal Decree no 929 of 21 June 1942) respectively. Article 77 of the patent law and article 58-bis of the trademark law respectively enable the party that has provided serious clues of the solidity of its claims to apply to the judge for obtaining an order that the other party produce all elements, documentation and information which may support the requesting party's claims as well as any information which may be of help in identifying other persons involved in the manufacturing and commercialisation of infringing products. These provisions were introduced by Legislative Decree 19 March 1996 No. 198 which implemented the TRIPs agreement (Trade Related Aspects of Intellectual Property Rights) in order to facilitate the gathering of evidence in patent and trademark infringement cases and have widened the scope of the order of production of evidence in comparison to the general rule. In particular, the aforesaid provisions of the patent and trademark laws appear to supersede the "indispensability requirement" imposed by Article 210 and to allow for the order to refer to categories of documents, rather than specifically identified pieces of documentation.

52 The comment in the text refers to the possibility that the judge order to the other/third party the production in bulk of evidence that the ordered party obtained through discovery in foreign proceedings to which the party requesting production was not joined. On the contrary it would of course not be precluded to the party to Italian proceedings to produce "in bulk" evidence that the same obtained through discovery in foreign proceedings to which he was also a party.

declare not to execute the commission rogatoire concerning the procedure known in States applying "Common Law" under the name of "pre-trial discovery of documents". The reservation of Article 23 has given rise to a conflict between a US court and a French defendant, the former wanting to obtain evidence through discovery in France, despite the fact that the latter had opted for the reservation. The conflict was resolved by the US court by denying that the Hague Convention was the exclusive means of taking evidence abroad and, therefore, the court concluded that discovery rules may indeed be used to obtain evidence even outside of the US territory[53].

The judge may *ex officio* request public administration bodies, including the AGCM, for information pursuant to Article 213 of the Code of Civil Procedure (as to the scope of this power please see above in this section).

Refusal by a party to the proceedings to produce a document may be used by the judge to draw conclusions against the same party. This is considered both by doctrine and case law substantially as the only available sanction for the event of refusal of the party to comply with the order of production; in the event of non-compliance by a third party, the system appears devoid of any proper sanction[54].

(b) Proving the infringement

(i) Is expert evidence admissible?

To date Italian courts have ruled on damage actions for breach of competition rules without relying on expert evidence for proving the existence of damages ("*an debeatur*"). Indeed, some of these actions were commenced and in any event concluded after that an infringement of the national competition rules had already been found by the AGCM. The AGCM's findings were relied upon by the courts, with the effect of obviating any need for the courts to investigate the infringement any further. In other cases (namely in the *Bluvacanze* and *Tramaplast* cases), the court identified the relevant market by relying on the documentary evidence acquired in court, on the parties' allegations as well as on its own knowledge of the principles applicable for market definition purposes.

In just one case the court appointed experts for the quantification of the amount of damages to be awarded to the plaintiff ("*quantum debeatur*") as a consequence of a finding of a breach of national competition rules (see *Corte d'Appello* of Milano, judgment of 24 December 1996, *Telsystem v. SIP*, (1997) *Danno e Responsabilità*, vol. 5, at 602-609). However, in the *Telsystem v. SIP* case evidence of the actual existence of the damage ("*an debeatur*") was mainly taken on the basis of documentation submitted by the parties.

In light of the above, we will deal with the issue of admissibility of expert evidence with a view to pointing out the limits within which experts' reports may be used by the courts under the general procedural rules. Such limits are equally applicable to damage actions for breach of competition rules.

Experts with specific technical knowledge in the field concerned may be appointed by the judge *ex officio* and are to be preferentially chosen from a list of qualified experts in the sector concerned held by each court. In practice, before the appointment of the expert by the judge, the parties may produce technical reports drawn up by experts appointed by them. This is not a means of evidence specifically provided for by law, although its production in court is not prohibited, and the judge may use the parties' technical reports as clues or, more often, as a

53 This was the view expressed by the US District Court for the Southern District of Iowa in the *Aérospatiale* case (482 U.S. 524 (1987). An Italian scholar explained the US court's conclusion with the effectiveness of the discovery system, which US courts are loath to abandon even when discovery is to be carried out abroad. The same scholar quotes the comment of US doctrine, according to which "*The heart of any United States antitrust case is the discovery of business documents. Without them there is virtually no case. The same is true in most other types of business litigation*" (Ficcarelli, B., *Pre-trial discovery statunitense e controversie transnazionali* (2000) I Rivista Diritto Civile 513).

54 Some authors have considered it possible that the third party who unjustifiably refuses to produce a document be condemned to refund damages suffered by the party upon whose request the order was issued by the judge; references to this doctrine are in Cavallone, B, voce "*Esibizione delle prove nel diritto processuale civile*", in *Digesto IV ed., Disc. Priv., sez. civ.,* VII, Utet, 1991, 664 and ff.

confirmation of the opportunity to appoint court experts. In any event, when experts are appointed by the court, the parties may appoint their own experts, who may be present during the carrying out of the technical expertise and submit memoranda to comment on the findings of the experts appointed by the judge.

The function of the expert(s) appointed by the judge is limited: according to Italian procedural law, experts are exclusively aides the judge may appoint to assist him with the evaluation of evidence which has already been proven by the parties, to the extent that such evaluation requires a specific expertise in technical fields other than the legal one. Strictly speaking, the expert's opinion does not constitute evidence. Moreover, experts, while carrying out their activity, may not gather evidence, which should always be taken following the parties' specific submissions and allegations in conformity with the "*principio della* domanda" and "*principio di disponibilità delle prove*" mentioned above[55].

Experts may "*motu propriu*" collect documentation and acquire information only if it is instrumental and ancillary for them to respond the queries posed by the judge. They are in principle enjoined from collecting documentation or acquiring information which may constitute evidence of either party's claim and from analysing documentation which was not produced in court by the parties. In this respect, the *Corte di Cassazione*, in its judgment of 10 May 2001, No. 6502, stated that "*The expert appointed by the judge may, also without the judge's authorisation, acquire information from third parties and ascertain facts to the extent that they are necessary prerequisites to respond to the queries. The expert however does not have the authority to ascertain the facts which the parties have used as foundation of their respective claims. The burden of proving those facts rests on the parties and if the expert goes beyond these limits, the experts' findings are invalid and therefore devoid of any evidentiary value*"[56].

Technical expertise may in some limited instances and by way of an exception to the general rule be used as a means of evidence. This is particularly the case when the technical expertise constitutes the only means to prove facts which may be ascertained only by having recourse to specific technical knowledge. This principle is most frequently applied for gathering evidence of damages suffered by the plaintiff when such damages may only be proven by acquiring and elaborating technical data and information which are not immediately available to the plaintiff. An application of this principle may be seen in the *Telsystem v. SIP* case particularly with respect to the evidence of the causal link between the defendant's conduct and the "*loss of a chance*" damage claimed by Telsystem (see in this respect point E(d)(i)).

(ii) To what extent, if any, is cross examination permissible?

Cross examination is not permissible under Italian procedural law.

The procedure for hearing witnesses under Italian procedural law is quite rigid. It is for the parties to the proceedings to identify, by way of a specific request for admission of witness evidence, the individuals to be heard as witnesses. In the same request, the parties should also submit in advance to the judge the specific questions the witnesses should be asked (please refer to point for the possibility

55 This principle, prohibiting the use of expert evidence as a means of taking evidence, may be exemplified by making reference to a patent invalidity case decided by the *Tribunale di Trento* on 11 June 1999. On that occasion the Tribunale dismissed the invalidity claim holding, amongst others, that "*The presumption of validity of a patent charges the party challenging the patent with an absolute burden of proof. Therefore the request for admission of technical expertise aimed at ascertaining the invalidity of a patent may not be upheld if it is not accompanied with objective data concerning the existence of priorities, as it would otherwise result in a means of gathering evidence of explorative nature, since it would unofficially be seeking, through the expert's activity, the priorities to be examined*".

56 See also the judgments of the *Corte di Cassazione* of 29 May 1998 No. 5345 and of 26 October 1995 No. 11133. An exception to this general principle is provided for in connection with patent infringement actions by the Italian patent law (Royal Decree No. 1127 of 29 June 1939 as amended). Article 77.4 of said law provides that the expert appointed by the judge may receive documents relating to the task assigned by the judge even if they have not yet been produced in court. As pointed out in footnote 51, this provision was introduced by legislative decree 19 March 1996 No. 198 which implemented the TRIPs agreement in order to facilitate the taking of evidence in patent infringement cases. See Ciaccia Cavallari, B., *Prove documentali e consulenza tecnica nel processo per la tutela della proprietà intellettuale* (2003) 4 Rivista Trimestrale Diritto e Procedura Civile 1261.

that the judge order *ex officio* for the hearing of witnesses in a specific case provided for by the law). The judge, after hearing the other party's opinion, may modify the intended list of questions by excluding certain or even all questions (or parts of them) if he deems that they are not relevant or that they are aimed at soliciting the witness' opinion rather than hearing the witness on his/her direct knowledge of the facts.

After the determination of the list of questions, the witness is heard at a hearing fixed for the purpose. Except for the cases in which individuals called as witnesses may legitimately refuse to testify or are prevented by provision of law from testifying in court (please refer to point E(a) above), the individuals identified by the parties as witnesses, to the extent that they have been admitted by way of court order, have the duty to attend the hearing for the purpose of being questioned under oath. In the event the intended witness does not show up at the time and place fixed for the questioning the judge may, at his discretion, order that the witness be accompanied to the place for the hearing by the public police authority and apply a fine. The witness that, although appearing in court, unjustifiably refuses to testify, commits perjury or is reticent, may be subject to criminal sanctions. These sanctions consist in inprinsonment up to six months or fine from ε 30 to 516, in the event of unjustified refusal to testify, and in inprisonment from two to six years, in the event of perjury or reticency.

At the hearing, witnesses are and may be directly heard only by the judge, who will pose the questions resulting from the list as admitted. Limited space is allowed for the intervention of the parties' lawyers during the examination: if requested, the judge may allow the parties' lawyers to ask the witnesses to clarify the statements made. Such requests for clarifications however in principle may not be addressed directly by the attorney but through the same judge, who acts as a filter in order to avoid that the witness is asked questions which were not included in the list or were not admitted.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

Civil courts are not bound by the findings and decisions of administrative authorities in general and of the AGCM in particular. These findings certainly have an intrinsic authoritative value, particularly when delivered by technically qualified bodies. However, it should be clear that in principle the assessment of the merits of the case by the ordinary courts is autonomous from any assessment made by any administrative authority in general and by the AGCM in particular[57].

In an action for damages for breach of national competition rules - *Tramaplast v. Agriplast-Sisac-Vittorplastic sentenza* of 22 March 2000 - the *Corte d'Appello* of Milano dealt with the relationship between the AGCM's proceedings and proceedings brought before ordinary courts. The case was brought before the court of Milano by *Tramaplast* which claimed it was the victim of a concerted practice in which the defendants had engaged in Sicily with the aim of excluding it from the local market of production of plastic film for agricultural use. The same case had not been brought before the AGCM. In relation to this latter circumstance, one of the parties raised the issue of the compatibility with the Constitution of the "double track" system, which enables a person to bring a claim before ordinary courts

57 This principle was affirmed by the *Corte di Cassazione* in its judgment No. 9384 of 11 June 2003. Pursuant to the general principles established by article 5 of attachment "E" of Law No. 2248 of 1865, the court's autonomy in respect of any administrative decision would go so far as to enable same court to disallow the AGCM's decisions in the event the court finds that such decision encroaches on third parties' rights (see in this respect the *obiter dictum* of *Corte di Cassazione*, judgment No. 827 of 1 February 1999 No. 827). This principle has never been applied with respect to AGCM's decisions. However, by way of an example of its application, an author - Berruti, G.M. *La concorrenza sleale nel mercato Giurisdizione ordinaria e normativa antitrust*, (Giuffrè 2002) - refers to the case that an agreement between competing undertakings has benefited from an individual exemption pursuant to article 4 of Law 287/90 (which is the equivalent of article 81.3 of EC Treaty): If such agreement violates third parties' rights, any such third party may request that the court disallow the AGCM's decision. The effects of the possible disallowance by the ordinary court of the AGCM's decision would be limited to the third party only: as a matter of fact, only administrative courts, namely the *Tribunale Amministrativo Regionale* ("TAR"), as court of first instance, and *Consiglio di Stato*, as court of appeal, have exclusive jurisdiction to declare the invalidity *erga omnes* of administrative decisions.

without having first obtained the AGCM's decision on the same issue. According to this position, the principle of legal certainty would require that the issue of the existence of an infringement of national competition rules be first decided by the competent authority and subsequently brought before the ordinary courts for damages claim. The court rejected this argument on the grounds that "*civil courts have been assigned the task of resolving conflicts between persons whereas the competition authority's function is that of controlling the market in the* public *interest*", which has given rise to a system of "concurrent jurisdictions".

However, in practice, the AGCM's findings are extensively relied upon by Italian courts when proving the infringement, particularly as far as the economic assessment is concerned, even though – as aforesaid - in principle those findings are not binding on the judge.

The evidential value attached to the AGCM's findings is difficult for the parties to rebut given their high technical value. It should be stressed that the AGCM's decisions may be introduced in the proceedings as a means of evidence only following the initiative of one of the parties to the proceedings, in conformity with the principle of "*disponibilità delle prove*" described above.

The *Corte d'Appello* of Roma has made explicit reference to the AGCM's findings in two decisions relating to damage actions for breach of national competition rules:

- in an *interim* decision pursuant to article 33.2 of Law 287/90 (*Corte d'Appello* of Roma, decision of 15 January 2001, *Stream v. Telepiù*, in *Dir. Inf.* 2001, p. 172) the court supported its findings that Telepiù had abused its dominant position on the Italian market of pay-TV, by making reference to the AGCM's decision of 24 June 2000. In particular, the court on that occasion stated that: "*Of course for the above reasons (administrative character of the proceedings before the competition authority, absolute independence of the proceedings, differences in essence and function of the decisions adopted at the end of said proceedings, etc.) the conclusions reached by the competition authority… are not binding in the present case… This however does not bar the possibility that the facts historically ascertained by the competition authority and the processing of data on that basis may constitute the object of autonomous assessment by the Court and the source of evidence for its own decision, even more so considering that the objectivity of those facts was not challenged by Telepiù*";

- in the *Telecom v. Albacom* case, the court condemned Telecom to compensate damages suffered by Albacom as a consequence of Telecom's abuse of its dominant position on the market of data transmission services though DSL and SDH technologies. The court's finding that Telecom Italia held a dominant position were essentially based on the AGCM's decision of 27 April 2000 whereby Telecom Italia was fined in relation to the same conduct. In particular, the court stated that: "*said dominant position, which Telecom does not contest but for the sector of fibre optics (however groundlessly so because… it should be considered that the fibre optics transmission technology was undeniably utilised by Telecom in conjunction with the metallic network which realised an integrated transmission network over which Telecom is dominant) was in any event ascertained by the Autorità Garante della Concorrenza e del Mercato by its decision of 27 April 2000 in proceedings A285, and such factual findings may well be taken into consideration…*".

The same principles on the non binding character of the AGCM's decisions would apply to the decisions of other competition authorities. Courts would instead be bound by the Commission's decisions on the compatibility of an agreement or practice with Articles 81.1 or 82. This is a consequence of the principle established by the Court of Justice in Case C-344/98, *Masterfoods Ltd. v HB Ice Cream Ltd.*, [2000] ECR I-6297 at point 52. In particular, the ECJ stated that the principle of legal certainty within the European Union requires national courts ruling on

agreements or practices which are already the subject of a Commission decision to conform themselves to the decision of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance (this principle has now been incorporated in Article 16 of Regulation 1/2003).

National courts are bound by the findings contained in the judgments of other national courts, in so far as these latter judgments are final (i.e. no longer subject to appeal before a higher court) and have been delivered in proceedings involving the same parties or their predecessors in title[58].

According to the provisions set out in Law No. 218 of 31 May 1995 (the "international private law"), national courts are likewise bound by the findings contained in decisions given by foreign courts, provided that these have been given between the same parties or predecessors in title and are no longer subject to appeal according to the rules of the State where the foreign judgment was delivered. If the validity of the foreign judgment is contested by the other party, the party who intends to enforce the foreign judgment or to use it in court may apply to the competent *Corte d'Appello* that will check the foreign judgment against the requisites provided for by Article 64 of Law No. 218/1995. This check may also be done in the course of the proceedings in which the foreign judgment is intended to be used, although in such event with effects limited to the proceedings in course.

Law 218/1995 applies with respect to judgments rendered by the court of a foreign state which is not a member of the EU. The effects in Italy of judgments delivered by the court of a member State is governed by Regulation 44/2001. Law 218/1995 and Regulation 44/2001 are similar in scope, and, therefore, national courts would be bound by a judgment given by the court of another member State, again provided that this judgment involves the same parties[59].

With respect to the issue of recognition in Italy of foreign judgements in general, some differences between Regulation 44/2001 and Law 218/1995 are worthwhile noting. In particular: i) Law 218/1995 makes the recognition and enforcement of a foreign judgment in Italy subject to the condition that such judgment is no longer subject to appeal according to the procedural rules of the State where it was delivered. This condition does not apply with respect to judgements given in a member State; ii) according to Law 218/1995, a foreign judgement shall not be recognised in Italy if it is in contrast with an Italian judgment no longer subject to appeal, regardless of whether the Italian proceedings were instituted first or not. This is not the case under Regulation 44/2001, where the first judgment rules, if involving the same parties, regardless of whether it is subject to appeal or not[60]; iii) with respect to this latter point, Regulation 44/2001 also specifies that the recognition of the judgment of a member State by another member State will be hindered even in the case that the judgment for which recognition is sought is in contrast with an earlier judgement given in another member State or in a third State involving the same parties and with the same cause of action. This is not the case under Law 218/1995, where recognition is barred solely by an Italian judgement no longer subject to appeal (whether given first or not).

In addition to the above rules, it should be noted that in the event the court's decision depends on the resolution of another contentious issue between the same parties which is being scrutinised by another court, either national or foreign, and may not be decided by the first court *incidenter tantum* (i.e. with effects limited to the proceedings in course), the proceedings may be stayed pursuant to Article 295

58 This comment refers to the case that the two proceedings do not relate the same or related cause of action (in which case the internal rules on lis pendens or on derogation to jurisdiction because of the relation between the two actions would apply) and in which the second proceedings must address issues already decided by a previous judgment.

59 Also with respect to Law 218/1995 and Regulation 44/2001 the assumption is made that the Italian proceedings and the foreign judgments do not regard the same or related cause of action and that the Italian court is however requested to address issues already decided as between the same parties in the foreign judgment.

60 However, Regulation 44/2001 has a clear set of rules on Lis Pendens which would render the risk of conflicting judgments remote. Under Law 218/1995 the only rule akin to a Lis Pendens provision is the one not allowing for a foreign judgment to be recognised in Italy if proceedings between the same parties and with the same cause of action were instituted in Italy before the foreign proceedings.

of the Code of Civil Procedure until such time as the issue is decided by the other court.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

Under Italian law there are no rules for evidence of damage specific to damages actions for breach of competition rules.

The general principles applicable to the evidence of damage in civil proceedings, including damage actions for breach of competition rules, are hereunder outlined.

As for the specific items that the plaintiff must prove when seeking damages compensation, please refer to point D. We will hereafter focus on the evidence of the existence and of the amount of the damage, whilst the issue of proving causation will be addressed in the following paragraph. The issue of the proof of fault has been dealt with in point D(iii) above.

EXISTENCE OF DAMAGES

The existence of damages may be proven by any means of evidence subject to the limits of the general principle of "*tipicità delle prove*". Therefore, whilst documentary evidence is normally the most effective means to prove damages, there is no preclusion for the plaintiff to have recourse to other types of evidence, such as witnesses and presumptions. An example of the availability to the plaintiff of all means of evidence provided for under the procedural law may be seen in the *Bluvacanze v. Ventaglio-Turisanda-Hotelplan* case, in which, together with the acquisition of documentation and the use of presumptions, witnesses were heard in order to verify whether the defendants had had meetings at the time when the exclusionary practice against *Bluvacanze* had been allegedly concerted.

We will hereafter refer to the reasoning adopted by the *Corte d'Appello* of Milano in the *Telsystem v. SIP* case in order to exemplify how the issue of proving damages has been dealt with.
The *Corte d'Appello* of Milano found that sufficient evidence had been provided to prove SIP's abuse of its dominant position and the damage which had been suffered by Telsystem by stating, inter alia, that "*The previously mentioned documentation shows that SIP…, by abusing of its dominant position as a monopolist, had, in one instance, unjustifiably delayed the execution of a contract and, in another instance, tried to dissuade… the new clients of its potential competitor* [i.e. Telsystem] *by inducing them to revoke their consent by flagging the risks connected to the violation of article 296 of presidential decree No. 156/1973…* [i.e. the law which according to SIP did not authorise other operators to carry out telecommunication services] … *which action was particularly effective in dissuading the undertakings to which it was addressed because it was carried out by the monopolist which had the power to cut out at any time the provision of the service to Telsystem's clients, thereby causing serious damages to them…*".
It results from the reasoning that the court used both documentary evidence (the evidence relating to SIP's attempts to delay the execution of contracts and to dissuade Telsystem's clients) and presumptions (relating to the effectiveness of SIP's pressures in dissuading Telsystem's clients) to prove Telsystem's foreclosure from the relevant market[61].

Article 278 of the Code of Civil Procedure provides that, when the existence of the damage has been proven but the amount to be awarded is still uncertain, the plaintiff may request the court to deliver a so-called "*condanna generica ai danni*" ("condemnation to undetermined damages") and order that the proceedings continue only for the determination of the amount of damages to be awarded. In other terms, the plaintiff may obtain a partial judgment which recognises the plaintiff's right to be refunded for the damages suffered, but the amount of such

61 It should be noted that the Telsystem case was decided 7 months after that the AGCM had fined SIP for the same conduct. The relevant investigation proceedings were started in July 1994 by the AGCM upon Telsystem's complaint and the action before the *Corte d'Appello* of Milano was started in October of the same year.

damages is to be awarded in a second phase of the judicial proceedings which will continue to this end. This mechanism was applied in the *Telsystem v. SIP* case, where the court on 18 July 1995 delivered a partial judgment of condemnation of SIP to undetermined damages and on 24 December 1996 delivered a second judgment which determined the amount of damages SIP were to pay[62].

According to the case-law, the standard of proof which the plaintiff must satisfy in order to obtain the undetermined condemnation to damages is watered down with respect to that which would ordinarily be required to obtain the defendant's full condemnation. In particular, according to settled case law "*… in order to obtain the undetermined condemnation to damages it is not necessary that actual evidence of the existence of an economic prejudice be given, it being sufficient that the unlawful conduct which has been ascertained be deemed a potential source of damages, according to a probabilistic reasoning, without prejudice, in the liquidation phase of the proceedings, to the assessment of the amount and of the actual and effective existence of the damage*"[63].

AMOUNT OF DAMAGE

Also the amount of damages may be proven by any means of evidence subject to the limits of the general principle of "*tipicità delle prove*". Providing evidence of the amount of damages suffered is however generally considered by authors as a problematic task in damages actions for breach of competition rules. This is mainly because, under general private enforcement rules also applicable to damage actions for breach of competition rules, damages awarded by the court must be strictly related to the actual loss suffered by the plaintiff, thus having an exclusively compensatory function, whilst any punitive or deterrent effect is excluded.

A general rule which eases the plaintiff's task to discharge the burden of proving the amount of damages is provided for by Article 1226 of the Civil Code, which states that (in Italian and in English):

Article 1226 Civil Code

"Se il danno non può essere provato nel suo preciso ammontare, è liquidato dal giudice con valutazione equitativa"

"*If the precise amount of damages may not be proved, the judge shall determine it by way of an equitable assessment*"

The equitable criterion is a residual one, which courts may apply when the existence of the damage has been established but, as set out in Article 1226 of the Civil Code, the precise amount of damages may not be proved otherwise.

In particular, Article 1226 of the Civil Code does not relieve the plaintiff of the burden of proving the existence of the damage (*an debeatur*); it amounts to a relaxation of the burden of proof resting on the plaintiff only with respect to the prove of the amount of damages (*quantum debeatur*). The judge may (also *ex officio*) resort to the quantification in equity of damages only to the extent that it objectively proves impossible or significantly difficult to exactly quantify the injury and provided that the existence of the injury itself has been firmly established[64]. The principle allowing the judge to quantify in equity the damages suffered by the plaintiff is reaffirmed in Article 2056.2 with specific reference to the assessment of the "lost profit" damages in tort liability based claims (see point G(a)(i)).

In the field of damage actions for unfair competition, authors have noted a frequent recourse of the courts to the equitable quantification of damages, which

62 It should be noted that the case law has extended the possibility to split the two actions, the first to obtain an undetermined condemnation to damages and the other one for the determination of the amount payable, also between two separate proceedings.

63 *Corte di Cassazione* judgment of 28 January 1970 No. 172; see also amongst others *Corte di Cassazione* judgment of 22 November 2000 No. 15066.

64 See, *inter alia*, *Corte di Cassazione*, judgment of 14 February 2000 No. 1632.

has been likewise explained by the difficulty in determining the amount of damages to be awarded[65].

In the framework of damages actions for breach of competition rules, courts have appointed experts as a means of evidence in relation to the damage consisting in the "loss of a chance". In particular, one of the tasks the *Corte d'Appello* of Milano assigned to the experts in the *Telsystem v. SIP* case, appears to have been stretched as to substantially provide evidence of the causal link between the "loss of a chance" damage and the defendant's abusive conduct (see in this latter respect the additional information in the following point E(d)(i)). In addition, as it appears from the framing of the last query to the experts in the same *Telsystem* case (see footnote 66), experts were used also as a means to prove the amount of the same "loss of chance" damage. As stated above, the use of the experts report as a means of evidence of the causal link and of the amount of the "loss of a chance" damage is an exception to the general rule which does not allow for the use of experts' reports as a means of evidence of the parties' claims.

The main task assigned by the *Corte d'Appello* to the pool of experts in the *Telsystem* case was however that of quantifying the damages consisting in the "profit loss" and "actual damage" suffered by Telsystem as a consequence of SIP's exclusionary practice. The experts appointed by the court were requested to answer a number of queries which were specifically framed by the court in order to obtain evidence of the actual amount of damages which Telsystem could be awarded[66].

Based on the outcome of the experts' survey, the *Corte d'Appello* of Milano awarded to Telsystem damages of €1,871,552.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

According to Article 1223 of the Civil Code (please see point G(a)(i)), only damages that are "*the direct and immediate consequence*" of an unlawful conduct may be compensated.

In actions for liability in tort, category under which actions for breach of competition rules are generally deemed to fall, the "direct causation" test requires in essence that the author of the unlawful conduct be held accountable for those damages that are the normal consequence of the unlawful conduct. As is further explained below, this implies that the link between the damage and the unlawful conduct shoud be established according to the laws of statistics i.e. based on the probability that in reality the conduct in question has caused the damages claimed ("*id quod plerumque accidit*" test). This concept has also been explained in that the defendant's liability should be limited to the consequences of the unlawful conduct that could objectively be foreseen according to an *ex ante* assessment (i.e. foreseeable by a standard observer ideally placing himself at the time the injury was sustained regardless of the defendant's subjective conditions). In what appears an effort to pinpoint the conditions for the causalik link, the causal test has by some scholars been explained by reference to the purpose of the breached provision of law. Based on this position, the causal test shall be satisfied when the

65 Ghidini, G., *La concorrenza sleale* (UTET 2001).

66 It is worthwhile reproducing the queries the experts were requested to answer: "*the experts are requested to state, upon examination of the proceedings' file, and after having carried out any appropriate investigation, and having consulted – if necessary –any other information available: what expenses, attributable to the planned vocal telephonic venture for restricted group of users, have been incurred at loss by the plaintiff since the beginning of its activity to the date of 13 January 1995; what profits the plaintiff could have made until the same date if it had timely obtained from the defendant all the necessary direct local connections with its own clients, based on a prudent assessment that should take account of the undertaking's size, of its capacity of market penetration and of the return on investment in the initial phase of its activity*; *if, due to the one year delay caused by the controversy with SIP, Telsystem has suffered a damage, consisting of the loss of the chance to present itself as the first active undertaking on the Italian market of vocal telephonic services for restricted group of users in a liberalised regime; in the event of an affirmative answer to the preceding query, if it is possible to quantify the damage suffered by the plaintiff as a consequence of such loss of a chance, having regard to sound scientific economic parameters, based on a rationale reasoning resulting in statistically probable results and with prudent appreciation*".

damages claimed constitute realisation of the risk which the breached provision of law was intended to prevent.

Article 1223 of the Civil Code has a bivalent function: it sets the boundaries of refundable damages which must be proven and may consequently be awarded and, at the same time, it establishes the level of causation which must be proven in damages actions under Italian law. In abstract terms, Italian law requires the causation test to be carried out in two steps: with the **first step** courts should establish whether the harmful event is the consequence of the defendant's unlawful conduct and, thus, whether the defendant's liability may in the first place be affirmed (so-called "*causalità materiale*"). This test is carried out on the basis of the "*but for*" or "*condicio sine qua non*" theory, which implies that the causal link shall be deemed to exist if the harmful event would not have occurred in the absence of the defendant's behaviour; with the **second step** the court is required to determine the extent of the defendant's liability and thus what damages may materially be awarded to the plaintiff. In other terms, with the second step, courts are to establish the consequences of the harmful event the defendant should actually be held accountable for (so-called "*causalità giuridica*"). This test is carried out on the basis of the above mentioned principle of "direct and immediate consequences" set out in Article 1223 of the Civil Code, applied according to the "*causalità adeguata*" or "*regolarità causale*" principle (see below).

The above two-step reasoning is summarised in the diagram below.

It should be noted that, *de facto,* the two steps of the test for establishing the causal link are difficult to be kept conceptually separate and are merged into one in the reasoning of the courts[67].

The concept of "*direct and immediate consequences*" under Article 1223 of the Civil Code is interpreted by the case-law so as to extend the area of refundable damages also to the "*indirect and mediated consequences*", in so far as these may be regarded as constituting a normal consequence of the unlawful conduct, according to the principle of "*regolarità causale*" (causal regularity) or "*causalità adeguata*" (adequate causation)[68]. Despite the apparent linguistic conflict, this means that the defendant may be held accountable for all the chain of harmful consequences generated by the unlawful event, provided that the causal link is not interrupted by another supervened event, which *per se* would be sufficient to determine the harmful consequences (or part of them)[69].

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67 This would result, for example, considering the case where a concerted practice between competitors has led to an artificial increase of the retail price of certain products. In this case, the "harmful event" for final consumers consists of the overcharge they must pay for the products in question. At the same time, the "overcharge" applied to their own products by the participants in the cartel would also identify the damage which may be awarded to final consumers, as constituting the "immediate and direct" (in the sense explained above in the main text) consequence of the defendant's participation in the cartel activity.

68 See, *inter alia*, *Corte di Cassazione*, judgments of 11 January 1989 No. 65 and of 23 April 1998 No. 4186.

69 What just stated may be exemplified in the field of damages actions for breach of competition rules, with regard to a case where an undertaking claims to have been completely excluded from a given product market due to the exclusionary concerted practice of other undertakings. The excluded undertaking also claims that it would have used revenues generated from sales on the market from which it was excluded to finance a start-up marketing activity in an unrelated product market. In such a case, Article 1223 might warrant an award of damages in favour of the excluded undertaking not only for profit loss directly on the market from which it was excluded but also on the other product market, if, for example, the plaintiff is in a position to prove that productivity and thus sales and profits on the other product market were substantially reduced due to the lack of funding expected from the principal branch of the same undertaking.

The causal link must be proven by the plaintiff. A causal link may be proven also by way of presumptions, if the damage appears as a normal consequence of the unlawful conduct based on the "*id quod plerumque accidit*" observation (i.e. what is normally found to happen under equal circumstances –see in this respect the *Albacom v. Telecom* case).

In actions for liability in tort, courts have often authorised that experts appointed by the judge be used as a means of evidence of the causal link between the unlawful conduct and the damages claimed. This is again a derogation to the general rule that prohibits that experts be used as a means of evidence of the parties' claims. This derogation is explained by the courts with the impossibility to prove the causal link by other means due to the specific technical knowledge that finding the causal link would require. However, courts would normally make such atypical use of experts' evidence subject to the party providing at least clues of the damage claimed[70].

In the *Telsystem v. SIP* and in the *Albacom v. Telecom* cases, the courts have substantially considered that the causal link was proven *in re ipsa*, i.e. was inferred from the type of unlawful conduct denounced and from the damage claimed by the plaintiff.

In *Telsystem v. SIP*, the *Corte d'Appello* of Milano appears to have implicitly found that the causal link between the "loss of profit" damage suffered by Telsystem and SIP's exclusionary practices was self evident. However, the court was uncertain as to the existence of the causal link between SIP's conduct and the "loss of a chance" damage claimed by Telsystem. The court appointed pool of experts was, *inter alia*, given the specific task of proving the relevant causal link (see the queries posed to experts reported in footnote 66).

In *Albacom v. Telecom*, the *Corte d'Appello* of Roma was more explicit than the *Corte d'Appello* of Milano in holding that the existence of the causal link resulted *in re ipsa* from the assessment of the facts. The *Corte d'Appello*'s reasoning is as follows: "*As to the causal link, the court dismisses Telecom's objection that the abuse of dominant position, as found by the AGCM…, may per se be the cause of the damage in conformity with the principle which requires that… the damage be a normal consequence of the unlawful conduct according to the id quod plerumque accidit, because the abusive conduct would allegedly harm public interests only.* [The Court dismissal of such argument ensues from that] *the way said abusive conduct conformed itself… determines, according to the causal link as specified above, the damage suffered by the plaintiff, such damage consisting of its exclusion from the market in the period between the last months of 1999 and the whole year 2000… likewise Telecom may not validly argue that the plaintiff had not effectively entered the market not because of Telecom's abusive conduct but because it was not ready to enter the market of the transmitting technology x-DSL and x-SDH, as it is proven by the fact that Telecom had saturated the whole market… and that the plaintiff has… immediately after* [the end of the abusive conduct]… *acquired a significant dimension in the relevant market*".

F. Grounds of justification

(i) Are there grounds of justification?

No specific grounds of justification are available to the defendant.

After the existence of unlawful conduct has been ascertained, the defendant could avoid condemnation to damages only if the judge finds that the unlawful conduct was without fault. In abstract terms, fault would substantially be excluded by the defendant showing the legitimate exercise of a right, self defence, necessity (under which the breach of competition rules imposed by a law provision could for example fall) and force majeure. The possibility for the defendant to exculpate himself on these grounds appear, however, somewhat theoretical in the light of: i) the attitude of Italian courts and doctrine to favour the application of the objective

70 *Corte di Cassazione Sezioni Unite* judgment of 4 November 1996 No. 9522.

fault theory or, by analogy, the rebuttable presumption of fault provided for by Article 2600 of the Civil Code in relation to unfair competition actions and ii) the peculiarities of the competition infringement (see point D(iii) above).

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement or has benefited from the infringement? Mitigation?

The fact that the middleman has passed on any overcharges attributed to an abusive conduct was explicitly taken into account by the Italian courts in the *V.I.H. v. Juventus F.C.* case decided by the *Corte d'Appello* of Torino in application of national competition rules.

In this judgment the court dealt with the issue of passing-on as a manifestation of the general principle set out in Article 1227 of the Civil Code, which renders relevant the plaintiff's contributory negligence for the purpose of mitigating or excluding compensation of damages. The two issues are dealt with together by making reference first to the wording of Article 1227 of the Civil Code and then to the above mentioned judgment of the *Corte d'Appello* of Torino.

Article 1227 of the Civil Code, which relates to contractual liability actions but also applies to tort liability actions pursuant to Article 2056 of the Civil Code, reads as follows (in Italian and in English):

Article 1227 Civil Code

"*Se il fatto colposo del creditore ha concorso a cagionare il danno, il risarcimento è diminuito secondo la gravità della colpa e l'entità delle conseguenze che ne sono derivate.*
Il risarcimento non è dovuto per i danni che il creditore avrebbe potuto evitare usando l'ordinaria diligenza".

"*If the creditor has with fault contributed to cause the damage, the compensation of damages is diminished taking account of the gravity of the fault and of the extent of the consequences deriving therefrom.*
No compensation may be awarded in relation to those damages that the creditor could have avoided by exercising ordinary diligence"

The *Corte d'Appello* of Torino dismissed VIH's damage claims through a complex reasoning. This reasoning may be divided in two parts both leading to the exclusion of VIH's right to damage compensation on the grounds that VIH had passed on damages to the final purchasers.

In the first part of the reasoning, the court qualified the agreement of 1 May 1997 between VIH and Juventus as an agreement restrictive of competition prohibited under Article 2 of Law 287/90, as it fixed prices and tied the sale of the tickets for the football match with the sale of other unrelated products. The court found that VIH had wilfully and consciously accepted to adhere to the restrictive agreement in the prospect of renewing the contract with Juventus and with the intent in any event to pass on any overcharge to the final purchasers. Therefore, the court declared the agreement of 1 May 1997 as null and void and condemned Juventus to repay to VIH the down-payment received but awarded no damages in favour of VIH. The relevant passages of the judgment read as follows:

"*Under Italian law, actions for damages are compensatory in nature … while being devoid of any punitive or deterrent function… so that the person that has actually suffered damages actually has standing in court. On the contrary, the person that has passed the damage on third parties may not validly claim compensation for damages… Now, it is undisputed that VIH consciously participated in the prohibited agreement… which VIH accepted both with the prospect of transferring the damage, according to the "passing on" method* [the court used the English

expression in the judgment], *both of a future gain resulting from the three-year renewal of the contract*".

In the second part of the reasoning the court acknowledged that Juventus' behaviour amounted to an abuse of its dominant position on the relevant market (which was identified by the court in the market of sale of tickets for the Champions League's final). The court, however, held that the persons actually harmed by the unlawful conduct were those who bought the tickets with the tied in products. No damage could, be awarded in favour of VIH in conformity with the provision of Article 1227 of the Civil Code, because it had contributed to the causation of the damage by passing it on the buyers of the tickets.

The above is, to date, the only case where the "passing on" theory was explicitly applied in court[71]. It is however not clear form the reasoning whether the "passing on" defence was explicitly used by the defendant.

In connection with the use of the "passing-on" defence, reference should also be made to a judgment of the *Corte d'Appello* of Cagliari in a case of alleged breach of national competition rules (*Corte d'Appello* of Cagliari, *sentenza* 23 January 1999, *Unimare v. Geasar*). In the judgment, which did not explicitly touch on the issue of "passing-on", arguments were used that resemble the "passing on" theory. The court dismissed Unimare's claim that Geasar be condemned to damages for having caused the termination of Geasar's contract for handling services with the Naval Service Order, by increasing airport tariffs and thereby abusing its dominant position as airport managing company. The court found, inter alia, that "*in the light of the peculiar type of relationship between Unimar and the Naval Service Order, the increase of management costs has burdened the Naval Service Order that agreed to reimburse the intermediate company for the out of pocket expenses incurred. … Therefore, it is evident the lack of any direct causal link between the tariff increase in question and damages claimed by the plaintiff*".

There are no examples in Italian case law of proceedings instituted on the basis of the "indirect purchaser" theory. It should however be noted that in the *VIH v. Juventus* case the *Corte d'Appello* of Torino in its reasoning made reference to VIH's clients (i.e. the football fans who bought the tickets at an overcharge and with extra services bundled in) as those that would have standing in court to seek compensation of damages pursuant to Article 2043 of the Civil Code, which is the general provision regarding tort liability actions[72].

The "indirect purchaser" theory may raise three main issues under Italian law, particularly as regards consumers. These issues are: i) the uncertainty in the identification of the competent court; ii) the effectiveness of the enforcement system for individual consumers' rights in light of recent court decisions and law developments; iii) the identification of the proper defendant; iv) the evidence of the causal link.

In relation to each of the above issues, the following may be noted:

i) as explained in point B(i), *the Corte di Cassazione* with its judgement No. 17475 of 9 December 2002, decided that Article 33 of Law 287/1990 would not apply to damages actions for breach of national competition rules brought by individuals. At

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71 It should be noted that the reasoning of the *Corte d'Appello* of Torino reflects the conclusions reached a few years before by Toffoletto, A., *Il risarcimento del danno nel sistema delle sanzioni per violazione della normativa antitrust* (Giuffrè 1996). This author analyses the situation of the middleman who is aware of the unlawful conduct of the original vendor and, nonetheless, takes no judicial action to stop the abuse, choosing instead the easier road of passing onto the final buyers any overcharge. The author explicitly equates this situation to that of a direct participation of the middleman in a restrictive agreement, to conclude that the middleman has no right to compensation of damages. Such right, according to the author, should instead be acknowledged to the final purchaser, both towards the middleman and the original vendor, jointly liable towards the final purchaser. According to another author, (Bastianon, *supra* footnote 37), this position can however be hardly reconciled with the judgment of the *Corte di Cassazione* of 7 May 1991, No. 5035, which excluded that the person who suffered damages has the duty to take action in court in order to satisfy the "ordinary diligence" requirement set out in article 1227.2 of the civil code.

72 Please also refer to the opinion expressed by Bastianon and by Toffoletto, (*supra* footnotes 71 and 37) according to whom indirect purchasers under Italian law could claim damages for breach of competition law in the event that the overcharge has been passed onto them by the middleman.

the same time, the court however did not deny that consumers as such may have standing to bring competition related damages actions on the basis of general provisions of law (see in particular point B(i) and the summary of the court's decision in Section V). This judgment has as a consequence potentially shifted the centre of gravity of individuals' damages actions for breach of national competition rules to the *Giudice di Pace*, competent for petty claims, particularly as regards damages claims deriving from consumers contracts. The *Corte di Cassazione* did not however take a clear position on the entitlement of consumers to claim damages and thus did not resolve once and for all the issue of the standing of consumers pursuant to Article 33.2 of Law 287/90, as it transpires both from the mostly negative reactions of the doctrine and from the subsequent decision of the lower court, which instead held that a consumer damage action was to be referred to the competent *Corte d'Appello* pursuant to Article 33.2 (see point B(i)). This clearly gives rise to a situation of uncertainty for consumers in the identification of the competent judge. This uncertainty might in the near future be resolved by a decision of the joint divisions (Sezioni Unite) of the *Corte di Cassazione*, which have been called to rule on this issue (please refer to point B(i));

ii) related to this issue, is the issue of the effectiveness of the protection that the system affords to consumers. In the consumers' perspective, the stance taken by the *Corte di Cassazione* could at first be welcome as a positive outcome, as it would save them the burden of bringing damages actions, usually of a small value, before more qualified courts (namely the *Corte d'Appello*) and in any event ease the enforcement of their rights. It should however be noted that the amendment to Article 113 of the Code of Civil Procedure enacted after the *Corte di Cassazione*'s judgement (see point B(i)) might prove to work as a disincentive for consumers' (competition based) damages actions. The amendment to Article 113 has deprived the *Giudice di Pace* of the authority to decide "on an equitable basis" (see point B(i) for the relevant meaning) claims not exceeding the value of ε 1.100, whenever the claim relates to consumers contracts (such as banking contracts, insurance contracts, contracts for the supply of electricity/gas and so forth). This amendment could increase the difficulty for individual consumers to have their claim upheld, as the judge will no longer be allowed to use his discretion (even though such discretion is now substantially limited as a result of the *Corte Costituzionale's* judgment no. 206 of 5 July 2004 – see point B(i) above) to rule on small value claims and the more laborious ordinary proceedings would apply[73]. In addition, the amendment to Article 113 of the Code of Civil Procedure has also resulted in the relevant judgments now being subject to potentially two appellate proceedings (before the *Tribunale* and subsequently before the *Corte di Cassazione*), whereas under the previous system (which however is still in force for damages claims not related to mass consumers contracts), judgments given by the *Giudice di Pace* would only be subject to appeal before the *Corte di Cassazione* (see point B(i));

iii) the indirect purchaser's action could in practice require that both the principal and the intermediate undertaking be sued to demand that they be jointly and severally condemned to compensate damages. As it was noted by part of the doctrine[74], the middleman could in fact be held liable for the overcharge, together with the principal undertaking, if the middleman, being fully aware of the principal's unlawful conduct, consciously decides to pass the overcharge onto its customers, or if the middleman, although unaware of the principal's conduct, ought to have known it by making use of ordinary diligence;

iv) the "direct and immediate consequences" causation test under Article 1223 of the Civil Code, in the extensive interpretation given by the case law (see point E(d)(i)), would not appear to constitute in theory a hurdle to finding that a legally relevant causal link exists between the principal's conduct and the damage suffered by the end customer. The middleman's price increase as a way to pass on the overcharge could in fact be regarded as a normal consequence of the principal's

73 In this respect it is reasonable to believe that the value of the individual claim in damages actions relating to consumers contracts could in many instances be within the ε 1,100 threshold provided for by Article 113 of the Code of Civil Procedure, as amended. As a matter of fact, the nature of mass consumers contracts is such that, whilst in aggregate the overcharge (the damage) imposed on consumers by the cartel participants might be really high (as it would be the result of a multiple of the overcharge applied to each contract), the overcharge paid by each individual consumer could well be within the ε 1,100 threshold.

74 Toffoletto, A., *supra* footnote 71, p. 328 ff.

conduct according to the "*causalità regolare*" or "*causalità adeguata*" test. In practice, however, it may prove difficult to establish which part of the overcharge is directly linked to the principal's conduct or if instead the overcharge actually paid by the end customer is not also the result of an additional mark-up added by the middleman, which may for example be the case if the demand is inelastic (this issue is connected to the other issue pointed above of identifying the proper defendant)[75].

Only with reference to actions based on contractual liability, the defendant may limit his liability to the damage that was foreseeable at the time when the obligation arose, provided that the defendant did not with intent fail or delay the fulfilment of the obligation (Article 1125 of the Civil Code). In brief, this defence enables the party to limit his liability to damages that, based on an *ex-ante* evaluation, could be considered as a normal consequence of the breach of contract at the time the contractual obligation was undertaken. This defence is not available to the defendant where the foundation of the damage claim is liability in tort, under the general provision Article 2043. As pointed out in this report, Italian courts have so far considered that the liability arising from the breach of competition rules is primarily tortious in nature.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Article 1223 of the Civil Code identifies the basis for the assessment of damages. This provision reads as follows (in Italian and in English):

Article 1223 Civil Code

"*Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta*"

"*Compensation of damages for failure to perform the contract or delay in the performance shall comprise both the actual damage and the profit lost by the creditor, in so far as they are the immediate and direct consequence thereof*"

Although it explicitly refers to the hypothesis of damage actions for breach of obligations arising out of contracts, the above provision of Article 1223 of the Civil Code, like that of Article 1227 (see point F(ii)(iii) above), also applies to calculation of damages in tort liability based actions, pursuant to the provision or Article 2056 of the Civil Code. This article extends the application of some of the provisions governing the quantification of damages in contractual liability based claims to tort liability based claims. In particular, according to Article 2056 of the Civil Code, damages in tort liability actions shall also be assessed taking account of the "*danno emergente*" (actual damage) and of "*lucro cessante*" (lost profit). Article 2056 of the Civil Code read as follows (in Italian and in English):

Article 2056 Civil Code

"Il risarcimento dovuto al danneggiato si deve determinare secondo le disposizioni degli articoli 1223, 1226 and 1227.
Il lucro cessante è valutato dal giudice con equo apprezzamento delle circostanze del caso"

"*Damages to be awarded to the injured party shall be determined pursuant to the provisions or articles 1223, 1226 and 1227*.

75 Indeed, according to Giudici, P., *supra* footnote 13, Italian courts could assert that a problem of proximate causation prevents the recovery of damages suffered by indirect purchasers acting in tort.

Lost profit shall be assessed by the judge with equitable appreciation of the circumstances of the case"

The second paragraph of the above provision, requesting that the judge in tort-liability based claims determine the lost profit with equitable appreciation of the circumstances of the case, appears to be interpreted by the case-law within the same limits and as serving the same function as the provision of Article 1226 of the Civil Code[76] (see point E(c)(i) above).

When the tort giving rise to the action amounts to a criminal offence, then it is open to the plaintiff to claim also compensation of "*danni morali*" (moral damages), pursuant to Article 2059 of the Civil Code. Since breach of competition rules does not amount to a criminal offence under Italian law, we will not deal with the issue of liquidation of "*danni morali*".

It should be noted that "actual damage" and "loss of profit" are regarded by the case law as two general categories, which may on a case by case basis be specified depending on the type of injury claimed by the plaintiff. For the purpose of this report, it should be noted that two of the specifications of the damage have been typified: these are the so-called "damage to the commercial reputation" ("*danno all'immagine*") and the damage for loss of chance ("*danno per perdita di chance*"), which are usually considered as falling within the category of actual damage.

In the three main cases which have been concluded by the Italian courts with an award of damages to the plaintiff, damages have been assessed taking account of the "*danno emergente*" and of the "*lucro cessante*" by the plaintiff.

In *Telsystem v. SIP* the *Corte d'Appello* of Milano, with the aid of a pool of experts appointed by it, first assessed the damage suffered by Telsystem on the basis of the "*out of pocket expenses, imputable to the telephone services for restricted group of users, incurred by Telsystem at pure loss since the beginning of its activity on 13 January 1995*". This is a typical example of liquidation of damages related to the "*danno emergente*" (i.e. substantially expenses incurred at loss by the plaintiff as a consequence of the defendant's unlawful conduct).

In the same case, the *Corte d'Appello* also awarded the overall damage suffered by Telsystem on the basis of the profit lost by the same Telsystem as a consequence of SIP's exclusionary practice.

In the *Albacom v. Telecom* case, the *Corte d'Appello* of Roma awarded damages taking account exclusively of the profit lost by Albacom as a consequence of Telecom's exclusionary practice. It appears that in that case no award of damages in relation of expenses incurred at loss was claimed by Albacom.

Likewise in the *Bluvacanze v. Ventaglio-Turisanda-Hotelplan* case the *Corte d'Appello* of Milano awarded patrimonial damages to the plaintiff taking account of the profit lost by the latter and of the injury to its commercial reputation caused by the defendants' unlawful conduct.

The general rule under Italian law is therefore that the basis for assessment of damages is the injury suffered by the plaintiff and not the profit made by the defendant[77].

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76 See *inter alia Corte di Cassazione*, judgment of 27 December 1994 No. 11202.

77 In some cases relating to damage actions for acts of unfair competition, Italian courts have however assessed the damage suffered by the plaintiff on the basis of an automatic correspondence between the profit lost by the plaintiff and the profit gained by the defendant (see *Tribunale* of Urbino, in *Rivista diritto industriale*, 1989, II, p. 96); this finding has been criticised as arbitrary by the Italian doctrine (Ghidini, G., *supra* footnote 65). Still in relation to a damage action for unfair competition, the *Corte d'Appello* of Milano has stated that the automatic correspondence between the profit lost by the plaintiff and the profit gained by the defendant may be established for the purpose of damages calculation only in the event that the plaintiff and the defendant have identical commercial and productive characteristics, which in that case was found in relation to a product niche highly specialised, in which the demand was determined by technical needs and little affected by subjective factors (*Corte d'Appello* of Milano, judgment of 1 February 1994, in *Rivista diritto industriale*, 1994, II, p. 224).

(ii) Are damages awarded for injury suffered on the national territory or more widely?

There is no specific precedent in this respect. Assuming however that jurisdiction of the Italian court has been established, and based on conflict of law rules, in principle there is no obstacle in awarding damages for injury suffered more widely than on the national territory (see in this respect *Corte di Cassazione*, judgement of 3 April 2000, No. 86).

(iii) What economic or other models are used by courts to calculate damage?

Both the *Corte d'Appello* of Milano and Roma, in the *Telsystem v. SIP* and *Bluvacanze v. Ventaglio-Turisanda-Hotelplan* cases, on the one hand, and in the Albacom v. Telecom case, on the other hand, have assessed damages by making use of the "but for condition".

As regards the *Telsystem v. SIP* case, the recourse by the court to the but for model follows clearly from the phrasing of the second query posed to the pool of experts, which, as pointed out above, requested that the experts establish: "*what profits the plaintiff could have made up to the same date* [i.e. 13 January 1995] *if it had obtained from the defendant in a timely manner all the necessary direct local connections with its own clients, based on a prudent assessment that should take account of the undertaking's size, of its capacity of market penetration and of the return on investment in the initial phase of its activity*".

The calculation of damages on the basis of the "but for" economic model in the *Telsystem v. SIP* case follows even more clearly from the introductory passages of the experts' report, which read as follows: "*The assessment of the economic* significance *of any entrepreneurial initiative requires an overall evaluation of its effects over the course of time, to be identified in accordance with the principles of the differential analysis. Therefore, all those (and only those) consequences that the activity generates at economic level and that would be missing in the absence thereof shall be imputed to it. (…) If a disruption of the activity occurs, the economic consequences shall still be assessed according to the principles of the differential analysis. In other words, one should identify the modifications that the adverse event induces in the expected manifestations of the economic initiative and that, in the absence of such event, would not occur*"[78].

Likewise, in the Albacom case, the *Corte d'Appello* of Roma applied the "but for" model. On that occasion it appears that the court directly quantified damages to be awarded, based on the available documentation (no court experts were appointed). Namely, the court awarded to Albacom an amount of damages which would compensate the profit lost by Albacom in the relevant market in the period (between the end of 1999 – 2000) during which it was foreclosed from the market due to Telecom's abusive conduct. Such damages were calculated as follows: the market share held by Albacom on the market before its foreclosure was multiplied by Telecom's turnover on the same market during the foreclosure period. The court held in this respect that Telecom's turnover in the foreclosure period corresponded to the overall market value, as during that period Telecom was the only active operator. The court extracted from the resulting figure the profit which Albacom would have presumably gained in the absence of Telecom's exclusionary behaviour. The court deemed that this profit amounted to 10 per cent. of turnover. The court arrived at the figure of 10 per cent. by reducing the 12 per cent. profit ratio identified by the telecommunication authority for Telecom, this reduction being explained by the fact that Albacom was an innovator on the market and thus subject to higher costs.

In the *Bluvacanze case* the court applied the "but for model" according to the "before and after theory". The court, before dealing in detail with the quantification of the profit lost by Bluvacanze, made the following explanatory statement: "*The quantification of the damage may also be made on the basis of presumptive criteria of the profit lost as a consequence of third parties' unlawful behaviour, by*

78 The experts' report is not public. Some passages of the report have been made available in Bastianon *supra* footnote 37.

forecasting the earnings that could have been made in the absence of such behaviour and by projecting the data noted in the past and that could have reasonably been noted in the subsequent period". On the basis of the data provided by the plaintiff, the court considered the average value of the defendants' travel packages sold by Bluvacanze in the year 2000, i.e. the year immediately before the period (March-June 2001) during which the tour operators denied access to the on-line reservation system. It then moved on considering the increase ratios of the value of the defendants' respective travel packages sold by Bluvacanze from March 2000 up to the end of the year. This increase ratio was applied to the average value of the defendants' travel packages sold during the first three months of 2001 (January-March) immediately preceding the period of exclusion. The resulting average value was then multiplied by three, i.e. by the number of months during which Bluvacanze was denied access. The resulting value was checked by the court against the value of the defendants' travel packages actually sold by Bluvacanze in the same period (March-June) of 2002, in order to verify whether the two values (i.e. the hypothetical value referred to the period of exclusion and the actual one referred to the same period but after the exclusion) were comparable. The court found that the two figures were indeed similar and calculated the profit lost by the plaintiff by applying on such value the commissions the plaintiff would have received from the defendants less the 10 per cent. flat discount that the plaintiff would presumably have granted to all its clients according to its usual commercial policy.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

Courts use ex-ante estimates, subject however to the adjustments in the final determination of damages explained in point (b)(i) below with reference to indexation and interest.

(v) Are there maximum limits to damages?

No maximum limits to damages are provided for under Italian law, subject however to the general principle that damages may not be awarded in excess of the plaintiff's actual injury.

(vi) Are punitive or exemplary damages available?

No. Please also refer in this respect to the *dictum* of the *Corte d'Appello* of Torino in the V.I.H. v. Juventus F.C. (reported under point F(ii)(iii)).

(vii) Are fines imposed by competition authorities taken into account when setting damages?

No. Although in the absence of any specific court precedent in this regard, no statutory basis exists for the judge to take account of fines imposed by a competition authority when setting fines.

(b) Interest

(i) Is interest awarded from the date the infringement occurred, of the judgment, or the date of a decision by a competition authority?

Before dealing in detail with the question, it should be noted that under Italian law a distinction exists between types of monetary obligations, including those arising out of an award of damages. The distinction is between obligations which have as their object a predetermined sum of money ("*debiti di valuta*") and obligations which do not have as their object a predetermined sum of money ("*debiti di valore*"). For the latter, the liquidation of a sum of money is determined by the judge essentially as the substitute for the duty to restore the victim to the situation it would have been in had the violation giving rise to the obligation not taken place.

Debiti di valuta are typically payment obligations undertaken in a contract, whereas *debiti di valore* are typically monetary compensation awarded in tort liability based claims. It should however be noted that, whilst tort liability based

claims may not give rise to a *debito di valuta* (since by definition obligations in tort do not have as their object a predetermined amount of money), contractual liability based claims may instead give rise to *debiti di valore* (since obligations may arise from a breach of contract which do not have a predetermined sum of money as their object[79]).

Calculation of interest and indexation in the case of *debiti di valore* and *debiti di valuta* respectively are discussed hereunder.

DEBITI DI VALORE

In the first place, courts determine the amount of damages with reference to the time of injury (i.e. the basic amount as if the damage was awarded simultaneously with the occurrance of the injury)..

Once the basic amount has been established, interest thereon may be awarded according to a number of methods[80]. In particular, courts may index the basic amount to the date of the judgment by applying the inflation rates as yearly noted by ISTAT (i.e. the national public institute for statistics). This is done because the basic amount, which, as aforesaid, reflects monetary values at the date of injury, must be recalculated (based on inflation rate indexes) to current monetary values at the date of judgment. The plaintiff otherwise would be awarded less than the actual damage, due to depreciation udergone by the amount of damages from the date of injury and the date of judgment. Once the amount of damages has been indexed, the staturoty interest (see subsequent paragraph) may be awarded (on top of indexation) from the date of the judgment.

Another, frequently used, method provides that courts award the interest (usually the statutory interest) on the basic amount (i.e. the amount of damages calculated at the date of inury) as progressively (usually yearly) indexed[81]. The statutory interest then continues to accrue on the fully indexed amount of damages from the date of the judgment (this is the method adopted by the *Corte d'Appello* of Roma in the Albacom case and by the *Corte d'Appello* of Milano in the Bluvacanze case). In no event may the court award interest on the fully indexed basic amount from the date of injury. Interest on the fully indexed amount may accrue only from the date of the judgment.

The *Corte d'Appello* of Milano in *Telsystem v. SIP* determined the basic amount and indexed it in full to the date of judgment. The statutory interest was awarded on the fully indexed amount from the date of the judgment. Differently from the *Bluvacanze* and *Albacom* cases, no intermediate interest periods on the amount of damages were awarded.

Courts may also award damages at actualised value, i.e. at monetary values at the date of the judgment without having recourse to the two-step calculation mentioned above.

When the damage is quantified by the court at actualised value, awarding interest on the amount of damage from the date of injury is no event permitted[82].

DEBITI DI VALUTA

The rules on the basis of which interest may be awarded in connection with *debiti di valuta* are set out in Article 1224 of the Civil Code. Differently from what is provided for *debiti di valore*, indexation and interest may not be cumulatively awarded for *debiti di valuta*[83]. Article 1224 of the Civil Code indeed provides that

79 See *Corte di Cassazione*, judgment of 1 July 2002, No. 9517.
80 Outlined by the judgment of the *Corte di Cassazione* of 24 March 2003, No. 4242.
81 See *Corte di Cassazione*, *Sezioni Unite,* judgment of 17 February 1995 No. 1712.
82 See *Corte di Cassazione* judgment of 8 April 2003 No. 5503.
83 This is mainly due to the fact that, when a contract is entered into which provides for an obligation to pay a given amount of money, the parties may by virtue of contractual provisions, hedge the risks related to inflation and possibly other forms of devaluation by providing for appropriate mechanisms, such as default interest rates. In the absence of this mechanisms, inflation does not per se constitute a damage, as it is something to which each and every monetary transaction is exposed to.

when the object of the obligation is the payment of an amount of money[84], statutory interest (see following paragraph) is automatically due from the day the defendant is formally in default. Only in the event that the plaintiff proves that the unavailability of the amount of money due has caused a damage higher than the statutory interest, this higher damage may be awarded by the judge pursuant to Article 1224.2 of the Civil Code. Such higher damage may for example be awarded in the event that the plaintiff proves that he would have invested the money in such a way as to gain more than the statutory interest on the oustanding amount of money. In the event that the inflation rate noted in the period during which the money was payable is higher than the statutory interest, the plaintiff may be awarded damages in a percentage equal to the inflation rate calculated on the outstanding money, again provided that the plaintiff may prove that he would have used that money in investments capable of hedging the inflation rate. The statutory interest and the possible higher damages pursuant to Article 1224.2 may not cumulatively be awarded[85].

If default interest higher than the statutory interest is provided for by contract, such default interest is awarded in the judgement. In this case, however, in no event may damages higher than the default interest be awarded.

(ii) What are the criteria to determine the levels of interest?

The level of interest is determined pursuant to Article 1284 of the Civil Code, which establishes the level of the so-called *saggio dell'interesse legale* (i.e. statutory interest rate), i.e. of the interest rate that by operation of law accrues on any awarded amount of money. The level of statutory interest may be changed every year by way of a decree of the Minister of Finance to be issued by December 15th every year. The legal interest rate is currently fixed at 2.5 per cent.

Is compound interest included?

Compound interest is not included. According to Article 1283 of the Civil Code, accrued interest may be productive of interest only from the date when the compounding of interest is demanded in court and provided that the interest has been payable for a period of at least six months. This principle applies only to *debiti di valuta*, and thus to contractual payment obligations. As a matter of fact, the *Sezioni Unite* of the *Corte di Cassazione* by judgment No. 11065 of 10 October 1992 ruled that interest payable on *debiti di valore* (i.e. on the awarded amount of damages in tort liability cases such as normally cases for breach of competition rules) may not be compounded and thus may not be productive of interest.

H. Timing

(i) What is the time limit in which to institute proceedings?

According to Article 2947 of the Civil Code, proceedings to enforce the right to compensation of damages for tort liability claims must be instituted within 5 years from the date of the "verification of the event". The meaning of this expression, which is used in Article 2947 of the Civil Code, must be read in conjunction with Article 2935 of the Civil Code. This article identifies by way of a general principle the *dies a quo* from which time limits start to run. According to this provision, time limits in relation to all types of actions start to run "*from the day on which the right becomes enforceable*". According to the case-law, Article 2947, interpreted in the light of the general provision of Article 2935, means that the time limits to institute proceedings start to run from the day the injured party ought to have known of the injury. In particular, according to the *Corte di Cassazione* (judgments No. 5913 of 9 May 2000 and No. 12666 of 29 August 2003) what triggers the lapsing of the time limit is the objective manifestation of the damage not the simple existence of it, whilst the injured party's subjective unawareness of the existence of the damage does not bar the lapsing of the time limit. The provision of Article 2947 of the Civil Code applies to damages actions for breach of competition rules, which

84 Also if this is due as restitution of payments made on the basis of a contract which is declared null and void – see judgment of *Corte di Cassazione*, *Sezioni Unite* judgment of 4 December 1992 No. 12942.

85 See *inter alia Corte di Cassazione,* judgment of 26 June 2000 No. 12758.

are deemed by Italian courts and doctrine to fall within the wider category of tort liability actions (see judgments in the VIH, Telsystem and Albacom cases).

The time limit for instituting proceedings extends to 10 years in relation to actions for obtaining the restitution of payments made in performing a contract, which is subsequently declared null and void for breach of Article 2 or 3 of Law 287/90 (or of Articles 81 or 82 EC). This 10 year time limit also applies to actions based on contractual liability in general.

(ii) On average, how long do proceedings take?

On average, proceedings started before the *Corte d'Appello* pursuant to Article 33.2 of Law 287/90 may take around 2 to 3 years. The same time may on average be necessary for a possible appeal before the *Corte di Cassazione*.

In the event that damages actions for breach of competition rules are to be instituted before the courts of first instances (*Giudice di Pace* or *Tribunale*), proceedings before those courts may range from months (for the proceedings before the *Giudice di Pace*) to 2 to 4 years (proceedings before the *Tribunale*). In the event of appellate proceedings before the competent second instance court (and then the *Corte di Cassazione*) these periods will be substantially increased[86].

In any event, the duration of the proceedings before the *Corte d'Appello* and, as the case may be, before the courts of first instance, depends on the way evidence is taken: the appointment of experts and/or the hearing of witnesses may perceptibly extend the duration of the proceedings.

(iii) Is it possible to accelerate proceedings?

Article 187 of the Code of Civil Procedure provides that when the judge deems that the judgment is ready to be issued without any need for any (additional) investigation (i.e. taking of evidence), he may break off the proceedings and decide the case. This decision is discretionary in nature, although it may be prompted by either party's request. The decision to consider that a judgment can be delivered, in any event may not be taken prior to the hearing for the appearance of the parties' attorneys pursuant to Article 180 of the Code of Civil Procedure and of another hearing for the personal appearance of the parties and an attempted settlement pursuant to Article 183 of the same code[87].

It should also be noted that, in the event of actions instituted before the *Tribunale* as court of first instance, the parties may shorten the time necessary for obtaining the definitive judgment of the *Corte di Cassazione* by by-passing the second instance judgment pursuant to Article 360.2 of the Code of Civil Procedure. According to this provision, the parties may submit the judgment of the court of first instance directly to the *Corte di Cassazione*, as supreme and final court of appeal. This procedure, however, requires the agreement of all parties to the proceedings.

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86 In this connection it should be noted that one of the pillars of the Procedural Reform - as stated in the report accompanying the project - is that of remedying the problem of the excessive duration of proceedings in Italy, which in general, from the first instance judgment to the final judgment of the *Corte di Cassazione* may take over a decade. To this end, one of the main changes envisaged by the Procedural Reform is illustrated in the following footnote.

87 The Procedural Reform provides for a radical change in the way proceedings are presently conducted. Under the rules currently in force, every procedural step (such as, in particular, the deposit of defences or documents and requests for admission of evidence) must be authorised at a specific hearing by the judge. Proceedings therefore require the continuing involvement of the judge and the fixation of a relevant number of hearings, most of the time for activities which are in practice routinary. The Procedural Reform now provides that the parties agree on a faster track, and decide to carry out the fact finding phase through exchange of defences and documentation out of court and out of the control of the judge. In practice it amounts to a statement-response mechanism (like table-tennis), which however may be broken at any time by the addressee of a response by requesting the fixation of the hearing before the judge. Such hearing should be the decisive one fixed for the discussion of the parties' positions, except that other hearings are required for hearing witnesses If the Procedural Reform is passed into law, it will therefore be for the parties to accelerate proceedings by choosing a procedure faster than the current one (which, also after the envisaged reform, would substantially continue to apply, even though changed in order to concentrate hearings).. Other procedural changes are provided for with respect to summary judgements and interim proceedings, still aimed at accelerating the duration of the proceedings.

(iv) How many judges sit in actions for damages cases?

One judge sits in actions for damages both before the *Tribunale* (this latter also if acting as second instance court in respect of decisions of the *Giudice di Pace*) and before the *Giudice di Pace*.

As regards actions for damages for breach of national competition rules pursuant to Article 33.2 of Law 287/90, the case is decided by a panel of three judges in accordance with the ordinary procedural rules[88]. It is disputed whether the investigative phase before the *Corte d'Appello* still requires the presence of three judges or whether it may instead be handled by just one judge. This latter opinion seems to be the prevailing one (a dissenting position was taken by *Corte d'Appello* of Torino in the Pagine Bianche/Pagine Gialle case).

Five judges sit in the appellate proceedings before the *Corte di Cassazione*. The number of deliberating judges may be nine in the event the case is assigned to the *Sezioni Unite* of the same Court.

(v) How transparent is the procedure?

Article 128 of the Code of Civil Procedure provides that hearings are not publicly held, except for the final one which may be fixed upon the parties' requests for the oral discussion of the case. In practice this hearing is never held, as the parties confine themselves to the final written defences. Pursuant to the same provision, the judge may however order that even the final hearing be held privately, when this is required by reasons of security of the State, *ordre publique* or public decency.

The parties' defences and the minutes of the hearings are not available to the public. As between the parties, there are no specific provisions providing for the protection of the parties' (or third parties') business secrets. In general, and in the absence of specific precedents to our knowledge, it may be held that it is for the parties themselves (and for third parties) to decide to withhold business information of a confidential nature. The lack of scrutiny by the judge prior to disclosure, aimed at evaluating what information may be considered as a sensitive one particularly in the context of an order for disclosure pursuant to Article 210 of the Code of Civil procedure, may be the source of procedural uncertainty or inefficiency (see also comments in point E(a) and footnote 48).

The judgment, when delivered, is made available to the public by way of deposit with the chancellery.

I. Costs

(i) Are court fees paid up front?

Court fees must be paid up front by the party who first files the proceedings with the general registry of contentious matters of the competent court (usually the plaintiff).

Court fees payable up front vary depending on the value of the dispute, to be determined on the basis of the parties' claims. Currently they range between a minimum of ε 0 (for proceedings with claims of a value not exceeding ε 1,100) to a maximum of ε 930 (for proceedings with claims of a value exceeding ε 516,457).

(ii) Who bears legal costs?

88 It is debated whether one judge should be sitting in damages actions for breach of competition rules before the *Corte d'Appello*, This opinion is based on the reason that the *Corte d'Appello* exceptionally acts as court of first instance, which would authorise the application by analogy of the rules provided for proceedings before the *Tribunale*. The opinion in favour of the presence of one judge only also stresses the fact that the procedural rules requiring the presence of three judges have been specifically designed for the cases that the *Corte d'Appello* acts as court of second instance. See Peroni, P. *nota ad ordinanza Corte d'Appello di* Milano *2 maggio 2003* (2003) 6 Il Diritto Industriale 537.

Pursuant to Article 91 of the Code of Civil Procedure, the losing party shall in principle be condemned in the judgment to refund the winning party's legal costs.

The judge may also decide that each party bear its own legal costs in the event that both parties' claims are partially upheld or in the event that the legal issues are complex and unusual or that there are conflicting court precedents in respect of those issues or whenever the judge deems that any other "*justified reasons*" exist for each party to bear his own legal costs.

(iii) Are contingency fees permissible?

Article 45 of the professional ethics code, relating to any kind of litigation activity of lawyers, prohibits any arrangement fixing the lawyers' fees in a percentage of the value of the claim. Under the same provision, however, written "success fee" arrangements, allowing the lawyer to claim a bonus in the event of a successful action, are permissible, provided that such success fee is held down to reasonable limits and is justified by the type of controversy. The same provision is also contained in the professional tariff for lawyers. In this context, it should be noted that the minimum values provided for by the professional tariffs for lawyers may not be derogated from, whilst such prohibition does not exist in relation to the upper limit of the fixed tariff scales, which may be derogated from by agreement of the parties.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

(v) What are the different types of litigation costs?

In principle, legal costs that may be recouped by the winning party are those indicated in the professional lawyers' tariff, which identifies a number of items, each corresponding to a specific judicial activity. For each item, the professional tariff fixes a variable amount, ranging between a minimum and a maximum (the *"onorari*"), related to the value of the claim.
On top of the variable amount, a fixed, lower value, is provided for other itemised activities, mostly secretarial, of a non strictly professional nature ("*diritti*"). The winning party is also entitled to recoup the court fee, if paid, an amount equal to 10 per cent of the total of "*onorari*" and "*diritti*" as a lump sum for general expenses incurred and the fees paid to technical expert appointed by the same winning party, provided however the expert has been appointed as part of a technical expertise authorised by the judge.

The costs of experts appointed by the court are, by order of the court, usually advanced in equal parts by the parties to the proceedings. With the judgment, the judge shall in principle condemn the losing party to refund the other party of the advance on the court's expert costs. This is however subject to the possibility for the judge to decide that each party bears his own legal costs, when this is justified by the nature of the controversy (see point I(ii)).

Similarly, in the event that the disclosure ordered pursuant to Article 210 of the Code of Civil Procedure (see point E(a)(iv)) entails a cost, this is to be advanced by the requesting party, save the reversal of the relevant cost onto the losing party with the judgment (and again subject to the judge's decision that each party bear his own legal costs).

The judge pursuant to Article 92 of the Code of Civil Procedure has the power to reduce legal costs claimed by the winning party to the extent they are deemed excessive or superfluous.

(vi) Are there national rules for taxation of costs?

Article 91 of the Code of Civil Procedure provides that "*The judge with the judgment defining the proceedings brought before himself, shall condemn the losing party to refund the expenses incurred by the winning party and shall award them together with lawyers' fees*".

Taxation of costs is decided by the judge with the judgment ruling on the merits of the case, based on the principle of the "losing party pays all" which, however, is not imperative and may be derogated from by the judge taking account of various factors (see section "Who bear legal costs" above). The award of costs may be challenged by appealing the judgment.

In principle the judge may not award costs and attorney's fees in excess of the amounts fixed in the professional tariff between a minimum and a maximum for each item of judicial activity (currently provided for by Ministerial Decree No. 585 of 5 October 1994) in relation to the value of the claim. It is for the party's attorney to submit a detailed statement of fees and costs within the limits identified in the tariff. In the absence of such a statement, the judge may *ex officio* award costs to the winning party by way of a decision which is discretionary in nature, again within the limits set out in the tariff.
Article 5 of the professional tariff exceptionally provides that "*in cases of particular importance for the type of legal issues involved*" the judge may depart from the maximum limits fixed in the tariff and award fees in favour of the winning party for an amount up to twice the maximum amounts established for each item. The existing case-law indicates however that judges are loath to make use of such a power. In practice, the application of the professional tariff may result in the winning party being awarded legal costs for less, and sometimes considerably less, than the actual disbursement[89].

(vii) Is any form of legal aid insurance available?

Various forms of legal aid insurance policies are available. Legal aid insurance policies are available both for undertakings and individuals claiming damages for breaches of competition rules. These policies would indemnify the policy-holder for legal costs incurred by the plaintiff/defendant. However the maximum insurance coverage is usually limited and below the disbursement that could be required in damages actions for breach of competition rules.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is difficult to indicate average litigation costs in damage actions for breach of competition rules. These costs may vary significantly depending on the number of professionals involved, such as lawyers and economists, on the degree of professionals' commitment required by the case, on the judicial activity required, and, in particular, whether it would be necessary to hear witnesses or to carry out technical expertise, and on the value of the claim.

Legal costs each party could face may in fact vary from a few hundreds of Euros (in the case of petty claims brought before the *Giudice di Pace*) to hundreds of thousands of Euros (in cases brought before the higher courts).

However, a reasonable estimate of costs for judicial assistance in first instance proceedings before the *Corte d'Appello (*pursuant to Article 33.2 of Law 287/90) or before the *Tribunale* (pursuant to Article 81 or 82 EC) would be approximately ε70-80,000. This estimate has been made assuming that the case is based mostly on documentary evidence, that limited judicial activity is required and that the amount of damages claimed is equal to approximately ε1,000,000.

J. General

89 As a matter of fact, whilst the minimum values provided for in the professional tariff may not be derogated from (see point I(iii)), the maximum values provided for in the tariff may indeed be derogated from. This could for example be the case for law-firms charging their clients on an hourly basis, rather than on a fixed rate per type of activity basis. In this connection, it is worthwhile mentioning the judgment delivered by the *Corte d'Appello* of Torino in a case of alleged breach of national competition rules (*Corte d'Appello* of Torino, judgment of 7 August 2001, *Pagine Italia v. Telecom Italia and Seat*, in (2002) il Diritto Industriale, vol. 3, at 261 and ff.). On that occasion the court explicitly considered the professional tariff as implicitly abrogated after the judgment of the Court of Justice of 18 June 1996 in Case C-35/96 and awarded to the winning parties legal costs for ε 160.000 circa. However, in the light of the subsequent judgment of the Court of Justice in the *Arduino* case (C-35/99, [2002] ECR I-01529), it is foreseeable that the ruling on costs of the *Corte d'Appello* of Torino will remain an isolated case.

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The answers to the previous questions are not specific to the private enforcement of competition rules, except for those addressing the issue of competent courts and those dealing with the "passing on" defence in damages actions for breach of competition rules.

Rules on competent courts substantially differ from the general private enforcement rules, because they have identified the *Corte d'Appello* as the court having jurisdiction pursuant to Article 33(2) of Law 287/90 as court of first instance on nullity and damages actions arising out of the breach of national competition rules.

The *Tribunale* and the *Giudice di Pace* (the latter only for small claims) have jurisdiction on cases of infringement of EU competition rules and of national rules brought pursuant to Article 2043 of the Civil Code. In connection with these cases, the *Corte d'Appello* would ordinarily act as second instance court in respect of judgments delivered by the *Tribunale*.

As far as the "passing on" theory is concerned, this appears to characterise to some extent competition based damages actions. However, the issue of passing-on did arise in the context of other areas of litigation and, particularly, in connection with the issue of whether undertakings may recoup from the tax admnistration duties levied in breach of Community law, after that such duties have been passed as an overcharge onto final purchasers (see in this connection the *Cinzano* case described under point E(a)(iv) and at Community level Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595)..

(ii) EC competition rules are regarded as being of public order. Does that influence any answers given?

No.

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

In principle there are no differences.

It should however be noted that, pursuant to Article 8.2 of Law 287/90, undertakings that, by virtue of a legal provision, are entrusted with the operation of services of general economic interest or are allowed to operate as monopolists on a given market, are exempt from the application of the national competition rules, only with respect to activities as may be strictly related to the fulfilment of the task specifically entrusted to them.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There are no precedents in this respect, although no statutory basis would appear to justify any such interaction.

(v) Are there differences from region to region within the member State as regards damages actions for breach of national or EC competition rules?

No.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction.

ISSUE OF THE VALIDITY OF DOWNSTREAM CONTRACTS

An animated debate exists in the Italian doctrine and case-law on the issue on the effects of agreements restrictive of competition on the contracts concluded downstream by the participants to the unlawful agreement with individual customers. In particular, it is discussed whether the sanction of nullity provided under Article 81.2 and Article 2.3 of Law 287/90 in respect of restrictive agreements also applies to the corresponding clauses of the contracts concluded between the undertakings and their respective customers.

This issue has in particular arisen in connection with a number of actions brought by customers against banks requesting the repayment of loans or enforcing personal guarantees. The origin of all these actions was similar: the banks obtained provisional payment orders against their customers or the guarantors, who in their turn appealed against those orders. In particular, the banks' customers or guarantors challenged the validity, as incompatible with Article 81 and 82, of the standard bank conditions (*Norme Bancarie Uniformi*) drawn up by the Italian Banking Association (*Associazione Bancaria Italiana)* and applied by Italian banks in contracts for current-account credit facilities and provision of guarantees. One of these actions gave rise to the judgment of the *Corte di Cassazione* No. 1811 of 4 March 1999, whereby the court denied that individuals have standing to claim the nullity of downstream contracts under Articles 81 and 82 of the EC Treaty[90]. The issue of the compatibility with Article 81 and 82 and of the effects of the nullity of the upstream agreements on the downstream agreements was also referred to the ECJ by the *Tribunale* di Genova for a preliminary ruling in May 1996 (Case C-215 and 216/96, *Bagnasco and others v. Banca Popolare di Novara and Carige*, [1999] ECR I-135). The court ruled on the first issue but did not answer the question concerning the effects of the restrictive agreement on the downstream contracts as it found that the application of the standard banking conditions was not caught by the provisions of either Article 81 or 82.

The prevailing opinion both in the case-law and doctrine denies that the nullity of the upstream agreement may result in the invalidity of the downstream contracts[91]. In this respect, it is stressed that both the national and EC competition rules limit the sanction of nullity to the upstream agreements; on the other hand the fact that the downstream contracts may in practice constitute the implementation of the restrictive agreement would not be a sufficient reason for the downstream contracts to be declared as null and void under the general rules of the Civil Code on the validity of contracts. The principal available remedy would remain compensation of direct damages suffered by the undertakings' customers[92]. Contrary to this position, other case-law and doctrine, intending to afford ampler protection to the interests of final customers, are in favour of the nullity of the downstream contracts or at least of the specific clauses of these contracts affected by the restrictive agreement[93]. It has been pointed out that this concern may be overcome by the possibility to apply the rules set out in Articles 1469-bis and ff. of the Civil Code which implemented EC Directive 93/13 on unfair terms in consumer contracts: to the extent that the terms of the downstream contract may be regarded as "unfair" within the meaning of Article 1469-bis and 1469-ter of the Civil Code, the specific term(s) would not be binding on the consumer whilst the remainder of the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms[94].

RELIEVES AVAILABLE IN INTERIM PROCEEDINGS

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90 A summary of this judgment is available in Section V of this report. See also footnote 21.

91 See in this respect *Corte di Cassazione* of 11 June 2003 No. 9384 and of 25 February 2002 No. 2726. Contrary to this view, Castronovo (*supra* footnote 13) holds that the downstream contract would, at least partially, be affected by the nullity affecting the upstream agreement.

92 See *Corte d'Appello* of Torino 17 October 1998, *Tribunale* of Torino 16 October 1997, *Tribunale* of Milano 25 May 2000, in (2001) II Banca Borsa e Titoli di Credito p. 86 con nota di Falcone; *Tribunale* of Alba 12 January 1995, in (1996) I, 2, Giurisprudenza Italiana, p. 212; Guizzi, G. *Mercato concorrenziale e Teoria del contratto* (1999) I Rivista di Diritto Commerciale 67; Caputi, G., *Il diritto privato e le regole antitrust, un rapporto ancora problematico* (2002) 10 Diritto e Formazione 1359.

93 *Tribunale of* Roma*,* 20 February 1997, in Giurisprudenza Commerciale (1999) II p. 449 commented by Guccione, A.V. critical of the conclusions reached by the court; Toffoletto, A., *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust* (Giuffrè, 1996); Delli Priscoli, L., *La dichiarazione di nullità dell'intesa anticoncorrenziale da parte del giudice ordinario* nota a Cassazione 1 febbraio 1999 n. 827, (1999) II Giurisprudenza Commerciale 226.

94 See Falcone, G., *supra* footnote 92.

Another issue relates to the type of relief that may be obtained by the plaintiff in the context of *interim* proceedings instituted before or in the course of ordinary damages action for breach of competition rules. It is generally accepted that courts impose negative temporary cease-and- desist orders ("*obblighi di non facere*") as well as temporary positive orders imposing a specific conduct onto the defendant ("*obblighi di facere*"). Contrasting views instead exist as to the possibility for the court to impose by way of an *interim* decision a contractual behaviour on the defendant or to interfere with a contractual relationship in course (so called "*provvedimenti costitutivi*"). In this latter respect, it should be noted that recently the *Corte d'Appello* of Milano (case *Gemeaz Cusin v. S.C.M. ordinanza* of 2 May 2003 in Il Diritto Industriale n. 6/2003 p. 537) rejected the claimant's application that the court suspend the efficacy of an exclusivity covenant entered into between the defendant and a third party, in order to allow the claimant's entry into the relevant market. The court held that "*The prevailing case-law denies the admissibility of interim measures…that may cause the "modification" of existing contractual relationships (as well as the "creation" of a new contractual obligation*)". In its decision of 16 January 2001 in the *Stream v. Telepiù* case, however, the *Corte d'Appello* of Roma took a different position and delivered an *interim* decision establishing the partial ineffectiveness of the contracts whereby the major Italian football clubs granted to Telepiù a 6 year exclusive license for the broadcasting of the football matches.

ISSUE OF APPLICABLE LAW IN NON CONTRACTUAL DISPUTES

According to the Italian conflict of law rules (Law 218/1995 Article 62), there are two alternative connecting factors which determine the law applicable to non contractual disputes: the place where the damage occurred or the place of infringement. However, in the event that the litigants are all citizens of one and the same State where they also reside, then the applicable law shall be that of the common State.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon.

No publicly available statistics exists in this respect (please also refer to caveat in footnote 2). Based on internal searches, it appears that to date there is only one case based on the violation of EC competition rules in which the issue of damages was decided upon (see section V).

III. Facilitating Private Enforcement of articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under Sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Based on the above findings, the following major elements should be pointed out:

- need for a simplification and specialisation of the competent courts: the distinction between the *Corte d'Appello* as competent court for private enforcement of national competition rules under Article 33.2 of Law 287/90 and the *Tribunale* (or in some limited instances the *Giudice di Pace*) as competent court for the infringement of EC competition rules does not ease the private enforcement of competition rules. The designation of court sections specialised in the enforcement of competition matters has recently been recommended by a number of scholars by analogy with the reform recently implemented in the field of enforcement of intellectual property rights. In this respect, however, it should be noted that any such reform, which indeed would help, would be ineffective if it was not preceded by a thorough training programme for judges;

- need for clear rules on the standing in court and for the recognition of class actions also through consumers' associations: consumers should be clearly attributed standing in court to claim damages in connection with a breach of

competition rules. In this respect, the considerable debate existing in Italy on the proper qualification of consumers' competition related action[95] is indicative of the uncertainty surrounding the issue. Class actions could be an effective tool for favouring the enforcement of private competition rules, particularly if consumers' associations are acknowledged the right to take action. Consumers' associations are financially better placed to face actions in courts, which could require substantial expenditure especially when they are brought in respect of hard core restrictions which have not been investigated by the EU or national competition authorities;

- expansion of the means of evidence: proving an infringement of competition rules is a particularly difficult task for undertakings which intend to take action in court and even more so for individuals. Whilst a beneficial reform in the field of antitrust litigation would probably be the introduction of discovery, which should however be adapted to the peculiarities of civil law systems, a first step in this direction could be the widening of the judge's power to order the other party, always upon the claimant's motion, the disclosure in bulk of categories of documents (such as correspondence and accounts), thereby circumventing the requirement that document(s) of which disclosure is sought be specifically indicated by the party requesting disclosure. The unjustified refusal to disclose documentation should be made subject to a penalty which could go so far as to equate the refusal to produce documentation to proof of the infringement. This however subject to the claimant providing sound and serious clues of the infringement and without prejudice of the proof of damages. A serious hurdle would however be the possibility of acquiring undertakings' unofficial documentation (especially correspondence), since the existence of any such correspondence could be denied by undertakings;

- wider use of experts evidence: the possibility for the judge to appoint experts could be widened, particularly in respect of the economic analysis of the market concerned. The judge could be granted the possibility of appointing experts for the specific task of carrying out an economic analysis substantially at their own discretion. The experts' activity could then be modelled on that provided for in the field of enforcement of patent and trademark rights after the implementation in Italy of the TRIPs agreement. This would allow them to take documentation, provided however that the undertakings' trade secrets were properly protected. This use of experts evidence should however be allowed only to the extent that the plaintiff has provided serious clues of the infringement;

- explicit provision of the rebuttable presumption of fault: the applicability of Article 2600 of the Civil Code (which in the matter of unfair competition provides that the existence of fault is presumed whenever the acts of unfair competition have been proven) could be explicitly extended to damages actions for breach of competition rules;

- clear identification (by law?) of the criteria for application of the passing on theory: although in the absence of a statistically significant set of precedents, Italian courts seem loath to award damages whenever the plaintiff is found to have passed on the overcharge onto final consumers. The passing on theory is not entirely satisfactory, and may in fact discourage well founded actions, when its flat application saves the court the labour of considering if, in spite of the passing on, the claimant has indeed suffered damages. This could for example be the case if the claimant has been excluded from the market as a result of the overcharge applied, or if the profit which the claimant would have gained anyway even with an overcharge (due for instance to an inelastic demand) was applied to the original distributor/producer rather than to the claimant's other investments or to the claimant's own benefit.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

95 If it should be based on tort or on contract and if a (partial) nullity of the consumers' contract with consequential restitution or if rather damages would be the most suitable remedy: see *supra* nota 13.

No alternative means of dispute resolution are available. As reported above in footnote 3, the latest draft of the Procedural Reform envisages the possibility for the parties to request the court to appoint an expert in the pre-trial phase, with the task of ascertaining the damage and its amount both in contract and in tort based damages claims. The finding of the appointed expert, if adhered to by the parties, may ne sealed by the court's decree as a fully enforceable settlement agreement, which prevents the initiation of the proceedings. This proposal indeed appears to amount to an alternative means of dispute resolution[96].

The prevailing Italian doctrine and case law hold that issues of private enforcement of competition rules may be referred by the parties to arbitrators. Referring a dispute to arbitrators would however require the parties' agreement. Therefore arbitration proceedings are considered under Italian law as a form of "private justice" rather than as a proper means of dispute resolution alternative to the recourse in court. In any event, the publicly available documentation, of course limited due to the confidentiality of arbitration proceedings, does not show evidence of arbitrators' awards dealing with the issue of damages actions for breach of competition rules.

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96 Along with the Procedural Reform, currently there are also six bills of law for the introduction of alternative dispute resolution procedures pending in Parliament (these are: C.541, C.2463, C.2538, C.2877, S.1551, C.3559).

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V. National Case Law Summaries

Corte d'Appello of Milano, *Prograf s.n.c. v. Siemens s.p.a*, judgment of 13 September 1990.

Facts and legal issues
Prograf claimed that Siemens had breached Article 86 EC (now 82) by refusing to offer technical assistance and spare parts to a third party purchaser of certain equipment manufactured by Siemens and sold by Prograf. Prograf requested that the judge ascertained Siemen's obligation to offer technical assistance to any third party purchaser of the equipment manufactured by the defendant and sold by the plaintiff; Prograf also requestd that Siemens be condemned to pay damages suffered by Prograf as a consequence of the failure to sale the equipment to the third party which in its turn was due to Siemen's refusal to offer technical assistance.

Held
The Court, with a very concise reasoning, rejected Prograf's claim, on the grounds that Prograf had failed to provide sufficient evidence of Siemen's market share on the relevant market and of the fact that on the market there were no alternatives to Siemen's as a technical service provider.

Corte d'Appello of Milano, *Telsystem S.p.A. v. SIP S.p.A.*, judgment of 18 July 1995/24 December 1996

Facts and legal issues
In October 1994 Telsystem, a newly set up telecommunication company, sued the then Italian telecommunication monopolist SIP (now Telecom Italia S.p.A.) alleging that it had abused its dominant position in the telecommunication market. In particular, Telsystem contended to be the first operator to offer on the Italian market a telephone service for "restricted groups of users", which would enable users belonging to the same organisation (such as a company) to communicate with each other at the cost of a local call even if located in different cities. Since after EC Directive 90/388 such service was to be considered as liberalised, Telsystem requested SIP to hire at cost the direct local network, as an essential facility for Telsystem to give its clients access to the service. Although SIP at first had adhered to Telsystem's proposal, it refused with various pretexts to carry out the request of Telsystem's clients to connect them to the direct local

network. Telsystem took action in court claiming that SIP's conduct amounted to an abuse of its dominant position in violation of article 3 of Law 287/90 which had excluded Telsystem from the market of provision of telecommunication services to restricted groups of users and demanded that SIP be condemned to compensate damages suffered by Telsystem as a consequence of such abuse. SIP on its turn contended that the EC Directive 90/388 could not be relied upon by Telsystem, as it had not yet been implemented by the Italian government. Therefore, since the directive was not applicable, no abuse of dominant position could be found, as SIP was at that time the legitimate monopolist for any telecommunication services and, as such, immune under article 8 of Law 287/90 from the application of competition rules.

Held
The court delivered a partial judgment on 18 July 1995, whereby it held that: i) the directive, although not yet implemented in Italy, could be relied upon by Telsystem in its horizontal relationship with SIP; ii) SIP's conduct amounted to an abuse of its dominant position, as monopolist, on the telecommunication market; iii) a pool of experts should be appointed for the quantification of damages that were to be awarded to Telsystem. With its subsequent judgment of 24 December 1996, the court, based on the experts' findings, awarded damages to Telsystem for an amount equivalent to ε 1,871,552. It also condemned SIP to reimburse Telsystem's for the legal costs incurred for an amount equivalent to ε 114,727.

Corte d'Appello of Cagliari, *Unimare S.r.l. v. Geasar S.p.A.*, judgment of 23 January 1999

Facts and legal issues
Unimare contended that for several years it had provided handling services in favour of the Naval Support Office, of the American Navy, at the airport of Olbia in Sardinia. Unimare also set forth that after 1989, when Geasar, a concessionaire of public services owned by the state, took over the management of the airport, the tariffs payable by Unimare for the utilisation of the airport progressively raised to such level as they caused the Naval Support Office to terminate the handling service contract and revert for these services directly to Geasar. Unimare on the basis of the above recital of facts, requested that the court condemned Geasar to compensate damages suffered by Unimare as a consequence of the exclusionary practice adopted, which allegedly amounted to an abuse of its dominant position as sole airport managing company in violation of article 3 of Law 287/90. The defendant objected that Unimare lacked standing in the law-suit as the party that would allegedly be harmed by Geasar's conduct was the Naval Support Office as the entity forced to enter into a contractual relationship with Geasar. The defendant also contended the tariff's increase was determined by an adjustment decree of the Ministry of Finance applied equally all over the national territory and that the Naval Support Order had chosen Geasar as then provided of handling services, exclusively because Geasar proved to be a more efficient company.

Held
The court rejected Unimare's claims on the basis of the following reasoning. The court found that indeed Geasar acquired a dominant position as a consequence of the decree of the Ministry of Transports of 30 January 1989, which appointed Geasar as the sole responsible for the management of the airport's infrastructures. The court, however, did not find that Unimare's had abused its dominant position mainly because the tariff's increase was imposed by the Minister of finance's decree, so that Geasar did not have any power to autonomously determine the applicable tariffs. In any event, the court held that the tariff's increase did not have any bearing on Unimare's interests, because, on the one hand, the Naval Support Office had undertaken to reimburse to Unimare any out of pocket expenses and, on the other hand, the Naval Support Office would have had to pay the higher tariffs established by the Ministry regardless of the contractor to which it would entrust the handling services. Finally the court found that Unimare did not provide any evidence of the fact that Geasar had pressured the Naval Support Office not to renew the handling services contract with Unimare.

Corte di Cassazione, *sezione I civile*, Mr. Montanari v. Banca Carige S.p.A., judgment No. 1811 of 4 March 1999.

Facts and legal issues
Banca Carige S.p.A. ("Carige") obtained a provisional payment order against Mr. Monatanari, who had undertaken a guarantee obligation in respect of a credit facility Carige had granted to one of its customers. On 25 October 1990, Mr. Montanari appealed against said payment order before the competent *Tribunale* and, in second instance, before the competent *Corte d'Appello*, on various grounds, none of which however assumed the invalidity of the guarantee obligation undertaken as containing clauses in breach of EC competition rules. It was only in the appellate proceedings

before the *Corte di Cassazione* that the plaintiff for the first time challenged the validity of the guarantee obligation under Articles 85 and 86 (now 81 and 82) of the EC Treaty. In particular, the plaintiff challenged the validity, as incompatible with Article 85 and 86, of the standard bank conditions (*Norme Bancarie Uniformi*) drawn up by the Italian Banking Association (*Associazione Bancaria Italiana)* and applied by Italian banks, including Carige, in contracts for current-account credit facilities and provision of guarantees. According to the plaintiff, the nullity of the standard bank conditions would result in the nullity of the individual guarantee contracts incorporating said conditions.

Held
The *Corte di Cassazione* in the first place rejected the plaintiff's appeal as inadmissible, on the grounds that the law does not allow for a claim of nullity to be raised for the first time before the *Corte di Cassazione*. For the sake of argument, the court, however, specifically addressed the merits of the claim under Articles 85 and 86 of the EC Treaty. The court stated that "*Articles 85 and 86 are aimed at protecting free competition between undertakings… The direct addressees of said provisions are undertakings, which are entitled to avail themselves of those provisions in order to achieve the effective freedom of competition: the individual end consumer could only de facto, in an indirect way, take advantage of the general benefits of free competition, whilst he may not be deemed to be directly vested with the standing to claim in court alleged violations* [of competition law] *put into effect by an undertaking or by a group of undertakings*".

Corte d'Appello of Milano, *Tramaplast S.r.l. v. Agriplast S.r.l. – Macplast S.p.A. – Sisac S.p.A. Vittorplastic S.r.l.* and with the call into the law-suit of *Enichem S.p.A.*, judgment of 22 March 2000.

Facts and legal issues
In July 1998, following a successful interim phase, Tramaplast sued Agriplast, Macplast, Sisac and Vittorplastic before the *Corte d'Appello* of Milano pursuant to article 33.2 of Law 287/1990. Tramaplast argued that the defendants had engaged in a cartel aimed at excluding the plaintiff from the market of production and sale of plastic film for agricultural use (LDPE) in Sicily. Tramaplast consequently requested that the defendants be condemned to compensate damages, that the court's judgment be published in national newspapers and that the defendants be enjoined from continuing the unlawful activity.
Tramaplast's demands were based on the facts summarised hereinafter. In October 1997 a subsidiary of Tramaplast had entered with Enichem into a preliminary agreement for the acquisition of land owned by Enichem in the industrial area for chemical productions of Ragusa. The acquisition of the property was instrumental to the building of a plant where Tramaplast would produce LDPE and recycle it. The closing of the transaction was subject to the competent authorities releasing by 31 May 1998 the permit for the construction of the plant. To this end, Tramaplast had timely started the paper work for obtaining the permit. The bureaucratic process was however unexpectedly barred by the defendants' hostility, who exerted pressure on the authorities to convince them not to release the necessary permit. Tramaplast contended that the defendants had concerted their conduct in order to exclude Tramaplast from the market. This amounted to a cartel which appreciably affected competition on a significant part of the national territory, notably Sicily, as the defendants' market shares at national level were equal to 35-39 per cent. and in Sicily to 80-90 per cent.. Tramaplast also requested that the defendants be condemned to refund damages, because their conduct would have caused a delayed entrance of the company in the market. The defendants appeared in court, arguing that their behaviour vis-à-vis the authorities qualified as a lawful lobbying activity and, that, in any event, their aggregate market shares in Sicily were not capable of resulting in an appreciable restriction of competition. Two of the defendants also requested the call into the proceedings of Enichem, which had allegedly abused its dominant position. In particular, Enichem would have discriminated among producers of LDPE by according preferential economic conditions to Tramaplast in the sale of polyethylene (a raw-material necessary for the production of LDPE), and by selling an "essential facility" (the property for the building of the plant) to a competitor. Enichem on its part challenged the constitutional legitimacy of Article 33.2 of Law 287/1990, *inter alia* because the independence between the proceedings before the court and those before the AGCM would breach the principle of legal certainty, which would instead require that the existence of an infringement of Law 287/90 be first investigated by the AGCM, whereas ordinary courts would have exclusive jurisdiction to decide on damages claims ensuing from the violation of the national competition rules. Enichem contended in any event that any claim against it was unfounded.

Held

The court analysed in the first place Enichem's challenge of Article 33.2 of Law 287/90 for its alleged breach of the constitutional principles of, *inter alia,* equality and proportionality. The court ruled that the challenge was manifestly unfounded and, thus, not to be referred to the Constitutional Court. According to the court, the "double jurisdiction system" was coherent with the constitutional principles in view of the different nature of the interests protected by the AGCM and those protected by the ordinary courts.
The court found that the defendants' behaviour amounted to a breach of Article 2 of Law 287/90, as it had as its object the limitation of production and investments. The court, on the basis of the documentation produced by the plaintiff, held that the parties had openly constituted a common front to represent to the authorities, in a misleading and over-dramatised way, the problems that would have arisen form the establishment of Tramaplast in Sicily. The defendants' position that their activity qualified as a legitimate lobbying activity was rejected by the court. In particular, the judges held that, whilst it is true that a lobbying activity is not per se caught by the prohibition of Article 2 of Law 287/90, such activity is however unlawful whenever its aim in not that of informing the authorities and of exercising the right of petition, but rather exclusively that of preventing, restricting or distorting competition on the market. The court therefore found that a cartel was actually created and that it appreciably restricted competition on a significant part of the domestic market. It did however not award damages to the plaintiff, because of lack of evidence of the causal link between the violation of the national competition rules and the injury allegedly suffered by the plaintiff. The court found in this respect that the actual reason why Tramaplast did not enter the LDPE market in Sicily was the failure to conclude the definitive contract for the acquisition of the land with Enichem, and that no causal link at all was proved between this failure to conclude the contract and the cartel created by the defendants. The demands proposed against Enichem were rejected by the court.

Corte d'Appello of Torino, *V.I.H. S.r.l. v. Juventus F.C. S.p.A.*, judgment of 6 July 2000

Facts and legal issues
V.I.H., a tour operator specialising in sport events, since July 1996 had been in a contractual relationship with Juventus F.C. for the selling of tickets and travel packages relating to Juventus F.C.'s football matches. In May 1997, V.I.H. was requested by Juventus F.C. to enter into a new agreement, meant to replace the existing one, relating to the sale of tickets and travel packages for the final of the Champions League match to take place in Munich on 26 May 1997. Juventus made the renewal of the previous contract, to expire on July 1997, subject to VIH's consent to agree to special conditions for the sale of the tickets for the Champions League's final. V.I.H. claimed that these conditions proved particularly vexatious, as Juventus demanded that the tickets be sold at a substantial overcharge and that V.I.H. sold them to the football supporters bundled in with a travel package including air transport and accommodation in Munich. Moreover Juventus requested that V.I.H. undertook to make a down-payment for a minimum guaranteed amount equal to 20 per cent of the overall turnover that the sale of the travel packages would generate, such turnover not to be less than a certain substantial amount. V.I.H. alleged to be forced to enter into the new agreement, being otherwise at risk of losing the renewal of the original contract. The sale of tickets was very poor due to the excessively high prices imposed and to the fact that consumers had no choice but to buy the full travel package. V.I.H. claimed in court that Juventus had abused its dominant position by threatening the refuse to renew the contract, imposing high prices and bundling of products and requested that Juventus be condemned to pay damages. Juventus' defence was substantially that V.I.H. had failed to prove the damage suffered, and did not prove the defendant's dominant position.

Held
The court held that the agreement of 1 May 1997 entered into between the parties was to be qualified as an agreement restrictive of competition, in violation of article 2, letter a) and e), as it fixed prices and made the purchase of the principle product (the ticket for the match) subject to the purchase of other unrelated products. V.I.H. had consciously and with negligence contributed to the unlawful agreement, with the prospect of renewing the original agreement and passing on any overcharge to the end purchasers. Therefore, V.I.H. contribution to the causation of the damage excluded that it could be awarded damages. The court also considered the issue of Juventus' possible abuse of dominant position. It found that indeed Juventus held a dominant position on the market of sale of tickets for the Champions league's final, because the relevant market was as narrow as one single product. Therefore the court found that Juventus had abused its dominant position. Also in this respect, however, the court denied that V.I.H. had suffered any damages, because the parties actually injured were the end users, who, in their turn, had standing to act in court pursuant to article 2043 of the Civil Code.

Corte d'Appello di Torino, *Pagine Italia S.p.A. v. Telecom Italia S.p.A. and Seat S.p.A.*, judgment of 7 August 2001

Facts and legal issues

In March 2003, Pagine Italia brought proceedings against Telecom Italia and Seat pursuant to article 33 of Law 287/90, arguing that Telecom Italia and Seat had engaged in an unlawful behaviour restrictive of competition on the market of collection of advertising to be published on alphabetic telephone directories. Pagine Italia maintained that this behaviour consisted of an agreement restrictive of competition and of an abuse of dominant position to its damage as publisher of telephone directory divided per class of products and services known as "Pagine Utili". In particular, Pagine Italia contended that Telecom Italia had acquired a 20 per cent stake in Seat which, combined with shareholders' covenants, resulted in a *de facto* control over Seat. Moreover, Seat was also Telecom Italia's exclusive licensee for the collecting of advertisements to be published on Telecom Italia's alphabetic phone directory "Pagine Bianche". According to the plaintiff, this situation barred its successful entry on the market of telephone directories, as it was proven by the fact that the small market share held by "Pagine Utili" had been progressively eroded. On this basis, Pagine Italia demanded that the court ordered the dismissal of Telecom Italia's participation in Seat and the defendant's condemnation to damages. The defendants on their part argued, amongst others, that: i) the *Corte d'Appello* did not have jurisdiction to order the dismissal of the participation, because the court had not been given such power under Law 287/90, which, instead, placed it upon the national competition authority; ii) the acquisition of a minority participation did not amount to an agreement restrictive of competition, as the target company was not a party to the share transfer agreement; iii) Pagine Italia had failed to provide evidence of the alleged damage.

Held

The court upheld the defendant's principal argument that the court did not have the authority under article 33 of Law 287/90 to order the dismissal of a participation. The court, in any event, disagreed with the plaintiff's argument that the 20 per cent participation vested Telecom Italia with *de facto* control rights. In addition the court held that the exclusive license agreement in force between Telecom Italia and Seat did not harm Pagine Italia; as a matter of fact, Pagine Italia was active on a product market, that of telephone directories per class of products and services, different form the market of alphabetic telephone directories, to which the alleged restrictive behaviour related. Therefore, the monopoly allegedly attained on this latter market had no bearing on the market on which Pagine Italia was active. The court dismissed Pagine Italia's claims and condemned it to refund the defendants' legal costs for an amount equivalent to ε 154,000.

Actions before the *Giudice di Pace* as a consequence of the AGCM's decision of 28 July 2000 against insurance companies

Facts, legal issues and held

By decision of 28 July 2000, the AGCM fined 39 insurance companies operating on the Italian territory for having exchanged information on sensitive market data, resulting in an artificial price increase of 20 per cent on average of premiums of car insurance policies. As a consequence of the AGCM's decision, a significant number of damage actions were brought before the competent *Giudici di Pace* by the individuals who had entered into insurance agreements with the insurance companies concerned. The plaintiffs claimed that they were directly damaged by the insurance companies' unlawful behaviour and demanded that the judge condemned the insurer to repay the average overcharge determined by the AGCM. The *Giudici di Pace* systematically rejected the defendant's argument that the exclusive competent court to decide on damages actions for breach of national competition rules was the *Corte d'Appello*. Given the non significant claim's value, in most of the cases the *Giudici di Pace* upheld the plaintiffs' claims relying on the provision of article 113 of the Code of Civil Procedure which, until its amendment of 8 February 2003, required that the *Giudice di Pace* decide on an equitable basis claims not exceeding a value of ε 1,031. By way of a government urgency decree dated 8 February 2003, article 113 of the Code of Civil Procedure was amended so as to prohibit to the *Giudice di Pace* to decide even petty claims on an equitable basis, in so far such claims related to the so-called consumers' contracts governed by standard terms and conditions. Based on recent judgments, it appears that the judges might now incline to declare the partial invalidity of the clause setting the policy premium at a 20 per cent overcharge, and to condemn the insurer to repay the relevant amount.

Corte di Cassazione, sezione I civile, Mr. Larato v. Axa Assicurazioni S.p.A., judgment No. 17475 of 9 December 2002.

Facts and legal issues

Axa Assicurazioni S.p.A. ("Axa") was one of the insurance companies fined by the AGCM's decision of 28 July 2000 (please refer to section above). As a consequence, Mr. Larato on 19 September 2000 sued Axa before the territorially competent *Giudice di Pace*, seeking compensation of damages suffered as a consequence of the overcharge (of 20%) Axa had applied to Mr. Larato's car insurance policy by putting into effect the cartel found by the AGCM. Axa appeared in court, objecting, *inter alia*, that the *Giudice di Pace* lacked jurisdiction to decide on the case, on the grounds that Article 33.2 of Law 287/90 attributed exclusive jurisdiction to the territorially competent *Corte d'Appello* to rule on competition based damages claims. The *Giudice di Pace* rejected Axa's claim by way of a judgment limited in scope to the specific issue of competence and ordered that the proceedings continue for the decision on the merits of the case. Axa appealed the judge's decision on, *inter alia*, the issue of competence before the *Corte di Cassazione*, requesting that the judge's ruling be overturned and the competence of the *Corte d'Appello* pursuant to Article 33.2 declared.

Held

The *Corte di Cassazione* rejected Axa's appeal. The reasoning of the court may be summarised as follows. According to the court, the prohibitions set out in Article 2 of Law 287/90 (i.e. the prohibitions relating to cartel activities), have as their reference "undertakings" and "competition" as market factors to be preserved vis-à-vis disrupting events, such as possible agreements restrictive of competition capable of affecting the demand-supply game and the entry or permanence of individual undertakings on the market. In respect of such prohibitions, Article 33.2 identifies the possible private sanctions, consisting of the nullity of the agreement restrictive of competition and of damages compensation. With specific respect to "nullity", the court observes that this sanction may be claimed exclusively by the undertakings which gave rise to the restrictive agreement because of the interests, as identified above, at the protection of which Law 287/90 is aimed. Consumers instead have been primarily assigned the function of soliciting the intervention of the competition authority to unravel the unlawful restriction of competition. According to the court, if this limitation of standing applies in relation to the action for nullity, which could not be brought by consumers, this would also be valid for the possibility to claim damages envisaged by Article 33.2 of Law 287/90. The court held in this respect that damages that may be claimed under Article 33.2 are exclusively those strictly connected to the activity of the undertakings and to their presence on the market.

According to the court, however, the above conclusion does not amount to a flat denial of any form of protection for end consumers who have been negatively affected by the upstream restriction of competition. In particular, damages actions related to a breach of competition rules are opened to individual consumers under two conditions: a) it is necessary to ascertain that the relationship between the undertaking and the end consumer may be characterised as an unlawful one, in whole or in part, i.e. that it has resulted in the violation of a given right (*diritto soggettivo*) of the consumer. According to the court, it should however be excluded that such violation may per se be inferred from the existence of an upstream agreement restrictive of competition; b) the damage action brought on these grounds would qualify as an ordinary action for damages, subject to the ordinary criteria of competence and not to the criterion set out in Article 33.2 of Law 287/90.

Corte d'Appello of Roma, *Albacom v. Telecom Italia*, judgment of 20 January 2003 (two identical judgments on the same day awarded damages in favour of Wind and Cable & Wireless which also sued Telecom Italia).

Facts and legal issues

On 20 September 2000, Albacom (and, separately, Wind and Cable & Wireless), brought proceedings pursuant to article 33 of Law 287/90 before the *Corte d'Appello* of Roma. The plaintiff, a telecommunication operator competing with Telecom, claimed that it was unlawfully denied access by Telecom Italia to the market of data transmission services though DSL and SDH technologies. This behaviour amounted to an abuse by Telecom Italia of its dominant position in the relevant market. In the course of the proceedings, the AGCM fined Telecom at the end of investigation proceedings for abuse of dominant position started on the basis of a complaint filed by the same plaintiff (together with Wind and Cable&Wireless) in relation to the same behaviour. The unlawful behaviour consisted of Telecom's refusal to put forward a "wholesale offer" to the competitors requesting the acquisition of transmitting capacity in DSL and SDH technology. In fact, the prices indicated by Telecom were substantially equal to the retail prices. This resulted in the exclusion of Telecom's competitors from the relevant market in the period comprised between the last months of 1999 and the whole year 2000. Albacom (together with Wind and Cbale&Wireless)

demanded that Telecom Italia be condemned to damages. Telecom substantially argued that there was no evidence of the causal link between its refusal to supply at fair market condition and Albacom's exclusion from the market.

Held
The court upheld Albacom (Wind and Cable&Wireless) demand. The court's finding that Telecom Italia held a dominant position on the market of DSL and SDH transmission technologies was extensively based on the AGCM's decision of 27 April 2001. The court rejected Telecom Italia's defence that the causation link had not be proven, by stressing that the existence of the causal link could instead be inferred from the same characteristics of Telecom's behaviour and from the fact that, after that Telecom had put an end to the abusive conduct, the plaintiff had re-expanded their market shares. The court awarded damages to Albacom for the amount of ε 1,313,564.22 plus revaluation (and to Wind for ε 437,854 and to Cable & Wireless for ε 175,141).

Corte d'Appello of Milano, *Bluvacanze S.p.a. v. I Viaggi del Ventaglio S.p.A. – Turisanda S.p.A. – Hotelplan Italia S.p.A.*, judgment of 11 July 2003

Facts and legal issues
In August 2001, following a successful *interim* phase, Bluvacanze sued the defendants, some of the principal Italian tour operators, contending that they had engaged in a concerted practice in breach of Article 2 of Law 287/90, aimed at denying Bluvacanze, a retailer of travel packages, access to the offer of their travel packages. The concerted practice was deemed by Bluvacanze to constitute a retaliation to Bluvacanze's commercial policy to grant its clients a 10 per cent flat discount on any travel package sold. Such policy was subsidised by Bluvacanze with part of the commission (between 13 and 13.5 per cent) it would gain on each travel-package sold. Bluvacanze pointed out that other retailers complained vis-à-vis Bluvacanze's aggressive policy and that, as a consequence, the defendants had agreed*, inter alia*, to shut down Bluvacanze's access to the codes which would enable the on-line reservation of the defendants' travel packages. Bluvacanze provided indirect evidence of the tour operators' restrictive practice. Bluvacanze, in particular, produced the letters it received from Ventaglio and Turisanda, on 12 and 13 March 2001 respectively, whereby the latter announced their intention to terminate the contractual agreements in course with Bluvacanze and to shut down the on-line access codes. The plaintiff also produced in court an interview with the sales director of Hotelplan published on a specialised magazine, whereby he stated that during a meeting with the other tour operators, the course of conduct vis-à-vis Bluvacanze's pricing policy was agreed. In the interview, the representative of Hotelplan also declared his aversion to Bluvacanze's marketing policy focused on the price element only. Witnesses were also heard upon Bluvacanze's motion. The witnesses' statements confirmed that a meeting was held in the period immediately preceding the shutting down of the access-codes. On these grounds, Bluvacanze requested the defendants' condemnation to damages, both for the profit lost during the period of exclusion from the market (March-June 2001) and for the damage caused to Bluvacanze's reputation as a consequence of the press campaign carried out by the defendants on the sector's publications to react its commercial policy. The defendants' position was that no agreement was reached among them, as each of them autonomously adopted the course of action it deemed appropriate.

Held
The court upheld the plaintiff's demands. In respect of evidence of the infringement of Article 2 of Law 287/90, the court held that the evidence acquired in court qualified as "serious, precise and consistent" presumptions, from which the existence of the unlawful agreement reached between the tour operators could be inferred. The court also awarded damages to Bluvacanze, by applying the but-for model, taking account, on the basis of accounting documentation provided by the plaintiff, of the profits the plaintiff could have made in the period of exclusion, had it not been excluded from the market. The court also awarded, on an equitable basis, an amount of money to compensate for the injury to the commercial reputation caused by the defendants.
The amount of ε 184,494.49 was awarded for loss of profit and ε 50,000 for injury to the commercial reputation, plus monetary revaluation and interest at the legal rate (i.e. at the rate provided for by Article 1284 of the Civil Code).