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Private Antitrust Law Enforcement in Italy

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Europe's poor record in the private enforcement of antitrust law has stimulated much recent discussion, especially now that both the Court of Justice in its *Courage* decision and Regulation 1/2003 place increasing emphasis on the role of national courts in the enforcement of European antitrust.¹ In this paper I wish to contribute to the discussion from an Italian perspective. I will focus my attention on actions in which the plaintiff allegedly affected by exclusionary conduct is a business rival of the defendant or a distributor, and on purchasers' suits against the members of a cartel.² It is my view, as developed in this paper, that anti-competitive abuses of dominant position have been the subject of considerable, if not excessive, litigation, whereas private enforcement of hardcore violations such as price-fixing or market allocation cartels has been virtually absent. My argument is that claims by purchasers against members of hardcore cartels are the critical problem of private antitrust law enforcement in Italy. This problem cannot be ameliorated without revolutionary changes to the whole civil procedure system, since the present Italian system is simply not suited for disputes concerning the protection of purchasers' (consumers') diffuse interests. If this conclusion fits with the rest of the continental Europe experience (namely, the civil law part of Europe), it

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¹ Case C-453/99 *Courage Ltd. v Bernard Crehan* [2001] ECR I-6297. Council Regulation 1/2003/EC of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1. See *infra* Section I, § 3.

² Accordingly I will not follow, in the analysis of the reasons for ineffective private enforcement in European national courts, the distinction that is typically made between "use of Community competition law as a 'sword' in actions to obtain injunctive relief to prevent harm that would result from an infringement of Articles 81 or 82, or to obtain damages from a party with whom the plaintiff may not have any contractual relationship for injury suffered as a result of such infringement", and use of Community competition law "as a shield to justify non-performance of a contractual obligation on the grounds that the contractual provision in question infringes Article 81 (or Art 82)": Venit, 'Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', (2003) 40 CMLRev 545, 570-571. For the distinction see Jacobs – Deisenhofer, 'Procedural Aspect of the Effective Private Enforcement of EC Competition Rules. A Community Perspective', in Ehlermann – Atanasu (eds), *European Competition Law Annual 2001: A Community Perspective* (herebelow, *European Competition Law Annual 2001*), 2003, 187, 189-191; Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', (2003) 26(3) World Competition 473, 474. Indeed for the purpose of this paper the consequences of this distinction are not of particular significance.

becomes clear that this part of Europe will probably never experience anything like the recent American litigation in the *Vitamins* case.³

In Section I of this paper I will briefly analyse the key elements of antitrust enforcement in the US and the pros and cons of public enforcement and private enforcement in antitrust. A short discussion of the European position will conclude this introductory section and lead to Section II, where I will deal with the Italian antitrust system from the private enforcement perspective. I will consider the issue of abuse of dominance, indicating that claims in this area are brought fairly frequently. Thereafter, I will deal with cases concerning cartels. I will focus my attention on the *Motor Insurance* case, in which the Italian enforcement system risks ending its short history with the incredible judicial conclusion that consumers have no antitrust standing. In Section III I will leave this issue to one side and analyse why the Italian system offers an impossible environment to plaintiffs raising actions in cartel cases. It will become evident that at the root of all the problems lies the absence of effective discovery rules.

A terminological warning is required at the outset. I deliberately use the US term ‘antitrust law’ instead of the UK expression ‘competition law’. In fact, use of the latter creates confusion in a Continental context between the law which handles the market power problem (antitrust law) and that which regulates unfair competition problems (unfair competition law). Many of the problems of Italian law stem from the confusion between the two legal frameworks. In order to avoid this, I will separate them linguistically, following the American approach.

I PUBLIC ENFORCEMENT V PRIVATE ENFORCEMENT

1 Antitrust Enforcement in the US

Currently, US antitrust is stringently enforced.⁴ As far as public enforcers are concerned, the Antitrust Division of the Justice Department may bring either criminal or civil actions for violations of the Sherman Act. Its action is aggressive and is supported by the Corporate Leniency Programme (CLP) adopted in 1993, which has been a spectacular success.⁵ The Federal Trade Commission can issue cease and desist orders under Section 5 of the FTC Act and in competition cases it is also starting to use the remedy of disgorgement of unlawful profits under Section 13 (G) of the FTC Act. The attorney generals of the States and US dependencies vigorously enforce local antitrust laws.

³ For similar conclusions from a German perspective see Basedow, ‘Who Will Protect Competition in Europe? From central enforcement to authority networks and private litigation’, (2001) 2 EBOR 443, 461-468.

⁴ For a recent overview see Weber Waller, ‘The Incoherence of Punishment in Antitrust’, (2003) 78 Chicago-Kent LRev 207; Baker, ‘The Case for Antitrust Enforcement’ (2003) 17 J Econ Persp 27.

⁵ Riley, ‘Cartel Whistleblowing: Toward an American Model?’, (2001) 8 MJ 4; Riley, ‘Beyond Leniency: Enhancing Enforcement in EC Antitrust Law’, forthcoming.

However, the vast majority of antitrust enforcement comes through private damages suits.⁶ Frequently these suits are multiple class actions that can be consolidated in multidistrict litigation procedures and involve huge claims. States are very much involved in private litigation. They bring suit under federal antitrust laws as direct purchasers of goods or services. After the seminal *Illinois Brick* decision,⁷ many states issued antitrust rules also enabling indirect purchasers to recover damages. These rules were allowed by the Supreme Court in *ARC America*.⁸ Thus, states can also bring actions as indirect purchasers when state law allows them to do so.⁹ Moreover, they can sue on behalf of natural persons injured by antitrust violations in their territories, thanks to their *parens patriae* powers.¹⁰

Private litigation usually takes the form of: (i) purchasers' actions against hardcore price fixing, market allocation and market division cartels; (ii) distributors' actions against boycotts; and (iii) business rivals' actions concerning alleged predatory conducts. In Europe the first form of action is practically unheard of.¹¹ Third party claims, "i.e. claims made by parties who are not involved in the anti-competitive agreement and who have suffered loss as a consequence of that scheme"¹² require access to information. Frequently, but not always, these US actions follow government criminal prosecution of the defendants.¹³ But also in these cases, the possibility of third-party actions in the absence of a prior judgment disclosing the result of the public investigation and making accessible otherwise concealed information, appears a staggering achievement from a continental Europe perspective.

The success of private enforcement in the history of US antitrust has been intensely analysed. Private plaintiffs have many incentives to take action and defendants are subject to considerable pressure to settle. Foreign observers usually point to treble damages,¹⁴ class action mechanisms and aggressive discovery rules to explain why

⁶ Weber Waller, *supra* fn 4, 210; Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in *European Competition Law Annual 2001*, *supra* fn 2, 95, 99.

⁷ The Supreme Court held in *Illinois Brick Co vs Illinois*, 431 U.S. 720 (1977), that only direct purchasers can sue under federal antitrust law. On the indirect purchasers' issue see *infra* fn 100.

⁸ *California vs ARC Am Corp*, 490 U.S. 93 (1989).

⁹ For a recent analysis of the states' role in antitrust enforcement see First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', (2001) 69 *Geo W LRev* 1701.

¹⁰ The Hart-Scott-Rodino Antitrust Improvement Act of 1976 gave an explicit right to state attorneys to bring suit in federal courts as *parens patriae* for injuries arising out of a violation of the Sherman Act - 15 U.S.C. 15 c (2000).

¹¹ See also Basedow, *supra* fn 3, 461.

¹² *Id.* 461.

¹³ This is usually the case in rule of reason cases, where private plaintiffs face greater obstacles than in per se liability cases: Weber Waller, *supra* fn 4, 230-231.

¹⁴ Many writers point out that the lack of pre-judgment interest under the Sherman Act actually reduces treble damages to single damages or even less: Lande, 'Are Antitrust "Treble" Damages Really Single Damages', (1993) 54 *Ohio State LJ* 115, 171; accordingly, it is argued that European pre-judgement interest in antitrust cases could be more effective than treble damages without pre-judgement interest in the US: Jones, *supra* fn 6, 103-105.

private enforcement is so effective in the US.¹⁵ Further analysis stresses that US antitrust stands relatively unique also with “its rejection of *in pari delicto* defenses, the peculiar combination of joint and several liability, the lack of contribution, and the way settlements are credited against the potential liability of the remaining defendants in a case.”¹⁶ Moreover, plaintiffs can take advantage of Section 5 of the Sherman Act, which makes any verdict in a government antitrust case *prima facie* evidence in subsequent private litigation. As a consequence, “the knowledge of the existence of a federal grand jury (or FTC investigation) is virtually all that is required for the filing of a good faith class action price fixing case.”¹⁷

In a recent landmark case the full fury of the American enforcement system was unleashed against the world-wide vitamins cartel and even foreign parties tried to take advantage of the plaintiff-friendly US weaponry.¹⁸ Indeed, many non-US companies have started class actions as purchasers of vitamins abroad from the vitamin companies and for delivery outside the United States. In *F Hoffmann-La Roche Ltd, et al v Empagran* the Supreme Court will be called to decide whether or not foreign plaintiffs have standing to invoke the treble damages remedy of Section 4 of the Clayton Act.¹⁹

2 The benefits of cumulative application of public and private remedies

The enforcement level of antitrust laws in America is the subject of debate and criticism.²⁰ Many scholars think that there is too much enforcement and therefore over-deterrence.²¹ Some writers stress that it is the cumulative effect of public and private enforcement that raises deterrence over an optimal level and hence argue that antitrust private enforcement is detrimental.²² A more balanced view outlines the pros and cons of public and private enforcement respectively, and the benefits of a cumulative application of public and private remedies. The analysis is usually conducted from a welfare economics perspective, where antitrust remedies are seen in terms of deterrence more than in terms of compensation and corrective justice. Liability systems and government regulations have to establish optimal levels of deterrence. In theoretical terms public enforcement offers two advantages. First, it allows better control in setting the optimal monetary or non-monetary sanction in accordance with the theory of

¹⁵ For an overview see the contributions contained in Ehlermann – Atanasii (eds), *European Competition Law Annual 2001: A Community Perspective*, *supra* fn 2.

¹⁶ Weber Waller, *supra* fn 4, 208.

¹⁷ *Id.* 231.

¹⁸ The Vitamins cartel has been studied by Connor, *Global Price Fixing: Our Customers are the Enemy*, Kluwer Academic Publishers, 2001.

¹⁹ See the Brief for the United States as Amicus Curiae supporting Petitioners by the Department of Justice at www.usdoj.gov/atr/cases/f202300/202397.htm. On the issue see also more recently Trenchard, *The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-Of-Law Problem*, 2004 (the working draft of the article is published in www.ssrn.com).

²⁰ For a recent overview see American Bar Association, *Section of Antitrust Law*, Remedies Forum, 2003.

²¹ Usually this view does not contest that the benefits of antitrust appear to be greater than the enforcement costs. Thus, the debate concerns the enforcement level, not the need of antitrust law: see again Baker, *supra* fn 4, 42-43; for a different perspective, however, see Crandall – Winston, ‘Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence’, (2003) 17 *J Econ Persp* 26.

²² In Europe see Wils, *supra* fn 2.

deterrence, because a single public enforcer can take into proper consideration social cost and the probability of detection when deciding punishment. In fact, damages awarded in private litigation are unrelated both to the social cost and the *ex-ante* probability of detection of the violation, and when used together with administrative or criminal fines will usually alter the optimal level of deterrence.²³ Second, public enforcers have stronger investigative powers²⁴ and are equipped to discover information that private parties cannot usually disclose.

However, there are at least three arguments against a system that relies entirely on the public enforcement of antitrust law, considering that no public body can realistically calculate on a case-by-case basis the social cost of monopoly power²⁵ and it is in any event impossible to assert *ex ante* the probability of detection if the actual level of diffusion of wrongdoing is unknown. First, in the real world public agencies are not usually the most efficient enforcers, because they cannot have access to the widespread information that private parties naturally possess.²⁶ Second, they lack adequate financial resources to investigate all potential wrongdoers and to pursue all pending investigations with the same unrestricted vigour. Third, the public prosecutor can face agency costs. “Unable to capture the benefits of his work, he would tend to shirk. He might seek to maximize something other than allocative efficiency. He also would be amenable to payoffs, perhaps in the indirect form of future employment (the ‘revolving door’ between public and private jobs) or support for future political campaign.”²⁷

For all these reasons private parties must be provided with economic incentives to report, in the form of damages, restitution, bounties or any other form of monetary reward whatsoever.²⁸ In theory the power to sue granted to purchasers would also induce them to reduce switching to substitutes when facing higher prices due to cartels or abusive monopolization, thereby lowering the deadweight loss caused by monopoly.²⁹ Accordingly, even though the private incentive to bring suit remains “fundamentally misaligned with the social optimal incentive to do so, and the deviation between them could be in either direction”,³⁰ the enforcement pressure granted by the ‘private attorney-general’ is nevertheless needed. If one adds to these arguments considerations of corrective justice,³¹ it is clear that the problem is not whether or not private actions should have a role in antitrust enforcement. Rather, the problem is, in effect, that of reaching a balance of private and public enforcement (the most criticized

²³ In Europe see Wils, *supra* fn 2, 480-481.

²⁴ In Continental Europe we would rather say they have exclusive investigative powers: *infra*, Section III, § 15.

²⁵ For analysis of the social cost of monopoly see Viscusi – Vernon – Harrington, *Economics of Regulation and Antitrust*, The Mit Press, 2000, 75 ff.; Posner, *Economic Analysis of Law*, Aspen Publ., 2003, 272 ff.; Page, ‘Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury’, (1980) 47 U Chi LRev 467; Baker, *supra* fn 4, 44.

²⁶ Shavell, *Foundations of Economic Analysis of Law*, The Belknap Press, 2004, 578-579.

²⁷ Easterbrook, ‘Detrebling Antitrust Damage’, (1985) J Law & Ec 445, 454.

²⁸ Shavell, *supra* fn 26, 578-579.

²⁹ Easterbrook, *supra* fn 27, 451.

³⁰ Shavell, *supra* fn 26, 391.

³¹ Komninos, ‘Introduction’, 21, 23, in *European Competition Law Annual 2001*, *supra* fn 2.

factor of imbalance in the US being state activism, both through state antitrust laws and through state enforcement of federal antitrust law).³² In the end the real issue concerns the creation of formal or informal effective mechanisms for coordinating the roles of the two institutional frameworks (litigation and regulation), as is usual in fields where there is a cumulative effect of both.

3 Europe

In Europe antitrust private enforcement plays no significant role, although there is an argument that the statistics of final judgments given in antitrust matters give an understated impression due to the frequency of settlements. The general consensus is that private litigation must have a complementary function to that of public enforcement.³³ As recital 7 of Regulation 1/2003 states, “national courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.” After many years during which the main cause for the lack of private enforcement was explained by a deficit in antitrust knowledge amongst national courts, over the last decade it has appeared clear that cultural barriers alone cannot explain the European trend. The problems are structural. Regulation 1/2003 seeks to address some of them. It abolishes the notification procedure, also with the aim of facilitating the application of competition rules by the national courts, “as plaintiffs will no longer face torpedo notifications to DG Competition aimed at suspending proceedings in the national courts.”³⁴ Moreover, Article 15 introduces a new co-operation procedure and enables the Commission to intervene as *amicus curiae* in national proceedings concerning antitrust law.³⁵ From its side, the Court of Justice in *Courage v Crehan* stated the existence of a Community right to damages. As has been written, “the possibility opens up now for prospective plaintiffs to avail themselves of the Community nature of their rights to damages and to urge national courts to offer adequate protection to their Community rights, as they are bound to do by Community law.”³⁶

However the general view is that Regulation 1/2003 and the *Courage* decision cannot alter the pattern, embedded in national laws that are naturally unfriendly to private plaintiffs in antitrust suits. The national legal factors that play against the European

³² Posner, ‘Antitrust in the New Economy’, (2001) 68 Antitrust LJ 925; see also Blair – Harrison, ‘Reexamining the Role of Illinois Brick in Modern Standing Analysis’, (1999) 68 Geo Wash LRev 1.

³³ Few voices are against this position: one comes from Wils, *supra* fn 2, 480-486.

³⁴ Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part Two: Between the Idea and the Reality: Decentralisation Under Regulation 1’, [2003] ECLR 657, 665.

³⁵ However it has been argued that the Commission’s effort is just a political masterstroke: Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part One: Regulation 1 and the Notification Burden’, [2003] ECLR 604.

³⁶ Komninos, ‘New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages’, (2002) 39 CMLRev 447, 487. Although it is arguable, at least in England, that *Courage* is a limited breakthrough, following the Court’s ruling the Court of Appeal in *Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637 noted, in particular, at para 167, that ‘the effect of the ECJ decision was to put its imprimatur on the particular claim of Mr Crehan, holding that a right to the type of damages he claimed was conferred on him by Community law.’

plaintiff are easily identifiable through a comparison with the US plaintiffs' weaponry. I will discuss some of these factors from the perspective of Italian law in Section III. In the following section, however, I will argue that alleged exclusionary abuse is the subject of frequent litigation in Italy; accordingly, third-party claims are the real issue.

II THE ITALIAN ANTITRUST EXPERIENCE

4 The Italian competition law system

Competition law based on the EC Treaty rules was introduced in Italy by law no. 287/1990. A new independent authority (Autorità garante della concorrenza e del mercato - AGCM) was established and empowered to prohibit mergers, to investigate undertakings and abuses of dominant position and inflict sanctions in the form of monetary fines, following the EC Commission's model. However, the AGCM was substituted by the Bank of Italy as far as the banking market was concerned, by means of a much debated rule (Article 20) that is currently under discussion and will probably be amended in future through the elimination of the 'banking market exception'. The AGCM was also empowered to issue cease and desist orders and, in case of continuous violation of its own orders, to suspend any business activity of the firm for a period of up to 30 days. After considerable debate it was agreed that the AGCM's decisions had to be subject to appeal before the Administrative Court of the Rome Area ("Tribunale amministrativo regionale del Lazio"), *i.e.* a special court evaluating the decisions of independent authorities on procedural grounds and not on the basis of the factual background on which the decision relied. The AGCM was not empowered to institute civil actions.

At the same time, it was decided to give private enforcement a significant role. Under the Italian Constitution, special courts cannot be created.³⁷ Therefore the Antitrust Law attributed a special jurisdiction to Courts of Appeal as far as nullity of contracts and damages suffered by private parties were concerned in cases involving the violation of the Italian Antitrust Law (Article 33-2). Moreover, Courts of Appeal were given the power to grant interim measures. In establishing subject matter jurisdiction, the legislator wanted to make a clear statement: competition law is a serious matter to be decided quickly by higher level courts such as Courts of Appeal, thereby creating the only significant situation where these Courts act as first instance judges and one of the few areas where civil litigation offers no room for appeal on grounds of findings of facts. However, Article 33(2) proved to be very poorly drafted, as there was no reference to restraining or positive injunctions, to restitution under unjustified enrichment rules, or to the fact that subject matter jurisdiction does not cover suits concerning the violation of the EC Treaty competition rules, which remain in the jurisdiction of the low level courts in accordance with the general rule of jurisdiction given by the Civil Procedure Code.³⁸

³⁷ Special courts were used in the fascist era as a instrument to limit or suppress the general right to a due process. Accordingly, the Italian Constitution forbids their creation.

³⁸ Tesauro, 'Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues', in *European Competition Law Annual 2001*, *supra* fn 2, 269-270, who points also out that "the legislature has conferred the private (2004) 1(1) CompLRev

The legislator was aware that Italian courts had had no experience in antitrust law (litigation concerning EC antitrust rules had been very rare in the two previous decades) and was concerned about the risk of serious misunderstandings and ‘creative lawyering’. Therefore, a very straightforward interpretive rule was inserted in the Law, Article 1 (4) stating that the antitrust substantive rules contained in the Law are to be interpreted following the “principles of EC competition law”.

The Antitrust Law did not envisage any mechanism for coordinating AGCM’s actions with private actions. Even though administrative fines are subject to the principles governing criminal fines, in Italy (as in other European countries) private parties are not allowed to claim for damages in public law proceedings concerning wrongdoings punished with administrative fines (i.e. they cannot stand as *partie civile*).³⁹ This depends on the nature of the administrative bodies called on to apply administrative fines, which are not courts and can neither be considered as a type of specialized court because such courts are forbidden under the Italian Constitution. The rules adopted by the AGCM with reference to its own administrative proceedings permit the participation of interested third parties, but subject to very short time limits; this participation is permitted in order to submit arguments and not to obtain any kind of private adjudication. It is not clear whether courts have a power to grant restraining and positive injunctions concurrent to the power to issue a cease and desist order of the AGCM.⁴⁰ Finally, no rule equivalent to Section 5 of the Sherman exists (however, experience shows that courts tend to rely on the facts ascertained in the AGCM’s decision as evidence) and no mechanisms of access by private litigants to the documents obtained by the AGCM during a previous administrative procedure has been envisaged by the Antitrust Law.

5 Abuse of a dominant position: AGCM decisions versus court judgments

To date, the AGCM has opened 64 procedures concerning alleged abuses of dominance, finding an abuse in 48 cases (around 75% of cases).⁴¹ As far as private actions in court are concerned, it is impossible to rely on precise data. First, some actions are settled before judgment, even though the percentage of settled cases is certainly not as high as it is in England or in the US, since Italian procedure does not offer any discovery mechanism that can push anticipated settlement of a dispute.⁴² Second, not all the courts’ decisions are published. Third, many claims asserting abuse of market power are usually dressed as unfair competition cases (under Article 2598 n.

enforcement of competition rules on Courts of Appeal in recognition of the fact that a higher court is better equipped to deal with disputes involving complex economic assessments” and that the choice reflects “an effort to avoid judicial fragmentation.”

³⁹ For discussion concerning the *parte civile* model and its applicability to antitrust cases see Lever, ‘Effective Private Enforcement’, in *European Competition Law Annual 2001*, *supra* fn 2, 115.

⁴⁰ Tavassi, ‘Substantive Remedies for the Enforcement of National and EC Antitrust Rules before Italian Courts’, in *European Competition Law Annual 2001*, *supra* fn 2, 147. See also *infra* Section II, § 5.

⁴¹ The data is updated to 31 December 2003. In 2004 the AGCM opened a procedure concerning abuse of a dominant position that is still in progress.

⁴² See *infra*, Section III, § 15.

3 Civil Code), especially as far as predatory pricing and boycotts are concerned.⁴³ Among the published decisions which rely on Article 3 of the Antitrust Law (abuse of dominant position), courts have decided there was an abuse in 2 out of 27 cases, equivalent to around 7.5% of cases.⁴⁴

The difference between the two percentages creates the impression that the rules against abuse of dominant position are enforced primarily by the antitrust authority and not by the courts. However, this difference must not be given too much emphasis. The AGCM does not open an investigation procedure in all the cases that are reported by private parties, selecting only the most significant cases.⁴⁵ This explains the high percentage of 'success'. On the contrary, courts do not have any screening system to enable them to dismiss openly ungrounded actions. Monopolization claims (in Europe, claims of abuse of dominant position) are usually raised in order to subvert competition.⁴⁶ Typically the plaintiff invokes the antitrust law to demand protection from a defendant's behaviour that damages him, claiming that the protection of competition means the protection of firms operating in the market (for historical and cultural reasons, this claim finds considerable support also amongst academics).⁴⁷ Since the Italian antitrust authority is a public body which does not take decisions primarily concerned with the protection of individual rights, it is less prone to be 'captured' by a rival firm's complaints and allegations. Moreover, the AGCM takes into consideration the overall situation of a market before asserting the existence of an abuse. In contrast, a court, which is also less experienced than a specialized authority, must rely on information provided by the two opponents, without a clear picture of the market reality, since it has no general power of investigation concerning the market structure. For this reason, a plaintiff can be encouraged to start an action before a court when the authority has not reacted to its complaints or when the likelihood that the AGCM will open an investigation or take a punitive decision against the accused incumbent are low. In such a situation the plaintiff may also consider that the AGCM's decision can have a negative impact a subsequent court decision on the same factual grounds. Indeed, the correlation between the authority's decision and the court's judgment is also evidenced by the fact that the two cases in which the court granted damages to the plaintiff followed the AGCM's procedures against the dominant firm and which concluded with injunctions and fines.⁴⁸

⁴³ I have considered the issue in Giudici, 'I prezzi predatori' (Predatory Prices), Giuffrè, Milan, 2000, 285 ff.

⁴⁴ The two cases in those the plaintiffs succeeded are Milan Court of Appeal, 24 December 1996, *Telesystem vs Telecom Italia*, Danno e responsabilità 602 (1997) with note of Bastianon, and Rome Court of Appeal, 20 January 2003, *Albacom vs Telecom Italia*, Foro it. 2474 (2003) with note of Scoditti.

⁴⁵ The AGCM is obliged to evaluate any complaint but must start an investigation only when there is sufficient evidence concerning the existence of an infringement (*fumus boni juris*). See Antonioli, 'Riflessioni in tema di procedimento nel diritto antitrust' (2000) Riv Ital Dir Pubbl. Comunitario 61, 81-83.

⁴⁶ Baumol - Ordoover, 'Use of Antitrust to Subvert Competition', (1985) 28 J L & Economics 247; Giudici, *supra* fn 43, 151 ff; for a different perspective Fox, 'We Protect Competition, You Protect Competitors', (2003) 26(2) World Comp 149.

⁴⁷ See *infra*, Section II, § 11.

⁴⁸ See *infra*, Section II, § 6.

In short, if you have a very strong case it seems to be advisable to complain before the antitrust authority and wait for a positive conclusion of the public enforcement mechanism, and after that start legal proceedings to recover damages, whereas if you have a weak case and you want to utilise competition law to your advantage as a law that protects competitors from fierce forms of market rivalry, it is probably more convenient to raise your action immediately before a court. This means that it is more probable for weak cases to be brought before a court than to be subject to a formal procedure and a final decision of the AGCM. This is a first explanation for the difference in the rate of ascertainment of abuses of dominance observable between courts' published judgments and AGCM official decisions. This difference, however, also shows that courts are not so ready to grant antitrust defences to competitors. The ratio between successful and unsuccessful cases offers clear evidence that Italian courts are not so naïve when abuse of dominant position is concerned.

A second explanation for the difference in the ratios of findings of abusive conduct between the AGCM and courts lies in the fact that many private enforcement cases have been decided entirely on procedural grounds. It should be remembered that Courts of Appeal are entitled to declare the nullity of agreements, to grant damages and to take interim measures, and there is no reference to restraining injunctions. Some courts and some scholars consider that, since judges have a general power to take interim measures of whatever kind (atypical measures) directed at preventing unrecoverable damages, Courts of Appeal can also take interim measures ordering the dominant firm to adopt 'positive behaviour' such as fair price clauses or the opening of a contractual relationship with the plaintiff.⁴⁹ Other Courts have stated that interim measures must be related to final judgments declaring a contract null and ordering damages, thereby preventing courts from anticipating orders that cannot be contained in the final judgment.⁵⁰

A third explanation for the difference in the ratio of findings of abusive conduct is of a 'path-dependency' type. The most significant cases of abuse discovered by the AGCM concern regulated industries. The AGCM now possesses a vast knowledge of the incumbents' behaviour in regulated markets and reacts promptly to any complaint concerning those markets. Therefore, the AGCM is building up a significant set of related decisions in the field, in which it is taking benefit of economies of scale, scope and specialization that no judge could ever develop.⁵¹ An incumbent's rivals or

⁴⁹ See Alessi, 'Legge 287/90: tutela cautelare inibitoria, mercato rilevante ed altri problemi' (1992, II) Riv Dir Comm. 283; La China, 'Commento alla legge 287/90', in Afferni (ed), *Concorrenza e mercato*, 652; Milan Court of Appeal, 19 April 1995, *Ceit vs Ciuffo Gatto*, Tavassi - Scuffi, *Diritto processuale antitrust*, Giuffrè, 1998, 631 (the court initially ordered the defendant to deal with the plaintiff, but the injunction was not confirmed on review).

⁵⁰ Rome Court of Appeal, 21 December 1993, *De Montis & Catering Roma vs Aeroporti di Roma*, Tavassi - Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 534.

⁵¹ For instance, the antitrust authority has developed considerable experience in the telecommunication field: see, amongst other decisions: 3 C Communications, decision no. 412, 4 March 1992, *Bollettino* no. 5, 1992; *Ducati/Sip*, decision no. 1028, 24 March 1993, *Bollettino* no. 6, 1993; *Sistema telefonia cellulare GSM*, decision no. 1532, 28 October 1993, *Bollettino* no. 32, 1993; *Telesystem/Sip*, decision no. 2662, 10 January 1995, *Bollettino* no. 1-2, 1995; *Sign/Stet Sip*, decision no. 2970, 27 April 1995, *Bollettino* no. 17, 1995; *Assistal/Sip*, decision no. 3077, 30 May 1995, *Bollettino* no. 22, 1995; *Albacom/Telecom Italia- circuiti dedicati*, decision 5428, 30 October

distributors, more interested in preventing exclusionary practices than in obtaining damages, are therefore induced to trigger public enforcement instead of private enforcement. Both the uncertainties concerning the power of Courts of Appeal to grant restraining and positive injunctions, and the AGCM's expertise in the field of regulated industries lead one in an opposite direction from the one envisaged by those lawyers who consider that the first place to go for a plaintiff looking for interim relief is a court and not an administrative authority.

6 Damages in cases of abuse of a dominant position

In two cases, both concerning Telecom, the Court of Appeal granted damages for abuse of a dominant position.

In the first case, Telecom had denied Telesystem access to its network, the latter being a company which wanted to offer telecommunication systems to business clients. Initially Telesystem asked for interim measures from the Court of Appeal of Milan, which proved unsuccessful.⁵² After the AGCM's decision declaring that Telecom had abused its dominant position,⁵³ Telesystem claimed damages before the Court of Appeal. The Court held Telecom liable⁵⁴ and appointed a team of experts to ascertain the damages suffered by the defendant,⁵⁵ instructing them to quantify the costs faced by Telesystem in order to start its business and the lost profits due to Telecom's denial of access, considering also Telesystem's lost business opportunities as the first operator in the market.⁵⁶

The second case concerned Albacom, a company which requested, again, to be connected to Telecom's network. However, Albacom, unlike Telesystem, was not forced to wind up and, as soon as the AGCM ordered Telecom to offer its service, Albacom started a successful business. The Court of Appeal of Rome applied the 'but-for-theory'⁵⁷ and condemned Telecom to pay the damages that Albacom had suffered because of the delay in the start-up of the business.⁵⁸

1997, *Bollettino* no. 44, 1997; *Ass Ital Internet Providers/Telecom* decision no. 7978, 28 January 2000, *Bollettino* no. 4, 2000; *Tiscali-Albacom/Telecom Italia* decision no. 8481, 13 July 2000, *Bollettino* no. 28, 2000; *Infostrada/Telecom Italia- Tecnologia Adsl*, decision no. 9472, 27 April 2001, *Bollettino* no. 16-17, 2001

⁵² Interim measures were initially granted by the Milan Court of Appeal, 27 September – 8 October 1994, Tavassi - Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 560; but later, on review, the interim measures were not confirmed: Milan Court of Appeal, 4th-11 November 1994, Tavassi – Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 568.

⁵³ AGCM decision no. 2622 dated 10 January 1995, *supra* fn 51.

⁵⁴ Milan Court of Appeal, 18 July 1995, Tavassi - Scuffi, *Diritto processuale antitrust*, 571.

⁵⁵ Milan Court of Appeal, 24 December 1996, Tavassi - Scuffi, *Diritto processuale antitrust*, 575.

⁵⁶ Milan Court of Appeal, Tavassi - Scuffi, *Diritto processuale antitrust*, 573.

⁵⁷ Blair - Page, 'Speculative Antitrust Damages' (1995) 70 Washington LR 433.

⁵⁸ Rome Court of Appeal, *supra* fn 44. AGCM had already sanctioned Telecom: decision no 8481 dated 13 July 2000, *Bollettino* no 28, 2000.

7 Comment

Notwithstanding the obstacle concerning interim measures, alleged anti-competitive abuse of dominance (*i.e.* exclusionary abuse) is the subject of fairly frequent litigation in Italian courts. This is no surprise. Problems of incomplete and asymmetric information which, in the absence of discovery mechanisms, frustrate plaintiffs in third-party claims, are less severe in litigation settings where the two opponents are business rivals acting in the same market or, being at different vertical levels, had a previous business relationship. Unfair competition law was used before the arrival of a national antitrust law and it is still used as a substitute to exclusionary abuse of dominant position.⁵⁹ Thus, there is a consolidated background for this kind of litigation.

My analysis of predatory pricing suits in Europe and in Italy shows that in unregulated industries claims of abuse of dominant competition are usually brought in order to subvert competition. From this standpoint Easterbrook's view seems correct that a business rival is not the ideal 'private attorney general' in antitrust suits, because its incentive to sue is usually very much misaligned with social interest.⁶⁰ Accordingly, my opinion is that there is probably too much, and not too little, litigation as far as exclusionary abuses of dominant position in unregulated industries are concerned.

8 Agreements - Cases where parties use antitrust as a shield and boycott cases

In many published cases parties to an agreement have claimed that the contract was null and void under Article 81 EC Treaty or under its national equivalent, Article 2 Law no. 287/1990. Therefore, there are also reported cases in Italy in which parties have used antitrust as a shield in order to be discharged from their contractual obligations.⁶¹ Also to be considered amongst these cases are those actions in which the plaintiff, alleging that the contract entered into by him was null and void because the other party was a member of a cartel, has tried to be discharged from its obligations. Many of these actions concerned the clauses contained in the banking standard contracts drafted by the Italian Banking Association (Associazione Bancaria Italiana – ABI) and, in particular, standard bank guarantees.⁶² The interesting legal point raised by these cases is whether contracts entered into by members of a cartel and by means of which such members are performing the cartel agreements are null and void. The matter will be dealt with in following § 13. On the contrary, in Italy there are no significant published cases where the defendants torpedoed civil action by filing a notification with the Commission.⁶³ Many cases have been subject to arbitration and it has been disputed whether or not antitrust issues can be decided by arbitrators.

⁵⁹ Giudici, *supra* fn 43, 285 ff.

⁶⁰ Easterbrook, *supra* fn 27, 458-461.

⁶¹ Court of Cassation, 1st February 1999, no. 827, *Ferro e altro vs Mafin e altro*, Giur. It., 1223 (1999, II).

⁶² Court of Cassation, 4 March 1999, no. 1811, *Montanari vs Banca carige*, see *inter alia* Alba Tribunal, 12 January 1995, *Benf vs Cassa Rurale Artigiana di Gallo di Grinzale Cavour*, Giur. It., 212 (1996, II); Genoa Tribunal, 21 May 1996, *Bagnasco vs Banca Popolare Novara*, Giur. It. 167 (1997, II); Milan Tribunal, 25 May 2000, *Illarietti, Novara vs Banca Fideuram*, Banca Borsa Titoli di Credito, 88 (2001, II).

⁶³ On the issue see Riley, *supra* fn 34, 666.

A case recently published concerned a typical refusal to deal litigation, in which a travel agent was boycotted by a cartel of tour operators because of its pricing policy.⁶⁴ A rather more complex case involved the football team Juventus and raised issues concerning *in pari delicto defences* and ‘passing on’. The team had negotiated a contract with a travel operator by means of which the tickets for the Champions League final were sold to consumers with a high overcharge and bundled with travel services. Juventus had the right to 20 per cent of the turnover generated by the travel services and a huge per cent premium on the transaction value. The Court applied both Article 2 and Article 3 of the Antitrust Law. As far as the agreement was concerned, the Court ordered the restitution of the premium but denied damages, asserting that the travel agent was *in pari delicto* and had passed the overcharge to consumers.⁶⁵

Finally, two interesting cases involved lobbying activities by means of which the members of a cartel were seeking to obstacle a business rival.⁶⁶

9 The Motor Insurance case

As far as private enforcement of antitrust by third parties is concerned, the only major case is that of *Motor Insurance*, which is raising many problems, one of which seems to be an Italian peculiarity and a major obstacle to the future of private enforcement of antitrust law in Italy.

The AGCM imposed a sanction on a large number of insurance companies, on the basis that they had established a mechanism of exchange of information concerning car accident insurance.⁶⁷ The companies appealed the decision but the State Counsel, the highest administrative court, confirmed the existence of the cartel, even though it has discharged some companies because of their limited role in the cartel.⁶⁸

Motor insurance is compulsory in Italy. Every car has to be insured by the owner or by the usual driver against accident and third party risk. Accordingly, the market is immense. US litigation mechanisms would have exposed the members of the cartel to class action suits for billions of dollars. In Italy the case is proceeding very differently. In the absence of class actions, many consumers started individual legal proceedings against their insurers to recover the overcharge, relying on the AGCM’s assumption that the cartel had caused a 20 per cent increase in their premiums.⁶⁹ Two factors drove the insured to litigate before the small claims judge, the *Giudice di Pace*, instead of acting before the Court of Appeal. First, many of the plaintiff’s lawyers were indeed not aware that subject matter jurisdiction had been introduced by the antitrust law; accordingly, as the sums to be recovered were very low and thereby in the apparent jurisdiction of the

⁶⁴ Milan Court of Appeal, 11 July 2003, *Bluevacanze vs I Viaggi del Ventaglio*, Foro it. 597 (2004, I).

⁶⁵ Turin Court of Appeal, 6 July 2000, *Indaba Incentive Company vs Juventus*, Danno e responsabilità 46 (2001).

⁶⁶ Milan Court of Appeal, 13 July 1998, *Tramaplast c Macplast*, Giur. It. 1897 (1999, III).

⁶⁷ Decision dated 28 July 2000 no. 8546, *Bollettino* no. 30, 2000.

⁶⁸ State Counsel, 23 April 2002, no. 2199, Foro it. 482 (2002, III).

⁶⁹ See Giudice di Pace of Sala Consilina, 8 October 2001, *MR vs Nuova Tirrena Assicurazioni*, Arch. Giur. Circ., 72 (2003, I), Giudice di Pace of Laviano, 27 September 2002, *DGR vs Alleanza Subalpina Ass*, Arch. Giur. Circ., 72 (2003, I).

minor judge, they acted before the *Giudice di Pace*. Second, Courts of Appeal are located only in large cities and, being top-level judges, are perceived by lawyers as very demanding courts in term of quality of the legal paperwork, whereas *Giudici di Pace* are local and undemanding also because they can apply equity instead of formalized legal rules. Anglo-American lawyers must not think that they are an equity court in the English sense; nevertheless, they are not tied by strict adherence to formal legal reasoning in their decision. In the light of this last factor, it is easy to understand why insured parties tried to avoid Courts of Appeal. The approach of consumers' lawyers clearly shows that if claims are small and there is no way to aggregate suits, plaintiffs prefer small claim judges.

Needless to say, insurers raised a jurisdiction defence, claiming that small claims judges lacked subject matter jurisdiction. Nevertheless, many *Giudici di Pace* have decided in favour of the plaintiffs.⁷⁰ In order to circumvent Article 33(2) of the Antitrust Law (subject matter jurisdiction clause), they have used many different arguments as to the nature of the sum (usually, 20% of the insurance premium) awarded to the plaintiff. Some have argued that the restitution of the overcharge is a restitution grounded on the rules against unjustified enrichment (art. 2033 Civil Code).⁷¹ However, this view has little justification if one applies formal legal reasoning. Since a contract exists, in order to apply the rules against unjustified enrichment the judge should declare the contract to be null and void and thereafter order restitution as payments were made without consideration. But the *Giudici di Pace* cannot declare a contract null and void, for Article 33(2) paragraph clearly gives, on the issue, exclusive jurisdiction to Courts of Appeal. Moreover, restitution should be in full and not partial. Partial restitution is equivalent to a judicial decision concerning the fair price, a ruling for which the theory of unjustified enrichment allows no room.⁷² Other judges, supported by some writers, have argued that the overcharge is a breach of good faith rules and fairness principles.⁷³ However, a breach of contractual rules gives room to damages, not restitution; and again, damages are within the special jurisdiction of Courts of Appeal.

In the meantime insurance companies were lobbying the government in order to avoid *Giudici di Pace* equity decisions circumventing Article 33 of the Antitrust Law and being submerged by local court adjudications of the 20% in favour of the insured party. The Government issued an urgent decree that was later approved.⁷⁴ The new law states that

⁷⁰ Giudice di Pace of Casoria, 12 February 2003, *Barbato vs Lloyd Adriatico Ass.ni*, Foro it. 2192 (2003, I) with note of Colangelo, Giudice di Pace di Roma, 21 March 2003, no. 13638, *Carli vs RAS*, I contratti 900 (2003) with note of Hazan, Giudice di Pace di Bari, 13 January 2004, no. 181, *BF vs Milano Ass.ni* (unpublished).

⁷¹ Giudice di Pace di Roma, 21 March 2003, no. 13638, *Carli vs RAS*, *supra* fn 70, Giudice di Pace of Laviano, 27 September 2002, *DGR vs Alleanza Subalpina Ass*, *supra* fn 69.

⁷² Guizzi, *Mercato concorrenziale e teoria del contratto*, (1999) Riv Dir Comm, 67, 114-120, asserts that rules on severability could be applied by analogy. However also severability rules do not empower courts to modify the term of a contract.

⁷³ See Giudice di Pace of Casoria, 12 February 2003, *Barbato vs Lloyd Adriatico Ass.ni*, *supra* fn 70, Giudice di Pace of Sala Consilina, *MR vs Nuova Tirrena Assicurazioni*, *supra* fn 69, Guizzi, *supra* fn 72, 112; Guizzi, 'Struttura concorrenziale del mercato e tutela dei consumatori. Una relazione ancora da esplorare', (2004, I) Foro it. 479, 482, mentioning Article 1(e) Law no. 281/1998, as well as Scoditti, 'Il consumatore e l'antitrust' (2003, I) Foro it 1127, 1130.

⁷⁴ The decree is the no. 18 dated 8 February 2003 and became Law no. 63 dated 7 April 2003.

that Giudici di Pace can continue to apply equity if the value of a case does not exceed €1100 and if the case does not involve standard form contracts (which include *inter alia* insurance contracts).

10 The position of the Court of Cassation in the Axa case and in the Unipol case

The Court of Cassation had already held that consumers have no standing under antitrust law in a case where the plaintiff, in order to be discharged from the obligations stemming from a bank guarantee, had claimed that the text of the bank guarantee was the result of a bank cartel, and thus the guarantee he had signed was null and void.⁷⁵ The decision did not attract much attention, also because the plaintiff's attempt to use antitrust as a shield did not arouse much sympathy. However, when the first case in the Motor Insurance litigation finally reached the Court of Cassation, the judgment came as a shock. The Court held, in a decision involving the insurance company Axa, that the Giudici di Pace have jurisdiction in deciding upon insurer-insured litigation, as far as the plaintiff can establish a liability not grounded on antitrust law, i.e. a liability based on tort rules: consumers – the Courts repeated – have no standing in antitrust actions, since antitrust law goes to the direct benefit of competitors and only to the indirect benefit of consumers.⁷⁶ Therefore, consumers fall outside the class of persons whom the antitrust law is designed to protect.

It should be noted that no reference to the *Courage* case is contained in the decision. The Court simply ignored EC law and the interpretation of the Court of Justice. The Axa decision is thus in clear violation of Article 1(4) of the Antitrust Law, which states that in the interpretation of the Law the courts have to follow the EC principles of interpretation.⁷⁷ Moreover, the Court ignored the history of antitrust law, the US experience, the law and economics debate and the reasoning which shows that the best plaintiff in antitrust private actions is the buyer of the monopolized goods.⁷⁸

In a following case, however, a different section of the Court held that the issue of consumers' standing deserves careful examination and that all sections of the Court have to discuss and decide the issue.⁷⁹ Therefore, at present the market is waiting for a "Sezioni Unite" (joint) decision, that will decide whether insured parties have an action under Article 33 (therefore assessing that all cases pending before the *Giudici di Pace* are out of their jurisdiction) or whether insured parties have no action under antitrust law (thereby instructing *Giudici di Pace* to dismiss all claims or inviting them to a 'mission

⁷⁵ Court of Cassation 4 March 1999, no. 1811, *Montanari vs Banca carige*, *supra* fn 62

⁷⁶ Court of Cassation, 9 December 2002, no. 17475, *Axa vs Larato*, Foro it. 1122 (2003, I).

⁷⁷ Needless to say, if the Court of Cassation had decided in accordance with the *Courage* case (*supra* fn 1), it should have dismissed the case on procedural grounds, on the basis that the small claim judge had no jurisdiction. It must be also noted that if the action against the insurers is considered from the perspective of Article 81 EC Treaty, as in the actions concerning the standard banking contracts drafted by the Italian Banking Association (*supra*, fn 62), the position of the Court of Cassation could create potential liability for Italy under the EC Treaty rules in accordance with the *Köbler* decision: Court of Justice, Case C-224/01, 30 September 2003, *Köbler vs Republic of Austria*.

⁷⁸ Easterbrook, *supra* fn 27, 463 ff.

⁷⁹ Court of Cassation, 17 October 2003, no. 15538, *Unipol vs Ricciardelli*, Foro it. 2938 (2003, I).

impossible', *i.e.* finding a legal reasoning assessing that the presence of a cartel entitles the consumer to damages grounded on rules different from antitrust ones).

Needless to say, if the Joint Boards of the Cassation Court decide that consumers have no standing, the result will be astonishing: one of the founders of the European Community will raise, through its judiciary, a huge barrier to antitrust private enforcement, probably violating the Treaty as interpreted by the Court of Justice in the *Courage* case. Horizontal-cartels are the hard-core violations of antitrust rules. If consumers are denied any 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.

11 How the Consumer Standing Issue arose: the confusion between antitrust law and unfair competition law

It is interesting to understand how the idea that consumers have no standing in antitrust actions arose. First, in the history of Italian competition law, in the absence of antitrust law, in the sixties and the seventies there was a gradual mixing of reasoning grounded on unfair competition principles with a new legal reasoning relying, in a very naïve way, on 'market competition' principles emerging from the EC Treaty and which could find no explicit legislative equivalent in Italy.⁸⁰ The legal line of reasoning used to 'import' antitrust principles was grounded on Article 41 of the Constitution, a rule granting, in its first paragraph, the freedom of enterprise and in the following paragraph stressing that freedom of enterprise cannot conflict with social welfare. As economics was unknown to lawyers and judges, it was difficult to grasp that antitrust protects consumer welfare and not competitors. Protection of competition was therefore equalled to protection of competitors and antitrust law was partially absorbed by the law of unfair competition. Thus, the second part of Article 41 of the Constitution was ignored by many influential scholars, who focused their attention on the first paragraph and stressed that the freedom of enterprise required that incumbents could not prevent smaller rivals from growing and competing. This emphasis on the anti-exclusionary role of competition law was also strongly influenced by the construction of Article 86 (today Article 82) followed by the Commission in the late sixties and the seventies (*i.e.* a rule preventing predatory behaviour and thereby protecting competitors)⁸¹ and embraced by the Court of Justice in the *Continental Can* case.⁸² As a consequence, a considerable section of Italian courts and lawyers have developed a dogmatic idea of what constitutes competition law which is totally focused on the concept of competitor protection. It was forgotten that Article 86 (today, 82 EC Treaty) was born in the first instance as an anti-exploitative rule protecting purchasers, as the wording of its clauses clearly shows; and it is still possible to read, in the Italian literature, that cartels are

⁸⁰ I have considered the issue at length in Giudici, *supra* fn 43, 285 ff.

⁸¹ See the Memorandum of the EEC Commission concerning concentrations, dated 1 December 1965, in which the Commission expressed the idea that antitrust concerns the protection of competitors; on this point see Giudici, *supra* fn 43, 156-164 and Joliet, *Monopolization and abuse of dominant position*, 248.

⁸² Case C-6/72 *Europemballage and Continental Can* [1973] ECR 215.

prohibited in order to avoid exclusionary practices against new entrants,⁸³ even though at least the literal reference to consumer welfare contained in Article 81(3) should draw attention to the role of purchasers' protection in European antitrust law.

12 The special circumstances influencing the Motor Insurance case

It is also worth analyzing the special circumstances which made the Cassation Court decide that consumer protection fell outside the statute's scope. First, the case concerned a civil action started by a consumer against AXA in order to recover the 20 per cent overcharge. AXA raised the jurisdiction defence. The Giudice di Pace gave a first decision based on procedural issues, and asserted its jurisdiction. AXA asked the Cassation Court to decide the procedural issue on Giudice di Pace jurisdiction to adjudicate civil actions grounded on antitrust violations. The consumer did not submit defences before the Cassation Court, probably because the amount at stake was not worth the increased legal cost that litigation in Rome before the Cassation Court would involve. A US style class action lawyer would have had all the incentives to fight in favour of many aggregated claims of the same kind. An Italian local lawyer defending one or a few claims of the same kind cannot have the same incentives. It goes without saying that, on the contrary, AXA had every incentive to fight this small case as if it were a big one, since a favourable decision would have conditioned all pending and potential litigation with its insured parties.

Second, insurers claim that they have already paid the fines imposed by the AGCM and that further sanctions in the form of widespread overcharge restitutions would put their financial stability at risk. Such a claim can be very effective in an economic environment where protection of consumer welfare comes a poor second after the protection of national business champions such as (as far as insurance is concerned) Generali, Unipol, Sai-Fondiaria, Mediolanum.⁸⁴

Nevertheless, there is still hope that the joint meeting of the Cassation Court will lead to a different decision in the Unipol case as far as consumer standing is concerned, reconciling the Italian position generally with the *Courage* decision and, more in general, the scope of antitrust.

13 Damages vs restitution: the contracts entered into by the members of the cartel

As Easterbrook points out, "anything that could be accomplished by changing the rules of liability also could be done by changing the rules of damage."⁸⁵ A different and crucial issue at stake in the raft of private litigation flowing from the *Motor Insurance* case concerns the rules of damage. To start, it must be stressed that the *Motor Insurance* case is one of the most straightforward in terms of third-party actions against the members of a cartel. Consumers are the direct purchasers of the insurance services; accordingly,

⁸³ Ferro-Luzzi, 'Prolegomeni in tema di mercato concorrenziale 'aurea equitas' (ovvero delle convergenze parallele)', (2204, I) Foro it. 475, 479.

⁸⁴ Mediolanum's main shareholder is the present Prime Minister of Italy, Mr. Silvio Berlusconi, with a stake of 35,536 per cent (information published in Consob's data base and dated 19 May 2004).

⁸⁵ Easterbrook, *supra* note 27, 447.

the usual problem that consumers are not the direct purchasers is not present.⁸⁶ Moreover, in such a case there is no problem of computation of lost profits.⁸⁷ Thus the case could have been envisaged as a perfect launch pad for a favourable judicial trend to consumer suits. It has, however, become a nightmare following the unfortunate form of legal system which specifies the kind of subject matter upon which the Courts of Appeal could adjudicate, *i.e.* nullity of contract and damages. As we have seen, many consumers are attempting to circumvent the exclusive jurisdiction of the Court of Appeal by asserting that, under unjustified enrichment law, they are entitled to recover, 'restitution' being a completely different concept from 'damages'. In order to receive restitution the plaintiff should obtain a previous declaration that the contract is invalid. If we ignore the fact that the *Giudici di Pace* are not entitled to render such a declaration, it is interesting to ascertain whether or not the contract entered into by a member of a cartel is null and void. Clearly, this is a very different situation from the one decided in the *Courage* case and investigated under the national law perspective by many scholars.⁸⁸

The main view in Italy is that contracts by means of which a dominant firm abuses its clients are null and void because Articles 81 and 82 EC Treaty (as well as their Italian equivalents, Articles 2 and 3 of the Antitrust Law) are rules of 'economic public policy'⁸⁹; therefore, any contract that directly violates Article 82 is null and void. The abused client would be entitled to restitution as well to recover damages relying on the rule in Article 1338 Civil Code, which states that any party to a contract who knew or should have known that the contract was affected by invalidity and did not mention anything to the other party, is obliged to pay the other party the damages suffered as a consequence of having entered into an invalid contract.⁹⁰ The problem with Article 81 is that this rule clearly states that the contract which establishes the cartel is null and void, but says nothing about the contracts entered into by the cartel members pursuant to the cartel agreements. This omission could be interpreted as an implicit intention not to affect those contracts. On the contrary, if one should reason along the lines of Article 82, contracts entered into by the cartel members with their clients could be considered null and void,⁹¹ for there is no difference between a contract signed by a firm abusing its single market power and one signed by a firm belonging to a cartel abusing artificially created market power.⁹² Some scholars point out that consumers

⁸⁶ On the indirect purchaser problem see *infra* note 100. In the Italian literature see Toffoletto, 'Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust' 1996 *Giuffrè*, 321ff.

⁸⁷ For an overview see Page, *supra* fn 25; Blair - Page, *supra* fn 57. In the Italian literature see Bastianon, 'Violazione della normativa antitrust e risarcimento del danno', (1996) 555 *Danno e responsabilità*.

⁸⁸ See Rodger, 'The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment' (2002) 6 *EdinLR* 217.

⁸⁹ Trimarchi, 'Istituzioni di diritto privato', 2003 *Giuffrè*, §157, 201.

⁹⁰ These damages, accordingly, only take into consideration the so called "interesse negativo".

⁹¹ See Brescia Court of Appeal, *Girelli vs Novogas*, 29 January 2000, *Foro it.*, 2679 (2000, I), but contra Court of Cassation, 11 June 2003, no. 9384, *Liquigas vs Girelli*, *Foro it.*, 466 (2004, I).

⁹² For a different line of reasoning, see now Castronovo, 'Antitrust e abuso di responsabilità civile', (2004) 5 *Danno e responsabilità* 469, 473. In the US the contract which infringes the Sherman Act, and also related transactions, are not invalidated: Jones, *supra* fn 6, 101-102. In Germany a distinction is made between "Folgeverträge" (consequential contracts) and "Ausführungsverträge" (implementing contracts). Under this distinction, contracts between cartel members and their clients are considered to be merely consequential

could be damaged by a rule declaring that all the contracts entered into by cartel members are null and void, since the firms could invoke the presence of a cartel to be discharged from their obligations or to request immediate restitution of their goods.⁹³ However, purchasers would be in any event entitled to damages by Article 1338 Civil Code.⁹⁴ If this were not sufficient to prevent cartel members from using antitrust as a defence against their clients, the fear of ensuing monetary fines from the AGCM would be a strong disincentive to opportunistic behaviour. Moreover, one could also argue that there is a general principle in the law that only consumers are entitled to ask for a contract to be declared null and void when the violated rules intend to protect their position (“*nullità relativa*”).⁹⁵

A different line of reasoning is followed by those relying on the concept of partial nullity. This concept could be applicable to the clauses influenced by the cartel presence, such as the price clauses in the insurance contracts of the *Motor Insurance* case.⁹⁶ However, partial nullity of a contract means the relevant clause has to be considered null and void and does not allow for the court to insert a different clause.⁹⁷ There is, however, an exception. Article 1339 Civil Code asserts that if the price of a product or a service is determined by law, the price clause in the contract is automatically substituted by the regulated price. Some scholars assert that, by analogy, Article 1339 could be applied to cases where the competitive price has been altered because of the influence of a cartel.⁹⁸ If this conclusion were to be followed by the *Giudici di Pace*, the special jurisdiction defence would be defeated: consumers would be entitled to recover the overcharge as restitution of a price unduly paid, and no declaration of nullity of the contract would be required, for the substitution of the price is automatic. The problem with this line of reasoning is that Article 1339 assumes that a price is fixed by law, so that the judge is simply called to substitute the price and grant the recovery. Since it is clear that the AGCM’s evaluation of the cartel influence over market prices is not equivalent to a legal indication of the due price, the ‘special’ adaptation of Article 1339 to the needs of a price-fixing antitrust case would also circumvent the scope of the subject matter jurisdiction: the minor claims judge would

contracts which cannot be affected by the ‘nullity of contract’ sanction. In the Italian literature some writers rely on this German doctrine: see for instance Libertini, ‘Autonomia privata e concorrenza nel diritto italiano’, (2202, I) Riv dir comm 451; Guizzi, *supra* fn 72, fn 9. Such contracts are nonetheless considered to be null and void, and the distinction not relied upon, by, *inter alia*, Castronovo, *supra* at p 473; Pardolesi, ‘Cartello e contratti dei consumatori: da Leibniz a Sansone’, (2004, I) Foro it 470.

⁹³ Milan Tribunal, *supra* fn 62; Bertolotti, ‘Qualche ulteriore considerazione su intese vietate, contratti a valle e sanzioni di nullità’, (2002) Giur It 1211.

⁹⁴ Even though it must be noted that damages under Article 1338 Civil Code cover only the expenses of entering into the contract. Castronovo, *supra* fn 92, 474, also mentions Article 1338 Civil Code as an applicable rule in respect of nullity of contracts entered into by purchasers.

⁹⁵ Bertolotti, *supra* fn 93.

⁹⁶ For a similar situation (concerning the uniform contractual terms of banking contracts) see Ubertazzi, ‘Ancora su norme bancarie uniformi e diritto antitrust’, (1997) Dir della banca e del mercato finanziario 415, 427-429.

⁹⁷ Trimarchi, *supra* fn 89, § 256.

⁹⁸ See Toffoletto, *supra* fn 86, 343; Scoditti *supra* fn 73, 1129.

in any event investigate the cartel's effect on prices, contravening the law's intention to put these issues in the exclusive hands of Courts of Appeal.

The discussion concerning damages in the *Motor Insurance* case is clearly contaminated by the special antitrust jurisdiction clause, as is also demonstrated by the other, convoluted line of reasoning followed by consumers' lawyers, *i.e.* the argument that an undertaking fixing its prices under the influence of a horizontal cartel breaches its duties of good faith and fairness in its contractual relationships with consumers, thereby exposing it to liability not grounded on Article 33.⁹⁹ If Article 33 of the Antitrust Law had not restricted the special jurisdiction to nullity of contracts and damages, probably the full debate concerning the true nature of the recovery action would be very different in a context like the *Motor Insurance* case, and attention would be focused on whether direct purchasers are entitled at least to recover overcharges (as a measure of antitrust damages) characterising the action grounded on Article 33 as an action in tort, or as restitution plus damages under Article 1338 Civil Code on the basis that the contract entered into by the purchaser is null and void.¹⁰⁰

After *Illinois Brick*, one of the most debated issues in the US concerns the pros and cons of allowing only direct purchasers to sue.¹⁰¹ It is doubtful whether Italian courts would allow indirect purchasers to recover antitrust damages. Article 1223 and Article 2056 Civil Code states that damages are recoverable if they are the immediate and direct consequence of the tort. Courts could assert that a problem of proximate causation prevents the recovery of damages suffered by indirect purchasers acting in tort. Should the direct purchasers' claim be characterised as restitutionary/unjustified enrichment based on nullity of contract, indirect purchasers would probably not be protected, since it would be difficult to claim that their contracts are also null and void. In any event, it is clear that the debate would be totally different from the American one, where the deterrence function of antitrust damages is well recognized and incorporated in the legal reasoning of the Supreme Court's landmark decision.

III THE FACTORS LIMITING PRIVATE ENFORCEMENT IN ANTITRUST CASES

14 Vindicating the public interest: collective action

The dominant impression is that, in Italy, in fields where collective interests are at stake, private enforcement is under-developed because courts are extremely slow and inefficient. This is undoubtedly true; however, the real reason why antitrust law as well as investor and consumer protection law is under-enforced lies elsewhere.

⁹⁹ *Supra*, Section II, § 9 fn 73.

¹⁰⁰ This problem is the focus of Castronovo, *supra* fn 92. On overcharge as the standard measure of damages in price-fixing case in the US and on the "but for" condition, see Blair – Harrison, *supra* fn 32, 4 ff.

¹⁰¹ Blair – Harrison, *supra* fn 32; Hovenkamp, 'The Indirect-Purchaser Rule and Cost-Plus Sale', (1990) 103 Harv LRev 1717; Landes – Posner, 'The Economics of Passing On: A Reply to Harris and Sullivan' (1980) 128 U Pa LRev 1274; Landes - Posner, 'Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*', (1979) 46 Uni Chicago LRev 602; Harris – Sullivan, 'Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis', (1979) 128 U Pa LRev 269; Berger - Bernstein, 'An Analytical Framework for Antitrust Standing', (1977) 86 Yale Law J 809.

A more reasoned view points to the absence of class-action mechanisms. This view is becoming the most influential in the wake of the Parmalat collapse, where some Italian investors are trying to recover damages by joining the various class actions started in the US in spite of joining the Italian consumer associations (in which lawyers are usually heavily involved) which are promoting their own legal services. Capital markets law is discovering what is already known to the antitrust experience: foreigners are increasingly seeking redress in the US for injuries which are sustained overseas.¹⁰² Unfortunately, class actions cannot be effective without contingency fees. However the idea that lawyers can take the lead in the vindication of the public interest and thus that an “invisible hand” (in this case, lawyers’ actions) can promote collective welfare is, again, foreign to Italian culture. Thus, the introduction of class-actions raises many doubts as it requires a revolution in the rules governing the lawyer market.

My view is that if the scope of class actions is to ignite a private enforcement mechanism which is concurrent to the antitrust authorities’ action, class actions will play a limited role if the mechanism of discovery in civil litigation remains unchanged.

15 Disclosure

Evidence is a matter of information. The plaintiff has various ways of accessing information. If he is directly involved in the deal, as in a standard breach of contract situation, he probably possesses relevant information. If he is a third party to the transaction, as in the purchaser’s example, things obviously become more complex. Potential claimants can never have a case without access to information.

Civil procedure law approaches the problem in various ways. The most radical approaches are no discovery and broad discovery. English Civil Procedure Rules 1998 (CPR 1998) and US Federal Rules of Civil Procedure (FRCP) allow extensive recourse to discovery.

Disclosure is a crucial step in the litigation process in England. Disclosure arises under Section 31 of the Civil Procedure Rules (CPR) 1998.¹⁰³ However, the broadest range of discovery measures is offered by Rule 26 FRCP.¹⁰⁴ Even after the recent amendments aimed at containing discovery,¹⁰⁵ they can still impress, if not shock, any continental European lawyer.¹⁰⁶ Parties can not only access documents held by their opponents, but they can also inspect offices with detective-like powers that are simply

¹⁰² See *supra* Section I § 2 and fn 19.

¹⁰³ This can be accessed via the Department of Constitutional affairs website www.lcd.gov.uk. On disclosure see Matthews – Malek, *Disclosure*, London, Sweet & Maxwell, 2001.

¹⁰⁴ Stürner, ‘Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance’, (2001) 4 Rev Dr Unif 871, 876.

¹⁰⁵ Marcus, ‘The 2000 Amendments to the Discovery Rules’, (2001) Fed Cts LRev 1, <http://www.fclr.org/>; Rowe, ‘A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery’, (2001) 69 Tenn LRev 13; Stempel, ‘Politics and Sociology in Federal Civil Rulemaking: Errors of Scope’, (2001) 52 Ala LRev 529; Stempel – Herr, ‘Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery’ (2001) 199 FRD 396.

¹⁰⁶ Stürner, *supra* fn 104, 877, quotes the case *VW Ag vs Superior Court*, 123 Cal. App. 3d 840, as an “impressive” example of the power of discovery.

inconceivable in continental Europe (at least, as far as Italy and Germany are concerned). The discovery phase is the core of litigation and, as Professor Hazard has pointed out, “a procedural institution perhaps of virtually constitutional foundation.”¹⁰⁷ Since roughly 95% of all civil cases are resolved without trial, pretrial discovery is ‘the trial.’¹⁰⁸

It is highlighted in the American literature that certain types of claims such as discrimination claims would not have been possible without broad discovery granted to plaintiffs.¹⁰⁹ Cases where discovery is also an essential tool in the hands of plaintiffs are negligence torts, product liability claims, environmental degradation cases, antitrust and securities regulation cases.¹¹⁰ As far as antitrust is concerned, US rules are so aggressive that “most evidence of collusion emerges in the course of discovery by attorneys who hope to collect their fees from the defendants, in an amount not governed by the size of the damage award”.¹¹¹

Italian procedural rules allow broad discovery in a very limited and defined set of marginal cases. When reading a book on Italian civil procedure it may appear that access to the documents held by the other party can be obtained through a court order. The problem is that the party does not know exactly what documents his opponent has, and the court cannot grant any disclosure order unless a document is specifically indicated. Moreover, if the party obliged to discover the document does not comply, the court can simply consider this issue when deciding on the merits. The same is true as far as German and French law are concerned. Accordingly, the easiest way to classify the Italian situation is that of a country where discovery in the Anglo-American tradition is virtually absent. Given the lack of efficient discovery rules, third-party action against hardcore violations like price fixing cartels is virtually impossible in Italy as in the rest of Europe.¹¹²

The information situation at the beginning of the “game” is also influenced by the pleading rules. Basically, two different systems of pleading exist. The first one is “fact pleading”; the second is “notice pleading”. As has been noted, “fact pleading requires a full statement of all material facts from the beginning of the pleading process; notice pleading requires only that the party against which the pleading is directed is given notice of the nature of the claim”.¹¹³ Needless to say, the former system assumes that

¹⁰⁷ Hazard, ‘From Whom No Secrets Are Kept’ (1998) 76 Tex LRev 1665, 1694.

¹⁰⁸ Taruffo, ‘Sui confini’ 2002, Il Mulino, 80.

¹⁰⁹ Marcus, ‘Discovery Containment Redux’ (1998) 39 BC LRev 747, 751.

¹¹⁰ Stempel, *supra* fn 104, (2001) 52 Ala LRev 529, 603 ff.

¹¹¹ Hovenkamp, *supra* fn 101, 1729.

¹¹² The role of discovery in private antitrust litigation is stressed by many articles in the European literature on private antitrust enforcement: see Riley, *supra* fn 34, 668; Mestmäcker, ‘The Commission’s Modernization of Competition Policy: A Challenge to the Community’s Constitutional Order’ (2000) 1 EBOR 401, 424; Wils, *supra* fn 2, 480. In the Italian literature on civil procedure law the analysis of discovery rules has been conducted by Dondi. See Dondi, *Effettività dei provvedimenti istruttori del giudice civile*, Cedam, 1985; Dondi, ‘Questioni di efficienza della fase preparatoria nel processo civile statunitense (e prospettive italiane di riforma)’ (2003) Riv Dir Proc Civ 161.

¹¹³ Priestley, ‘Transnational Civil Procedure, - Fact Pleading v. Notice Pleading: its Significance in the Development of Evidence’ (2001) 4 Rev Dr Unif 841, 842.

the plaintiff is in possession of all relevant information, while the latter expects that litigation is also a way of discovering and accessing information.¹¹⁴ The US Federal and English systems are based on notice pleading. Civil law is generally based on fact pleading mechanisms.

Common law and civil code systems are on opposing ends of the spectrum as far as pleading and discovery are concerned. This difference is based on diametrically opposite conceptions of what private civil litigation is about. In the tradition of civil code countries, civil litigation is a private matter. The idea that one should help opponents in their defences is considered distasteful or, simply, unenforceable. In common law jurisdictions civil litigation is considered under a more general perspective. The promotion of justice is seen as a value at stake.¹¹⁵ As a US court wrote in a much quoted passage referring to discovery's intrusiveness, "except for a few privileged matters, nothing is sacred in civil litigation."¹¹⁶ From a civil procedure law viewpoint, those jurisdictions traditionally associated with intense public administration and interference are certainly more eager to preserve private interests. In this context, any serious hope that third-party claims could take a significant role in the enforcement of antitrust is ungrounded.¹¹⁷

16 Treble damages, deterrence v compensation

At the very beginning of legal history in our Western tradition, a party committing a tort was exposed to revenge. The passage from revenge to compensation is rightly considered a great achievement of our culture. Accordingly, the common-law and civil law traditions are both deeply rooted in the concept that private law remedies are compensatory and not punitive. Modern law and economics scholars are redressing the way we look at private law and public enforcement. Under welfare economics, compensation is not as effective as deterrence. Private law is seen as another weapon to deter inefficient conduct *ex ante*. As always in law and economics, antitrust is the cradle

¹¹⁴ "Imposing on a plaintiff a requirement that the claim be articulated in detail means that only claimants who have access to such detail are in a position to state a claim": James – Hazard – Leubsdorf, *Civil Procedure*, Foundation Press, 2001, 181.

¹¹⁵ Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' (1998) 39 BCLRev 691.

¹¹⁶ *Coca-Cola Bottling vs Coca-Cola Co*, 107 F.R.D. 288, 290 (D. Del. 1985).

¹¹⁷ Needless to say, introduction of discovery would raise litigation costs and, in "loser pays" systems (*i.e.* systems adopting the "English Rule", under which a prevailing party recovers all or most of its attorney's fees from the loser), that would considerably increase the risk to a plaintiff in initiating a private attorney general lawsuit against large firms with deep pockets, whereas in the US the defendant is not reimbursed by the plaintiff for the cost of the defendant's lawyers (the so called "American Rule": for a discussion see Marcus – Redish – Sherman, *Civil Procedure. A Modern Approach*, West Group, 2002, 100-106; James – Hazard – Leubsdorf, *supra* fn 114, 48-53). Moreover, among the US antitrust enforcement armoury there are also "attorneys' fees to prevailing plaintiffs under section 4 of the Clayton Act, 15 U.S.C. 15 and the right to attorneys' fees under the common fund doctrine in cases where class actions settle" (Cavanagh, *Antitrust Remedies: Final Thoughts*, ABA, 2003). Accordingly, the US system also very aggressively promotes antitrust litigation through the allocation of litigation expenses. From an Italian perspective, however, the difference between the English Rule and the American Rule should not be overemphasized. Formally, Italian civil procedure law adopts the English Rule. However, in practice Italian courts quite often shift away from a rigid application of the rule and do not require the losing plaintiff to pay the defendant's litigation costs (or the full amount) when the plaintiff's action had some grounds and the defendant has "deep pockets".

of the modern concept of private remedies as punitive instead of purely compensatory. Treble damages are standardized punitive damages. Punishment is no longer associated with vengeance. It is a way to deter, *i.e.* to influence social behaviour.

Punitive private remedies are still alien to Italian civil law. In Italy private damages are seen exclusively as compensation. Our law does not conceive the idea of private damages performing a deterrence role concurrent to the role of administrative or criminal fines. Even a penalty clause inserted in a private contract can be subject to judicial scrutiny if it is set too high. Courts can reduce excessive penalties to a fair value (art. 1382), and it is disputed whether interest arrears are subject to the law against usury. The impact of the EC Directive 2000/35 on combating late payment in commercial transactions, whose interest rates are clearly punitive, is also a factor.¹¹⁸ In addition, the contractual rules by which the Italian Stock Exchange, today a private venture, is empowered to sanction through fines or other forms of punitive decisions have been the subject of intense debate, since it is clear that even a self-regulatory body cannot punish; it can only seek compensation and damages. The difference with the US legal environment where, faced with a choice between corrective justice and efficient enforcement, the Supreme Court held in *Illinois Brick* that the primary purpose of private actions in the US system is deterrence instead of compensation, is striking. This leads directly to the discussion concerning private under-enforcement of antitrust law in Italy. The simple fact is that Italian civil law is not able to work as its American counterpart because both the law of entitlement to damages and civil procedure are conceived to deal with individual relationships where the public interest is not at stake and, accordingly, not under consideration. The governing principle is that public interest is protected by public bodies, meaning criminal judges and administrative bodies such as Ministries or agencies. In short, the idea that private enforcement can be an instrument to deter inefficient conduct *ex ante* and thereby maximise social welfare is alien to Italy, and continental Europe in general.

Needless to say, you cannot compare a system that offers huge incentives to plaintiffs, thereby creating private general attorneys which can monitor the level of compliance with antitrust rules, with a system where private plaintiffs have limited scope for collecting information, little opportunity to create economies of scale in one single procedure, no prospect of inducing their lawyers to share the cost and benefits of enforcement by entering into contingency fees agreements, and finally no supplementary incentive to be rewarded for their efforts.¹¹⁹

¹¹⁸ Basedow, *supra* fn 3, 467.

¹¹⁹ Since the problem of private antitrust law enforcement is simply part of a more general problem concerning effective protection of collective interests through private litigation in Continental Europe, it is unclear whether changes in the law will come directly from antitrust or from other fields. It is suggested that they are more likely to derive from capital markets law. Indeed the social expectation is that consumers, investors and depositors have a right to be protected and the State has to offer remedies. In this situation there is at least one case where third-parties can turn their attention to the agency instead of the regulated party: insolvency of the latter. Financial distress of regulated industries involving investment firms, banks or insurance companies could be caused by mismanagement of the firm which could lead to liability claims against supervisory authorities for alleged negligence or improper conduct in the exercise of their supervisory duties. This is the obvious consequence of a situation where the private interest of diffused parties is granted by the

17 Conclusions

From the Italian perspective, the assertion that antitrust suits are not subject to litigation requires qualification. Claims concerning abuse of market power are brought both under Article 3 of the Antitrust Law, Article 82 EC Treaty or under unfair competition rules, used in alleged predatory pricing and refusal to deal cases as substitutes of antitrust rules. Claims where antitrust law is used as a shield to justify non-performance of a contractual obligation are widespread. Claims by direct or indirect purchasers against members of hard-core cartels are the real issue. Since the whole civil procedure system is unfriendly to the protection of collective interests through private litigation, should the Court of Cassation revert the Axa decision in the Unipol case, the prospects of seeing purchasers' acting effectively as private general attorneys would nevertheless remain exceedingly remote.

state in the name of the public interest and private enforcement is weak. Thus, for creditors of the bankrupted firm, an efficient plan of action could be to sue the supervisor. The issue of supervisor's liability (*i.e.* State liability) will probably shape European law in the decades to follow [see Tison, *Challenging the Prudential Supervisor: Liability versus (Regulatory) Immunity*, Financial Law Institute Working Paper 2003/2004 (www.ssrn.com)] and could strongly affect the perception about the need to improve private enforcement of collective interests. Thus, any incentive for the State to reshape the litigation framework is more likely to come from capital markets law than from antitrust.