

# Directive 2014/104/EU on Antitrust Damages Actions. Some Considerations from the Perspective of Italian Law

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### Abstract

European Parliament and Council Directive (EU) 2014/104 of 26 November 2014 introduces a common regulation for claims for damages caused by infringements of competition law. The implementation of the Directive in the Italian legal system may face some issues from a civil law perspective. One of these issues is the role of the judge in the evaluation of the claim for damages, especially in consideration of the restrictions deriving from the decisions issued by competition authorities. This new role of judges corresponds to a significant evolution in the field of tort liability. Another issue refers to the notion of damages adopted in the Directive and the identification of the interests protected. Within this framework, it is noteworthy that the European legislator has explicitly excluded any overcompensation of the harm caused by the infringement of competition law. However, regardless of this choice, the quantification of the harm remains an open issue. The Directive mainly considers a certain kind of prejudice: the overcharge paid by the victim of the infringement due to the existence of a cartel agreement. When the victims are located at different levels within the same distribution chain, the existence of the harm and its quantification may be problematic. This problem, known as 'passing on', is addressed by the Directive very differently from the solutions adopted in the US. Finally, the essay contains some considerations on the private enforcement of competition law and the role that civil liability may play in this regard.

### I. The Directive: Premises and General Framework

European Parliament and Council Directive (EU) 2014/104 of 26 November 2014 (hereinafter, 'the Directive') is a destination, although perhaps not a final one, of a path whose preparatory steps can be traced with a fair degree of precision.

The first step was the *Courage*<sup>1</sup> judgment handed down by the Court of Justice of the European Union (hereinafter, CJEU). With that judgment, the

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<sup>1</sup> Case C-459/99 *Courage Ltd v Bernard Crehan* (European Court of Justice 20 September 2001) available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

CJEU first recognized the principle according to which a party who complains of harm arising from an infringement of competition law is entitled to compensation for the harm thus suffered, even if the injured and the infringing parties are linked by a contractual relationship within the sphere of which the alleged harm arose.

The judgment is significant for at least two reasons: first, it overcomes the principle of *nemo auditur suam propriam turpitudinem allegans*,<sup>2</sup> since the claim for damages may be legitimate regardless of the pre-existence of a contractual relationship between the infringing and the injured parties – a relationship considered irrelevant.<sup>3</sup> In this regard, civil liability represents a tool of general scope, and is therefore suitable to meet a need for protection even in terms of correcting, from the outside, the rules created within the contractual environment. Second, resorting to a framework of tortious liability enhances the position of the judge, who is now called upon to perform a leading role in the application of the rules of fair competition.

The latter aspect mentioned above, then developed in legislation within the sphere of Council Regulation (EC) 1/2003 of 16 December 2002, concerns the application of the rules contemplated by Arts 81 and 82 of the Treaty (now Arts 101 and 102 TFEU). Within the framework of a redistribution of duties and functions among Community institutions and national States, European law has expressly stated that national courts ‘shall have the power to apply Articles 81 and 82 of the Treaty’ (Art 6). Furthermore, to guarantee the uniform application of Community competition laws, Art 16 of the Regulation places a restriction on national judges, who are not allowed to take decisions that conflict with decisions already issued by the European Commission in application of the antitrust provisions. However, there is no statement on restrictions deriving from decisions on competition adopted by national authorities.

The development of the legal provisions and case law outlined above has had significant reverberations in Italy, also due to its interconnection with a provision of the Italian Antitrust Authority on an issue towards which the public is highly sensitive: the well-known case of the cartel between civil liability insurance companies for motor vehicles. The case triggered considerable litigation on claims for damages, which often ended up before the Supreme Court.

In this regard, in 2005, the Court of Cassation sitting *en banc* gave a

<sup>2</sup> The value of this point is illustrated by P. Iannuccelli, ‘Il rinvio pregiudiziale e il *private enforcement* del diritto antitrust dell’UE’ *Diritto dell’Unione Europea*, 715 (2012).

<sup>3</sup> See, in particular, para 24, worded as follows: ‘any individual can rely on a breach of Art 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision’.

first important systematic statement,<sup>4/5</sup> which overcame the existing restrictive attitude and recognized the existence of a legally qualified interest in the competitive balance of the market, and entitled all parties, whether consumers or rival undertakings, to that interest.<sup>6</sup> Once this position was adopted, it was a short leap to recognize a general entitlement to file action for compensation, if the interest in question was harmed as a consequence of behaviour contrary to competition law.

Precisely within the sphere of the Italian litigation arising downstream of the provisions on third-party vehicle insurance, the CJEU was again called upon to decide certain questions of interpretation, and thus had the chance to specify the statements it had made in *Courage*.<sup>7</sup> Indeed, in *Manfredi*,<sup>8</sup> the Court emphasized on several occasions that the full application of the relevant provisions of competition law could not disregard the contribution given by national courts, which must consider themselves vested with full jurisdiction to decide claims for damages based on alleged breaches of Arts 81 and 82 of the Treaty (now Arts 101 and 102 TFEU). Similarly, therefore, the Court emphasized the need to extend, to the greatest possible degree, the right to file actions for compensation deriving from antitrust infringement, precisely because these ‘bottom-up’ initiatives (ie filed by market actors who directly suffered from the consequences of the unlawful deed) could contribute towards improving the application of competition law in Europe.<sup>9</sup>

<sup>4</sup> Corte di Cassazione 4 February 2005 no 2207, *Giurisprudenza italiana*, 1675 (2005). The systematic opening was then confirmed by Corte di Cassazione 2 February 2007 no 2305, *Foro italiano*, 1097 (2007).

<sup>5</sup> *Ex multis*, see L. Castelli, *Disciplina antitrust e illecito civile* (Milano: Giuffrè, 2012), 130.

<sup>6</sup> On the differentiation between consumers and rival entrepreneurs in antitrust cases, however, see P. Iannuccelli, ‘Il *private enforcement* del diritto della concorrenza in Italia, ovvero può il diritto antitrust servirsi del codice civile?’ *Rivista delle società*, 731 (2006), who recalls that the relevant notion is that of the ‘user’, which includes all those who avail themselves, either directly or indirectly, of the products that constitute the subject matter of the illicit agreement or of the sanctioned behaviour.

<sup>7</sup> P. Iannuccelli, ‘Torniamo al Trattato! Per il superamento della distinzione tra *public e private enforcement* nel diritto della concorrenza’ *Concorrenza e mercato*, 83 (2014), examines the relationship (which is not necessarily linear) between the two decisions.

<sup>8</sup> Joined Cases C-295/04 to C-298/04: *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04); *Antonio Cannito v Fondiaria Sai SpA* (C-296/04); *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA* (European Court of Justice 13 July 2006) available at <http://curia.europa.eu/>.

<sup>9</sup> See paras 90-91: ‘(90) As was pointed out in paragraph 60 of this judgment, the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. (91) Indeed, the existence of such a right strengthens the working of

With *Manfredi*, therefore, the CJEU focuses on the potential of the so-called private enforcement as a ‘second pillar’ in the application of competition law, placing it alongside the traditional tool of the activity performed by the European Commission and the national authorities (the so-called public enforcement). At the same time, however, the CJEU displays awareness of the fact that, at European level, there is no uniform regulation of liability in respect of compensation;<sup>10</sup> indeed, in the decision recalled here, the CJEU’s attention is caught by the problems inherent in overcompensation and, in any case, by the possibility of drawing on the profit that the transgressor has obtained by means of the illegal action.<sup>11</sup>

In the view of the CJEU, the absence of uniform discipline is an important issue; indeed, if Member States proceed in a scattered manner with respect to compensation for damages deriving from infringements of competition law, the practical consequence will be that the incisive effect of actions brought for compensation will vary from country to country and, with this, the observance of competition law on the part of market operators.<sup>12</sup> In other words, with *Manfredi*, the CJEU clearly invites European lawmakers to adopt a common discipline for actions brought for compensation for damages due to infringements of competition law, to foster its uniform application at European level.<sup>13</sup>

Directive 104/2014/EU thus constitutes the answer given by the European legislator on the subject, after a fairly lengthy period of prior preparation.<sup>14</sup> It can already be stated that, from its very beginning, the Directive has adopted a minimalist approach<sup>15</sup> to the accumulation of problems arising in respect of compensation for damages caused by breaches of competition law; Art 1 para 1 is emblematic in this respect, stating that:

the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the National courts can make a significant contribution to the maintenance of effective competition in the Community (Courage and Crehan, cited above, paragraph 27)’.  
<sup>10</sup> See para 72.

<sup>11</sup> See paras 92-94.

<sup>12</sup> See also G. Villa, ‘La Direttiva europea sul risarcimento del danno antitrust: riflessioni in vista dell’attuazione’ *Corriere giuridico*, 301 (2015).

<sup>13</sup> To the same effect, see also G. Taddei Elmi, ‘Il risarcimento dei danni antitrust tra compensazione e deterrenza. Il modello americano e la proposta di direttiva UE del 2013’ *Concorrenza e mercato*, 211 (2014).

<sup>14</sup> This paper does not discuss the intermediate steps consisting in the Green Paper entitled ‘Damages actions for breach of the EC antitrust rules’ {SEC(2005) 1732} and the White Paper on Damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}. On this subject, see E. Camilleri, ‘Il trasferimento del sovrapprezzo anticoncorrenziale nella Direttiva 2014/104/UE’ *Annali Italiani del Diritto d’Autore della cultura e dello spettacolo*, 34 (2015).

<sup>15</sup> Or a ‘short step’, *ibid* 35 (author’s translation).

*‘(t)his Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law (...) can effectively exercise the right to claim full compensation for that harm (...)’* (author’s emphasis).

The text begins by stating the purposes pursued by the European lawmakers, which certainly appear demanding and ambitious: indeed, the aim is to overcome the current fragmentation of the legislative framework to reach a standardized regulation of compensation for damages deriving from antitrust breach. This will make it possible to develop an effective system of private enforcement of competition law.<sup>16</sup> This system can then interact regularly with the consolidated system of public enforcement, thereby improving the overall functioning of the relevant European and national law.

This paper will focus on certain problems of major interest strictly from the point of view of civil law. It is worth stating here that this analysis does not cover all the questions raised by the Directive, which also concern other legal spheres – in particular, procedural law and administrative law. In addition, with regard to the civil law issues, this paper does not follow the sequence of the provisions set out in the Directive.

## **II. Is an Infringement of Competition Law (Still) a Tort?**

For the purposes of this analysis, the starting point concerns the choices made in the Directive on the relationship between national judges and the authorities appointed to apply competition law provisions. As mentioned above, Regulation 1/2003 established a first restriction when it provided that national judges, when deciding cases relating to Arts 81 and 82 of the Treaty (Arts 101 and 102 TFEU), must adhere to the decisions already taken by the European Commission and must avoid conflict with its activities (Art 16).<sup>17</sup>

The Directive seeks to introduce a similar restriction into relations between national competition authorities and national judges,<sup>18</sup> but places it

<sup>16</sup> See L. Castelli, n 5 above, 92, who focuses on the scarce development, in Europe, of a system of private enforcement relating to infringements of competition law.

<sup>17</sup> The problematic nature of this provision is clearly reported by R. Rordorf, ‘Il ruolo del giudice e quello dell’Autorità Nazionale della Concorrenza e del Mercato nel risarcimento del danno antitrust’ *Le Società*, 785 (2014).

<sup>18</sup> The innovative nature of the provision is evident upon a mere consideration that prior to its introduction, the letter of the law precluded that a national judge could be restricted to the inquiries carried out by a competition authority (other than the European Commission); see L. Castelli, n 5 above, 110.

within a scheme that can be summarized as follows (Art 9): once the national authority has ascertained the existence of an infringement of competition law, the court seised of a relating claim for compensation cannot cast doubt on the facts as resulting from the decision of the administrative authority. The restriction is therefore effective if the court seised and the competition authority belong to the same Member State; if the judge and the authority belong to two different states, the competition authority's decision is simply *prima facie* evidence, which may be particularly reliable but not binding for the purposes of deciding upon the claim for damages.<sup>19</sup>

The provision did not fail to give rise to some perplexity among scholars of European law,<sup>20</sup> especially if one considers that, compared to solutions that already exist in some national legal systems, it constitutes a step backwards in the pursuit of European integration.<sup>21</sup> From the point of view of civil law, however, the provision deserves attention for other reasons: in particular, pursuant to the assumption that an infringement of competition law is always a non-contractual offence, the provision prompts questions on the role that judges are required to perform in cases of applications for protection submitted by a party who complains of harm to his interest in the competitive balance of the market.

In general terms (ie disregarding the specific aspects of competition law), judges have performed a crucial role in the application and evolution of tortious liability. This observation is particularly relevant to the Italian situation, in view of its intermediate position between the systems featuring the typical aspects of tort (the German model) and those that stand out for their atypical traits (the French model); the mediation between the two extremes is ensured by the provision on undue harm (*'danno ingiusto'*).

Summarizing a highly articulated conceptual path in extremely brief

<sup>19</sup> R. Nazzini, 'The Effect of Decisions by Competition Authorities in the European Union' *Italian Antitrust Review*, 91 (2015).

<sup>20</sup> B. Caravita di Toritto, 'Overview On The Directive 2014/104/EU' *Italian Antitrust Review*, 49 (2015).

<sup>21</sup> Pursuant to German competition law (s.33(4) Gesetz gegen Wettbewerbsbeschränkungen (GWB)), national courts must respect the decisions adopted by national competition authorities, whether these are German or of other Member States. On this subject, see M. Siragusa, 'L'effetto delle decisioni delle Autorità nazionali della concorrenza nei giudizi per il risarcimento del danno: la proposta della Commissione e il suo impatto nell'ordinamento italiano' *Concorrenza e mercato*, 299 (2014); and A. Rocchietti March, 'Il risarcimento del danno da illecito antitrust', in A. Catricalà and E. Gabrielli eds, *I contratti nella concorrenza, Trattato di diritto dei contratti* directed by P. Rescigno and E. Gabrielli (Milano: Utet, 2011), 491.

terms,<sup>22</sup> judges must identify the legally relevant interest that deserves protection, ascertain the harm, and allocate to another party the remedial consequences deriving from the harm caused. It is superfluous to note that this is fundamental to the proper functioning of the society, and it is precisely in this regard that it is possible to appreciate the value of the provision enshrined in the Italian Constitution according to which ‘judges are subject only to the law’.<sup>23</sup> For the purposes of this discussion, the constitutional provision means that, when deciding upon tort cases, judges encounter no restrictions other than those imposed by the provisions and principles of the legal system.

With regard to the Directive’s provision, interpreters are induced to check whether the approach summarized above can also be confirmed with regard to infringements of competition law.

In this regard, it is worth recalling that competition law consists – if the situation is considered in detail – of provisions whose scope is very general, and the application of which to a given market situation requires specialist notions as well as an attentive knowledge of the individual cases at hand.<sup>24</sup> It is also worth noting that the core of competition law (ie the provisions on agreements and on abuse of a dominant position) were included in the original European treaties adopting the suggestions and the wording of experts in United States competition law.<sup>25</sup> These provisions therefore reflect an approach specific to common law systems, which means that their implementation in non-common law systems may encounter certain difficulties.<sup>26</sup>

In any case, it is evident that, in this development from the abstract to the concrete level, those who actually implement the law enjoy a wide margin of discretion. To give a basic example, suffice it to consider that there is also no shortage of debate on how to identify the relevant market,

<sup>22</sup> Of an extremely prolific literature, it is worth reading the contributions of M. Barcellona, ‘L’ “ingiustizia” del danno e il doppio regime della responsabilità’, in U. Carnevali ed, *Dei fatti illeciti, Commentario del Codice Civile* directed by E. Gabrielli (Milano: Utet, 2011), in particular 75-76, and of C. Scognamiglio, ‘L’ingiustizia del danno (art. 2043)’, in C. Scognamiglio ed, *Illecito e responsabilità civile, I, Trattato di diritto privato* directed by M. Bessone, (Torino: Giappichelli, 2005), X, 65-68.

<sup>23</sup> Art 101 para 2 of the Constitution of the Italian Republic.

<sup>24</sup> Already clearly illustrated by L. Raiser, ‘Antinomie nel diritto sulle limitazioni della concorrenza’, in Id, *Il compito del diritto privato* (translated by M. Graziadei) (Milano: Giuffrè, 1990), 243, who warns of jurists’ need for economy.

<sup>25</sup> On this subject, see G. Amato, *Il potere e l’antitrust* (Bologna: Il Mulino, 1998), 8; C. Osti, ‘Antitrust: a Heimlich manoeuvre’ 11 *European Competition Journal*, 221, 237 (2015).

<sup>26</sup> That this was a traumatic event in respect of the approach traditionally adopted by (at least continental) European legal systems is emphasized by L. Raiser, ‘La costituzione economica come problema giuridico’, in Id, *Il compito del diritto privato* n 24 above, 39.

in terms of geography or product, and on the consequences of this regarding the existence or not of a cartel agreement or a dominant position. Considering the Italian national situation alone, a case brought before an administrative court against a decision of the Italian Antitrust Authority may certainly yield a different result from the decision of said authority.

Returning to the question of the role of judges in infringements of competition law, the traditional approach appears to be confirmed as regards the ‘stand-alone’ lawsuits for compensation, ie claims brought in the absence of a provision issued by the competition authority. Certainly, in such applications for protection, judges fully maintain their prerogatives, in the terms briefly illustrated above.

However, at least from a statistical viewpoint, it can be easily seen that the stand-alone cases constitute a very small minority, compared to the alternative model represented by the ‘follow-on’ lawsuits. These, on the other hand, are filed pursuant to a decision issued by the national competition authority (and possibly after the subsequent proceedings before the administrative court).

In these cases, the court seized of the compensation claim is effectively ‘expropriated’ of its power to inquire into the existence of the breach, since it is obliged to respect the inquiry carried out by the administrative authority appointed to apply competition law. The restriction is stringent if the European Commission is involved and when the competition authority and the court are of the same country; it is less so, but nevertheless incisive, if the inquiry was carried out by the competition authority of a different Member State, because in this case the evidence is *prima facie* proof (ie evidence which appears to be obvious and thus which at a first glance cannot be doubted).<sup>27</sup>

According to certain legal scholars, the inquiry carried out by the competition authority into the existence of the infringement does not affect the court’s power regarding the *proprium* of the claim for compensation, since the existence of the damages (understood as the harm of which the

<sup>27</sup> This issue is dealt with for the first time in the two judgments of the Corte di Cassazione 13 February 2009 no 3638, *Giustizia civile Massimario*, 235 (2009) and no 3640, *Foro italiano*, I, 1901 (2010) (Hon Marina Tavassi as reporting judge for both); critical comments on the subject can be found in the reasoning of the Corte di Cassazione 28 May 2014 no 11904, *Responsabilità civile e previdenza*, 1219 (2015). On this, see M. Tavassi, ‘Le azioni di danno antitrust nella giurisprudenza italiana’, in G.A. Benacchio and M. Carpagnano eds, *Il private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali* (Padova: Cedam, 2009), 151; critical considerations in A. Frignani, ‘La Cassazione prosegue l’erosione del diritto di difesa nelle cause risarcitorie antitrust *follow-on*’, in G.A. Benacchio and M. Carpagnano eds, *L’applicazione delle regole di concorrenza in Italia e nell’Unione Europea* (Napoli: Edizioni Scientifiche Italiane, 2014), 79.



plaintiff complains) must be ascertained regardless, as well as the entity of the harm and its causal link with the wrongdoing.

This hypothesis is open to possible criticism if one examines the Italian scenario and, in particular, the disputes triggered by the decision relating to motor vehicle insurance for third-party liability. Indeed, an examination of the judgments handed down by the Court of Cassation shows – at least in the opinion of this author – a progressive evolution towards reducing the judge's power of assessment and decision-making: there appears to have been a shift from an affirmation of the principle according to which the harm must be proven by the plaintiff,<sup>28</sup> towards an acceptance of the hypothesis according to which the existence of the harm and the related compensatory amount can be presumed to be proven<sup>29</sup> on the basis of

<sup>28</sup> This appears to be the attitude displayed by the Corte di Cassazione 2 February 2007 no 2305, n 4 above, according to which: 'The judge cannot omit to assess all the elements of proof offered by the insurer to contrast the presumptions, or to demonstrate that the causal sequence followed was broken by one or more different facts which alone were enough to cause the damage, or to ascertain that those facts, together with the illegal agreement, have taken on the nature of equivalent (and, therefore, concurrent) causes in the production of the damage. (...) The insurer had indeed attached a series of documented circumstances (see supra in the part illustrating the reasons for the claim) tending precisely towards confirming the aforementioned proof. Which circumstances the impugned judgment completely ignored, exclusively and uncritically resting on the mere content of the administrative provision, almost as if to endorse the aberrant thesis according to which the damage is *res ipsa*.

A hypothesis that is all the more unsustainable if one takes into account the fact that the antitrust provision in question (and the judgments of the administrative courts that have confirmed it) merely ascertains the illegality of an exchange of information, and that the alteration of the competitive situation and the consequent increase in the prices to the end consumer is merely a possibility' (author's translation).

It is no coincidence that the Court, with this decision, sustained the claim brought by the insurance company.

<sup>29</sup> Thus, for example, see also Corte di Cassazione 10 May 2011 no 10211, *Foro italiano*, I, 2675 (2011): 'If it is true that the antitrust authority has imposed punishment only pursuant to Art 2, para 2, of legge no 287 of 1990, recognizing an agreement that could falsify the competitive balance, instead of a cartel agreement on the levels of the premiums, there is no doubt that the abnormal increase in the premiums for motor vehicle third-party liability policies, during the period of the agreement, has created, on one hand, a premise for judging the behaviour illegal and, on the other, the doubtless ascertainment of its effect, to the detriment of the users of the insurance services', to then conclude that: 'The insured party who brings a claim for compensation for damages pursuant to Art 33 of legge no 287 of 1990, has the right to avail itself of the presumption that the premium has been unduly increased by effect of the conspiratorial behaviour and that the amount of the increase (therefore the entity of the harm sustained) is no less than the average level of 20 per cent: and pursuant to the investigation carried out by the antitrust authority (...)'.

In the wake of the latter, see, *ex multis*, Corte di Cassazione 20 June 2011 no 13486, *Giustizia civile*, I, 1793 (2012); Corte di Cassazione 18 August 2011 no 17362, *Giustizia civile Massimario*, 1175 (2011); Corte di Cassazione 20 December 2011 no 27554, available

nothing more than the decision of the national competition authority.<sup>30</sup> In the latter case, therefore, the lawsuit for damages is reduced to the defendant (a company belonging to a cartel) having to convince the court that the presumption has been borne out, demonstrating the inexistence of any compensation-worthy harm sustained by the plaintiff.<sup>31</sup>

If this was the position in case law prior to the Directive's enactment, it is difficult to believe that a step backwards may be taken after the content of Art 9 is transposed into a provision of Italian law.<sup>32</sup>

In a provoking or disillusioned tone, scholars have stated that, in the law on infringements of competition law, judges are destined to become the fair liquidator of harms ascertained in another venue.<sup>33</sup> The statement certainly has some truth, insofar as it notes that the judge's role has practically lost all purpose, save for that of ordering the payment of compensation for harms deriving from the infringement of competition

at [www.ilforoitaliano.it](http://www.ilforoitaliano.it) (last visited 24 May 2016); Corte di Cassazione 9 May 2012 no 7039, *Giustizia civile Massimario*, 577 (2012); Corte di Cassazione 9 May 2012 no 7045, available at [www.ilforoitaliano.it](http://www.ilforoitaliano.it) (last visited 24 May 2016); Corte di Cassazione 22 May 2013 no 12551, *Giustizia civile Massimario* (2013); Corte di Cassazione 28 May 2014 no 11904, n 27 above; Corte di Cassazione 12 June 2014 no 13360, available at [www.ilforoitaliano.it](http://www.ilforoitaliano.it) (last visited 24 May 2016); Corte di Cassazione 6 May 2015 no 9131, available at [www.ilforoitaliano.it](http://www.ilforoitaliano.it) (last visited 24 May 2016).

Aside from third-party vehicle insurance disputes, several different positions may be identified. For example, according to the Corte di Cassazione 10 September 2013 no 20695, *Giustizia civile Massimario* (2013): 'The damage caused by abuse of a dominant position is not *res ipsa*, but damage-consequence, different from and in addition to the distortion of the rules of competition. As such, it must be proven independently in accordance with the general principles of tort liability.'

<sup>30</sup> To this effect, see also M. Siragusa, n 21 above, 310. Recalling precisely the Corte di Cassazione 10 May 2011 no 10211 n 29 above, it is possible to register a change of direction with regard to the probative value of the antitrust authority's provision, which no longer concerns the illegal fact alone, but also the assessments of the damages worthy of compensation. This topic is also discussed in L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno', in U. Carnevali ed, n 22 above, 350-352. In particular, the author emphasizes that the case of damage *in re ipsa* risks causing confusion between public enforcement (the protection of competition by public institutions) and private enforcement (enforcement by one party against another); however, the two levels must remain distinct, as shown by the existence of several authorities appointed to provide for the respective types of surveillance. Recently, see also V. Vozza, 'RC Auto e intese anticoncorrenziali: la presunzione legale del provvedimento sanzionatorio' *Danno e responsabilità*, 162 (2015).

<sup>31</sup> On this subject, R. Nazzini, n 19 above, 93-94.

<sup>32</sup> L. Panzani, 'Binding Effect of Decisions Adopted by National Competition Authorities' *Italian Antitrust Review*, 101-102 (2015), states that there should be some reflection on the compatibility with the right of defence, in light of Art 117 of the Constitution, as well as with the case law of the European Court of Human Rights. To the same effect, see also K. Wright, 'The Ambit of Judicial Competence After the EU Antitrust Damages Directive' *43 Legal Issues of Economic Integration*, 4 (2016).

<sup>33</sup> To this effect, see A. Frignani, n 27 above, 86; similarly, K. Wright, n 32 above, 11 and the references contained therein.

law. Upon closer consideration, the legislative framework outlined by the European Commission (first by means of Regulation 1/2003 and then as reinforced by the Directive) clearly reveals the possibility of the court disagreeing with the conclusions reached by the competition authorities.

The result is an overall situation in which the judge's duty, except for rare cases in which – if the expression may be allowed – he or she 'dares' to decide a stand-alone case, is reduced to a task supporting and downstream of the competition authority. From this point of view, the integration of private and public enforcement does not appear to occur in an equal or balanced manner, but rather that private enforcement has a merely ancillary role:<sup>34</sup> in proceedings for damages, to complete the sanctions imposed on those responsible for the infringement.

Turning our attention to Italian law and the possible consequences of the Directive's implementation, reflecting upon the relationship between the national courts and the competition authority raises certain questions of significant systematic import. These questions regard not only the relationship between the courts and the public administration, or the relevance and the (non-)restrictive nature that administrative decisions and/or judgments of the administrative court may assume within the sphere of a civil lawsuit.

Indeed, the issue runs deeper and concerns the very notion of tortious liability arising when competition law is broken. The Directive reveals the inference that the relationship between the court and the law is no longer direct, but is mediated by the competition authority, which – in the intentions of the European legislator – is in fact the entity that was institutionally appointed to transform the abstract letter of the law into concrete action;<sup>35</sup> this competence is admittedly not exclusive, as the path of stand-alone actions remains open (at least formally), but it can hardly be denied that this competence is pre-eminent in nature.

Placing this concept within the normal schemes of tortious liability, it must be maintained that an infringement of competition law corresponds to harming a legally qualified interest in the fair competition of the market, although to the extent and in the manner ascertained by the specifically appointed authority. In simpler terms, the legal rule requires (almost necessarily) completion by the administrative authority, on whose decision the civil court can no longer cast doubt, not even to appreciate the

<sup>34</sup> In the same vein, see also M. Libertini, 'Il ruolo necessariamente complementare di "private" e "public enforcement" in materia di antitrust', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: Il Mulino, 2009), 174.

<sup>35</sup> On this subject, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* (Napoli: Jovene, 2008), 48.

legally relevant interest.

At this point, one is entitled to wonder whether an infringement of competition law can still be considered the expression of a tort (ie a non-contractual wrong), if this expression refers to a mutual interference of two independent legal spheres, a source of prejudice whose measurement and assessment the courts are called upon to decide, on the basis of the general clause of Art 2043 of the Civil Code. The theoretical alternative is to consider an infringement of competition law as an administrative wrong to be decided upon by an administrative court. In this scenario, once the existence of the infringement has been declared, the civil court's duty is actually reduced to a mere ascertainment of the harm of which the individual complains, without prejudice to the importance of the abovementioned presumptive reasoning.<sup>36</sup>

Thus, there appears to be a 'de-jurisdictionalization' of the infringement of competition law.<sup>37</sup> This conclusion may be reached on the basis of certain precise indications emerging from the evolution of the issue before national courts of civil law. On one hand, it is necessary to recall the principle (accepted by the highest courts) according to which the decisions issued by the competition authority can certainly be questioned in a civil court, but only weakly, as the court cannot replace its own assessment for that given by the authority, when the motivation of the latter cannot be considered unreasonable, illogic or inconsistent.<sup>38</sup>

On the other hand, considering litigation for compensation in the civil courts, it is possible to notice the total obliteration of the tort's subjective profile: once the infringement has been ascertained by the appointed authority (and therefore in the course of administrative proceedings), the problem of verifying the existence of the element of responsibility (ie negligence or a malicious intent) before the civil court no longer arises, nor does the possibility of recognizing an alternative criterion for connection, based on the schemes of strict liability or *sub specie* corporate liability. For that matter, the letter of the law itself is uncertain regarding the qualification of infringements of competition law in respect of the aforementioned debate on the nature of the liability.<sup>39</sup>

<sup>36</sup> See G. Villa, n 12 above, 306.

<sup>37</sup> In similar terms, see E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 39, who uses the expression 'the administrativation of civil law protection'.

<sup>38</sup> Last, see Corte di Cassazione-Sezioni Unite 20 January 2014 no 1013, *Giustizia civile Massimario* (2014); on this subject, see M. Siragusa, n 21 above, 314. Critical considerations are given in A. Frignani, n 27 above, 81.

<sup>39</sup> In the first meaning (tortious liability, or subjective responsibility), for example, see L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 170, who also emphasizes the deterring function; A. Genovese, *Il risarcimento del danno da illecito concorrenziale* (Napoli: Edizioni Scientifiche Italiane, 2005), 109; also, A. Rocchietti March, n 21 above,

This leads to the question of the actual nature of the infringement of competition law and its position within the legal system. For the moment, the question remains open. It can only be observed that the answer probably consists in maintaining its position within the sphere of tort law, in consideration of the indications that the system offers today; in an attempt to project our observation into the future, however, the answer may well differ, if one considers the special attention that the European lawmaker reserves to the binding nature of the decisions adopted by competition authorities.<sup>40</sup>

### III. The Notion of Damages Adopted by the Directive

The analysis of the Directive in terms of civil law must now shift its focus to the notion of damages proposed therein (Art 3 para 2). The provision's wording strictly adheres to the well-known differential thesis, since the harm is identified as the difference between (i) the situation complained of by the party which brings the action for compensation and (ii) the situation in which said party would be if there had been no infringement of competition law. The ancillary documents prepared by the European Commission<sup>41</sup> mention the 'counter-factual' method, which – as may be known – is one of the techniques developed for determining the harm resulting from an infringement of competition law.<sup>42</sup>

The essential factor is the exclusive attention given by the European legislator to the assets of the victim of the infringement. From this point of view, the harm corresponds to the harm suffered by said victim, and – conforming to the traditional categories of civil law – is qualified as actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), as well as

513. In the second meaning, instead, see G. Alpa, 'Illecito e danno antitrust. Un dialogo tra le Corti nazionali e la Corte di Giustizia dell'Unione europea' *Contratto e impresa*, 1237 (2015), who states that in a breach of competition law, the responsibility is objective, consisting of breaching provisions which prescribe certain specific behaviour; this therefore leads to an inversion of the burden of proof.

<sup>40</sup> The risk of a short circuit occurring is evident, if one considers that the European Commission is recognized the right to bring legal actions for damages deriving from agreements investigated and ascertained by itself. This is what happened with the Case C-199/11 *Europese Gemeenschap v Otis NV et al* (European Court of Justice Grand Chambre 6 November 2012) available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>41</sup> See, in particular, the Communication from the Commission on quantifying harm in actions for damages based on breaches of Arts 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), para 9.

<sup>42</sup> For an introduction at scholarly level, see L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 201, and the references therein; E. Brodi, 'Illecito antitrust e risarcimento del danno in alcuni recenti casi di abuso di posizione dominante' *Rivista delle società*, 1452 (2008).

interests. Thus, a recent legal scholar is perfectly correct when stating that the Directive unhesitatingly adopts the prospect of compensating for the harm deriving from an antitrust infringement.<sup>43</sup>

Fully consistently with the above, immediately after discussing the notion of damages, the text takes pains to clarify that all forms of overcompensation of the harm suffered, as punitive or multiple damages, are to be excluded. The European legislator thus makes a specific ideological choice, which is significant in two different aspects. First, there is a clean break with the approach adopted in the United States, where – as may be known – punitive and/or overcompensatory damages is common for antitrust infringements.<sup>44</sup>

Second, the Directive thus demonstrates its intention to eliminate the broader debate on the purposes of the compensation awarded for infringements of competition law; in particular, it denies that such compensation can seek not only to restore the losses of which the victim complains, but also to reduce the profit obtained by the infringing parties.<sup>45</sup>

The choice adopted is singular, if one considers that, on a traditionally similar subject such as the protection of industrial and intellectual property rights, the same lawmaker did clearly envisage the possibility of the compensation awarded resulting in a curtailment of the profit that the offender obtained due to the infringement.<sup>46</sup> Italian scholarship had also argued in favour of the possibility of ‘disgorgement’.<sup>47</sup> The legislator drafting the Directive, however, appears to be convinced that the entire problem of compensation can be managed exclusively from the

<sup>43</sup> Thus writes E. Camilleri, ‘Il trasferimento del sovrapprezzo anticoncorrenziale’ n 14 above, 54. Critical considerations on this legislative choice are made in F.P. Maier-Rigaud, ‘Toward A European Directive on Damages Actions’ 10(2) *Journal of Competition Law & Economics*, 354 (2014).

<sup>44</sup> This is widely observed in United States scholarship. See, for example, E.D. Cavanagh, ‘Detrebling Antitrust Damages in Monopolization Cases’ 76 *Antitrust Law Journal*, 97, 120 (2009); A. Mitchell Polinsky, ‘Detrebling versus Decoupling Antitrust Damages: Lessons From The Theory of Enforcement’ 74 *Georgetown Law Journal*, 1231, 1232 (1986). See P. Iannuccelli, ‘Torniamo al Trattato!’ n 7 above, 103.

<sup>45</sup> The prospect has been discussed repeatedly in the specialized literature. See, for example, E. Elhauge, ‘Disgorgement As An Antitrust Remedy’ 76 *Antitrust Law Journal*, 79 (2009), who expresses a favourable opinion on the use of the remedy. In Italian legal literature, similar thoughts are expressed in M. Scuffi, ‘I poteri inibitori e risarcitori del giudice nazionale antitrust’, in G.A. Benacchio and M. Carpagnano eds, *I rimedi civilistici agli illeciti concorrenziali - Private Enforcement of Competition Law* (Padova: Cedam, 2012), 50; and M. Tavassi, n 27 above, 129. A different opinion, however, is expressed by A. Genovese, n 39 above, 133, who denies the possibility of subtracting the profit deriving from the breach of competition law from the party who obtained it in the process of managing a business.

<sup>46</sup> See European Parliament and Council Directive (EC) 2004/48 of 29 April 2004, and Art 13 and para 26 of the recitals of the same.

<sup>47</sup> See citations n 45 above.

point of view of the damaged party. To this end, the two traditional tools of actual loss and loss of profit are used,<sup>48</sup> in the apparent belief that they are sufficient to cover all the potentially negative consequences that may derive from antitrust infringements.

In this author's opinion, this much confirms the minimalist approach pervading the entire Directive. The impression is further reinforced by the fact that the provision mentioned contains no substantive indications on the quantification of the compensation. Indeed, Art 17 ends up being merely a provision that refers back to national legal systems; the only significant passage is a methodological indication that expresses some hope in the reinforcement of forms of collaboration between the courts and the competition authorities,<sup>49</sup> upon the clear assumption that the latter are better able to provide useful elements on the quantification of the harm. Again, therefore, the effective venue of the decision-making appears to be outside the courts of civil law, as confirmed – in Italy – by the most recent opinions of the Court of Cassation.<sup>50</sup>

<sup>48</sup> Critical considerations are given in A. Genovese, 'Funzione e quantificazione del risarcimento. Considerazioni relative al danno da illecito antitrust', in M. Maugeri and A. Zoppini eds, n 34 above, 226-227. The author recalls that this technique for quantifying compensation is based on contractual damages. Its transfer to the sphere of antitrust damages is highly problematic, because it requires the identification of a loss that accrues in a structurally and functionally different context. Indeed, there is not only a problem of real wealth being destroyed, but also the need to identify the injured party's economic potentials that are prejudiced by the wrong.

<sup>49</sup> Indications to this effect were already given in M. Tavassi, n 27 above, 138. More recently, see B. Caravita di Toritto, n 20 above, 51, with reference to Art 213 of the Code of Civil Procedure.

<sup>50</sup> See the recent Corte di Cassazione 4 June 2015 no 11564, *Foro amministrativo*, 2200 (2015) in which it is stated that: 'The judge is required to make effective the protection of private subjects who bring actions before the civil court against alleged breaches of competition law (in the cases contemplated by legge no 287 of 1990, Arts 2 onwards), taking into account the informative asymmetries existing between the parties as regards access to evidence, also by means of an interpretation of the procedural rules as being functional to the pursuit of the correct implementation of competition law. It is an objective that can be pursued by means of the suitable use of the tools of investigation and discovery that the rules of procedural already contemplate, by an extensive interpretation of the conditions established by the procedural code on the exhibition of documents, the request for information (see also Art 15 of Regulation 1/2003) and, above all, by the technical expertise requested by the Court, for the exercise – also upon the court's initiative – of the powers of inquiry, acquisition and evaluation of data and information useful for reconstructing the reported case of anti-competitive practices, in respect of the principles of debate and without prejudice to the burden of proof bearing on the plaintiff (see Art 2 of Regulation 1/2003) to indicate in a sufficiently plausible manner serious evidence demonstrating that the case reported may alter freedom of competition and harm the plaintiff's right to enjoy the benefit of commercial competition'.

From a systematic and civil law point of view, the Directive's approach as summed up above, is worthy of analysis, especially due to the elements that were not included in the legal provisions introduced. In particular, two aspects are significant: the quantification of the harm that can be compensated and the identification of the applicable compensation techniques.

In scholarship, it has been authoritatively observed that the quantification of harm is a crucial problem,<sup>51</sup> insofar as regulation of this aspect expresses the purposes pursued by the law through the obligation to compensate. Indeed, in cases of antitrust infringements, the determination of the *quantum* of compensation implies a reflection on the interest underlying the obligation to compensate. Indeed, the latter ends up being a movement of wealth, which must be adequately justified according to principles of law; this is all the more true in the case of the Directive, which envisages compensation by means of payment of an equivalent value in cash.<sup>52</sup>

Briefly, therefore, judges must face the following question: what is really compensated, when the competition law infringer is obliged to pay the damage? The question must bear in mind that, generally, the infringement affects interests whose legal relevance may appear unclear at times,<sup>53</sup> or at least not always corresponding to the usual schemes familiar to the traditional jurist.

The Italian Supreme Court has answered this question, identifying the interest as consisting in the competitive balance of the market.<sup>54</sup> The answer is formally not subject to criticism, but probably incomplete when economic value is attributed to that interest and thus quantifies the harm caused.

One difficulty probably lies in the fact that the harm in question accrues in a context (ie the market or the field of competition) in which the interference between distinct legal spheres must be considered to be

<sup>51</sup> Thus M. Libertini, 'La determinazione del danno risarcibile nella proposta di direttiva comunitaria sul risarcimento del danno antitrust. Alcune osservazioni preliminari' *Concorrenza e mercato*, 265 (2014).

<sup>52</sup> This is discussed in A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 155-158.

<sup>53</sup> On this subject, see *ibid* 106. On the assumption that the adjudication of conflicts relating to competition law depends on a general clause, the author notes that this approach is functional to both the complementary nature of the disciplines (means) and the objective protection of competition (end). Pursuant to the principle of free competition, a competitor's aggressive action to take over the market position of another entrepreneur is never illegal *ex se*; in a competitive system, indeed, a company's market position is not protected as such, but only against certain 'methods' of aggression. See also E. Brodi, n 42 above, 1460.

<sup>54</sup> See the judgments listed n 4 above.



entirely physiological,<sup>55</sup> and not merely occasional, as may instead be inferred in traditional comments on tortious liability. This approach allows us to understand why, at least as regards the *an* of the compensation, the mediation of the competition authority is deemed necessary: it is this authority's assessment that enables distinction between cases in which the interference is legally irrelevant from those in which it is illicit and the source of harm is worthy of compensation.

Nevertheless, the question of the *quantum* of compensation remains open. From the theoretical point of view, it may appear relatively simple to base the problem on the actual loss or the 'dry' economic loss suffered by a party due to the distortion of the market functioning rules.<sup>56</sup> The paradigm case is the increase in prices as an effect of a cartel among various undertakings. It is no coincidence that the Directive focuses precisely on this case,<sup>57</sup> as will be illustrated further below.

Even remaining within the sphere of economic loss, the problem certainly becomes more complicated when considering the case when the increased price prevents a party from buying a certain good or service, perhaps replacing it with a substitute, which however influences profit or even harms the existing dominant position.<sup>58</sup> In this case, the determination of the harm sustained necessarily requires probabilistic estimates which are

<sup>55</sup> See A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 90, in which it is observed that antitrust law conceives competition conflicts as conflicts between subjects holding equal and contrary interests; consequently, each entrepreneur has an interest in the possibility and maximum profitability of the business initiative. Previously, to the same effect, see M. Barcellona, 'Funzione compensativa della responsabilità e private enforcement della disciplina antitrust' *Contratto e impresa*, 136 (2008). In this regard, problematic aspects are discussed in L. Raiser, 'Il diritto soggettivo nella dottrina civilistica tedesca', in Id, *Il compito del diritto privato* n 24 above, 125.

<sup>56</sup> See, however, A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 153. After identifying certain critical factors ((i) the company's assets do not show all decreases in value sustained; (ii) the company's value, understood as an economic entity that can be valued, is an investment; (iii) it is difficult to envisage the causal processes developed by means of the unfair competition), the author deduces that the representation of the harm caused by unfair competition as a real, albeit differential, economic harm is approximate and questionable. She therefore concludes that the remedy of compensation, if applied to illegal unfair competition, is a weak and unreliable instrument of protection.

<sup>57</sup> See F.P. Maier-Rigaud, n 43 above, 358.

<sup>58</sup> See the example offered by F. Denozza and L. Toffoletti, *Funzione compensatoria ed effetti deterrenti dell'azione privata nel diritto antitrust*, in M. Maugeri and A. Zoppini eds, n 34 above, 204: those privy to an agreement conspire to delay the introduction of an innovative process or product into the market; this leads to a range of private costs, such as benefits lost in terms of improved quality, safety or environmental protection that the new product or process would have generated. The quantification of this prejudice is difficult and, consequently, there is a risk of the damages being less than the company's full loss.

inevitably approximate.

If one then examines the loss-of-profit scenario, the problem assumes an even trickier profile.<sup>59</sup> In particular, in this context, there is a clear need to differentiate the position of the consumer (ie the party extraneous to the competition) from that of the undertaking, especially the undertaking that is a competitor of the infringing party (or parties) and that operates in direct contact with the latter(s). In this regard, the assessment of the harm complained of in terms of loss of profit inevitably requires reconstructing the situation that the market of reference would have been in if the breach had not been committed and thus of the profit that the undertaking could have gained.

If the above is correct, it cannot be denied that the compensation for loss of profit in the case of an infringement of competition law requires an analysis of the expectations that an undertaking can legitimately nourish when approaching and operating on the market, and of the extent to which such expectations can be protected by law through payment of compensation. Observant scholarship<sup>60</sup> has answered this question, placing, at the centre of the protection offered by compensation, the interest in the competitive advantage and, more precisely, the interest of the single undertaking in exploiting a competitive advantage over their rivals; harming this interest generates prejudicial effects on the income prospects of the undertaking suffering the harm.

According to its premises, this scholarship traces the harm back to the loss of chances and entrusts it to the judge's equitable assessment.<sup>61</sup> The prospect of a fair assessment of the damage is also confirmed by Italian case law,<sup>62</sup> thus attesting the great difficulty of quantifying the prejudice.<sup>63</sup>

In this regard, the Directive does not provides any constructive contributions. This is probably consistent with its essentially procedural value, since the objective pursued by European law aims mainly at standardizing the procedural rules on claims for damages due to infringements of competition law. As for this purpose, the substantive

<sup>59</sup> To the same effect, see also F.P. Maier-Rigaud, n 43 above, 348.

<sup>60</sup> A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 176.

<sup>61</sup> See *Ibid* 228-236. In the same vein, see also M. Libertini, 'La determinazione del danno risarcibile' n 51 above, 270.

<sup>62</sup> See, for example, Tribunale di Milano 27 December 2013 no 16319, available at [www.iusexplorer.it](http://www.iusexplorer.it), regarding a case of abuse of a dominant position.

<sup>63</sup> On this subject, see L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 362; E. Brodi, n 42 above, 1455-1456, who also recalls that the institution raises the problem of separating the evaluation of the causal link between the material profile and the legal profile.

issues, such as that discussed above on the amount of the compensation, still depend on the sensitivity of individual national legal systems.

This conclusion is confirmed by a document issued at the same time as the Directive, but that does not have force of law:<sup>64</sup> a Practical Guide on ‘Quantifying Harm in Actions for Damages’, in which the European institutions express some hesitation on the suitability of the concept of loss of profit to cover a series of potential harms deriving from breaches of competition law, such as those caused by the exclusion of a company from a certain market.<sup>65</sup> Indeed, the Guide states that the Directive does not prejudice the possibility of structuring the claim for compensation differently, basing it, for example, on the loss of chance or on harm to a company’s economic reputation, if these forms are contemplated by the applicable national laws.

Quantifying the harm thus also remains an open problem, especially since the operational indications that will arise in practice do not exist yet. It is highly likely that this evolution will not be guided by the courts but rather by the competition authorities, as already occurred in the issue of motor vehicle third-party liability insurance.

Before drawing some conclusions on the notion of damages, it is worthy to briefly mention the second aspect referred to above: the protective techniques contemplated by the Directive. In this regard, it must be noted that, in determining the role of judges on matters of infringements of competition law, the European legislator considers only the possibility of compensation by equivalence (in the form of cash), ignoring techniques of specific redress.<sup>66</sup> This choice is undoubtedly significant, especially to the extent that bars on practising are included therein, as well as court orders resulting in an action and that – with reference to the Italian legal system alone – are contemplated by legal provisions existing alongside antitrust provisions, such as that on the abuse of economic dependence (Art 9 of legge no 192 of 18 June 1998).

On this point, the Directive is silent.<sup>67</sup> The aforesaid measures cannot thus be considered forbidden or *contra legem*; they are simply extraneous to the harmonization pursued by European legislation, and will thus continue

<sup>64</sup> The Practical Guide on ‘Quantifying Harm in Actions for Damages Based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ (which accompanies the Communication mentioned n 41 above), SWD(2013) 205, § 183.

<sup>65</sup> It is frequently stated in legal literature that breaches of competition law may have been eliminated, or at least underestimated, by the Directive: see eg E. Camilleri, ‘Il trasferimento del sovrapprezzo anticoncorrenziale’ n 14 above, 38.

<sup>66</sup> On the importance of these protective techniques see M. Libertini, ‘La determinazione del danno risarcibile’ n 51 above, 271.

<sup>67</sup> On this subject, K. Wright, n 32 above, 8.

to be disciplined by national legal systems.

A potentially problematic aspect emerges at this point in the relations between judges and competition authorities: can judges issue a prohibition provision or an order to take action against a market operator, also if this measure may interfere with proceedings pending before the competition authority? If the proceedings are pending before the European Commission, the answer is provided in Art 16 of Regulation 1/2003, which clearly forbids the judge from interfering.

However, there is no similar explicit indication for cases in which the proceedings are pending before a national authority. Theoretically, therefore, the risk of interference cannot be excluded, and could occur if – for example – the judge and the competition authority issue conflicting precautionary provisions as to the behaviour that given market operator should adopt.

#### **IV. The Enforceability of the Claim for Compensation; The ‘Passing-On’ Problem**

As mentioned above, the Directive mainly considers a certain kind of prejudice: the overcharge paid by the victim of the infringement due to the existence of a cartel agreement (Art 12). The problem is then placed within the context of more or less complex vertical distribution chains, within the sphere of which the overcharge may ‘slide’ downwards<sup>68</sup> and thus tend to shift from to another operator of the chain.<sup>69</sup> However, this transfer can vary greatly from one case to another, both in terms of the *an* and of the *quantum*.<sup>70</sup>

This problem is familiar to the debate developing in the United States, where antitrust legislation has now been applied for over one century. In extremely brief terms, according to the rules in force in the US, the only party entitled to file a claim for damages is the direct purchaser, ie the operator that interacts directly (without any mediation) with the antitrust infringer,<sup>71</sup> as in the case of a company that abuses its dominant position or that belongs to a cartel.

The operating rule summarized above is the result of two successive cases before the federal Supreme Court. The former<sup>72</sup> prohibited raising the exception of ‘defensive passing-on’, establishing that the defendant in

<sup>68</sup> This image is also found in F.P. Maier-Rigaud, n 43 above, 345.

<sup>69</sup> On this subject, see L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 160.

<sup>70</sup> In this regard, see also A. Genovese, *Il risarcimento del danno da illecito concorrenziale* n 39 above, 207.

<sup>71</sup> See G. Taddei Elmi, n 13 above, 198, who emphasizes the efficiency reasons underlying this approach.

<sup>72</sup> *Hanover Shoe Inc. v United Shoe Machinery Corp.* 392 US 481 (1968).

a claim for compensation (ie the subject who committed the alleged infringement) can no longer argue that the plaintiff transferred the extra cost to the distribution chain downstream. Thus, the infringing party cannot maintain that there is no harm to be compensated because the harm was transferred by the plaintiff to another subject. The reasoning gives the impression that the Supreme Court intended to prevent judges from having to investigate the distribution chain's actual structure, with the risk that the deterrent effect of the claim for damages<sup>73</sup> would be weakened.

However, the second decision,<sup>74</sup> (apparently) symmetrically with the first,<sup>75</sup> excluded the possibility for indirect purchasers to claim damages from infringing party, under the assumption that this could lead to duplication or multiplication of claims for damages.

Therefore, at federal level at least, litigation on damages deriving from antitrust infringements is limited to disputes between parties who operate in direct contact with each other<sup>76</sup> within the distribution chain. However, if the analysis is extended to state-court level, the overall picture is much more complex;<sup>77</sup> for that matter, scholarly debate spares no criticism for the arrangement adopted at federal level, precisely regarding the system's basic choices.<sup>78</sup>

Compared to the situation briefly described above, the Directive made

<sup>73</sup> See the following emblematic citation from the Hanover Shoe judgment: 'Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness'. See also E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 43.

<sup>74</sup> *Illinois Brick Co. v State of Illinois* 431 US 720 (1977).

<sup>75</sup> The symmetry emerges from the following part of the reasoning: '(W)e conclude that, whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants'.

<sup>76</sup> Since 'the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers, rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it', as stated by the Supreme Court in the *Illinois Brick* decision.

<sup>77</sup> It has been observed that federal antitrust law protects competition, while common tort law protects competitors; this is noted by E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 270. On this subject, see also L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 341, who recalls that, at state level, it is possible to pass on the prejudice, thus endowing indirect purchasers with the right to bring actions for damages.

For an introduction, see A.I. Gavil, 'Thinking Outside the *Illinois Brick* Box: A Proposal for Reform' 76 *Antitrust Law Journal*, 97, 167 (2009).

<sup>78</sup> See, for example, E. Elhauge, n 45 above, 83, and A.I. Gavil, n 77 above, 171. Both scholars note that the Supreme Court's approach has a dissuasive effect, in the sense that direct purchasers tend to be reluctant to bring action against his habitual business counterpart.

diametrically opposite choices.<sup>79</sup> First, it avoided placing limits on the right to bring actions, recognizing to all market operators the right to do so, without distinguishing between direct and indirect purchasers (Art 12). Second, it contemplates the possibility for defendants in lawsuits for damages, to ‘paralyse’ the claims brought against him by raising the exception of the transfer of the overcharge downstream in the distribution chain; it remains understood that the defendant bears the burden of proof in any case (Art 13). Finally, to favour claims from indirect purchasers, the Directive has established, in their favour, a presumption of the existence of the harm sustained, if certain circumstances exist that link the overcharge of their purchase to the infringement of competition law that has emerged (Art 14).

There are several possible explanations for the radical difference of the European approach. On one hand, the provision of a generalized right to claim damages extended to all operators of the distribution chain is consistent with the Directive’s basic objective, namely to favour bringing actions for damages on part of market operators, to complement the activity of the relevant appointed authority. Therefore, it would probably be contradictory if, when intervening with an innovative discipline, barriers preventing application to the judicial authority were to be contemplated at the same time. Conversely, this problem does not arise in the US, where the antitrust attitude within the judicial environment<sup>80</sup> has always been widespread and private enforcement has thus had a pre-eminent role, compared to public enforcement.

On the other hand, the precautions and limitations surrounding claims in the US (at least at federal level) are linked to the punitive or sanctioning nature of the damages awarded. This means that the entity of the obligation imposed upon the infringing party can be much greater than the actual harm suffered by the plaintiff in the lawsuit for damages. In such a context, there is a clear risk that several claims for damages may overlap. If all claims are sustained, an ‘overloading’ of compensation would result and, consequently, a definitive expulsion of the infringing operator from the market.

<sup>79</sup> Thus G. Taddei Elmi, n 13 above, 228; M. Carpagnano, ‘Le regole (proposte) sul *passing on* e azione degli acquirenti indiretti’ *Concorrenza e mercato*, 275 (2014).

<sup>80</sup> On this subject, see D.J. Gerber, ‘Private Enforcement of Competition Law. US Experience and European Plans’, in G.A. Benacchio and M. Carpagnano eds, *Il private enforcement del diritto comunitario della concorrenza* n 27 above, 35-38, where even the consolidation of the widespread use of litigation has created uncertainty on the functions and objectives of competition law; M.A. Sittenreich, ‘The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions’ 78 *Fordham Law Review*, 2701, 2706 (2010).

In Italian scholarship, see E. Brodi, n 42 above, 1446.

This risk does not appear to exist in the (future) European scenario, given the specific ideological choice according to which the sole issue considered by the legislator is the restoration of the harm suffered by the victim, excluding all punitive or overcompensatory purposes. At least in theory, therefore, even in the case of several claims for damages brought by subjects linked at different levels of the distribution chain, the infringing party will always be required to make up for the harm caused, according to its concrete quantification, and if necessary as per an equitable evaluation.<sup>81</sup>

However, the possibility of several concurrent claims for damages remains legally relevant, to the extent that it can lead to a misalignment between the entity of the harm and that of the compensation awarded as a result of the legal action.<sup>82</sup> As appropriately observed,<sup>83</sup> regulating the concurrency between the various claims requires an in-depth knowledge of how the distribution chain operates in practice and, above all, of the mechanisms for shifting the value between operators; this implies the possession of specialist skills that are not easily available in ordinary civil claims.<sup>84</sup>

The legislator of the Directive is manifestly aware of the problem. The consequence of the answer provided in Art 15, however, is that the ultimate decision is again left to national legislators. The only methodological indication consists of an invitation to take into account any other decisions that may have already been made regarding the same antitrust infringement, or any other legal proceedings pending on the same issue.

This indication has significant consequences for procedural law, which are extraneous to this discussion. It must be noted, however, that the Directive poses another limitation in the operational sphere assigned to judges seized of a claim for damages deriving from antitrust infringements. Let us consider the following example: in the context of a rather complex distribution chain, two operators at different levels bring claims for damages separately, complaining that they have each suffered harms deriving from the overpricing due to an upstream agreement in the same chain. The judgement of the action brought by Operator A is given before that of the claim brought by Operator B. According to the Directive, therefore, in quantifying the damages, the court seized by B should take into account

<sup>81</sup> A positive evaluation of the choices adopted by the Directive in this regard can be found in R. Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' *Maastricht Journal of European and Comparative Law*, 18 (2013), who considers it reinforcement of the deterrent effect of claims for damages.

<sup>82</sup> The risk is also appreciated by G. Taddei Elmi, n 13 above, 229.

<sup>83</sup> Thus V. Mouta Pereira, 'Passing-on of Overcharges: Will the National Courts Lead the Way Forward?' *Italian Antitrust Review*, 113 (2015).

<sup>84</sup> Critical considerations are available in F.P. Maier-Rigaud, n 43 above, 344.

what was recognized to A in the distinct and separate claim brought by the latter.<sup>85</sup>

The example generates the impression that the Directive tends to separate claims for damages, favouring ‘one-to-one’ litigation and without favouring forms of aggregation of claims for damages. This impression is significantly confirmed in the statement made at para 13 of the recital, according to which ‘(t)his directive should not require Member States to introduce collective redress for the enforcement of Articles 101 and 102 TFEU’.

This is another ideological choice destined to create a gap between the experiences of Europe and of the United States. In the latter, as may be very well-known, the importance and relevance of antitrust litigation is a precise consequence of the use of class actions.<sup>86</sup> In Europe, the position of national legal systems regarding class actions is still extremely diversified, which may have an important effect on the establishment of an efficient system of private enforcement in antitrust matters.

## V. What is the Position of Private Enforcement?

The last observation made above clarifies that the Directive has made different choices compared to the US, as far as compensation for damages caused by infringements of competition law are concerned.<sup>87</sup> This could be due to the fact that in Europe, the law tends to create its own system of private enforcement, which takes into account specific European factors and sensitivities in this context.

Continuing with this line of reasoning, it is obvious, as noted above, that in Europe the role of public enforcement on competition issues is decidedly predominant, because of well-known historical events.<sup>88</sup> The central position of this pillar does not appear to be affected whatsoever by the Directive, which rather appears to be based on a need to introduce new means of protection because of an expansion towards the relationships between undertakings and consumers.

The chosen vehicle for this purpose is civil liability, which, however, is

<sup>85</sup> On this subject, also G. Villa, n above 12, 308; G. Taddei Elmi, n 13 above, 230.

<sup>86</sup> In general terms, see B.J. Rodger, ‘Institutions and mechanism to facilitate competition private law enforcement across the EU: Specialist Courts and follow-on actions’ *Concorrenza e mercato*, 141 (2014).

<sup>87</sup> The picture is summarized in G. Taddei Elmi, n 13 above, 186.

<sup>88</sup> On this subject, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 184, which recalls the ‘political’ aim of achieving the integration of domestic markets by means of actions from above. See also D.J. Gerber, n 80 above, 43.



shaped and adapted to the specific purposes pursued by the European legislator. The scholar of civil law who pays attention to systematic data cannot help noticing the particular role that tortious liability is called upon to perform in a typically contractual environment.<sup>89</sup> Indeed, it is clear that a breach of competition law taken into consideration by the Directive is performed, at least prevalently, by means of the stipulation of contracts: not only agreements through which an understanding between cartel members is formalized, but also – and especially – the contracts stipulated by the victims of the infringements (direct and indirect purchasers) with the companies infringing competition law with cartel-type agreements or the abuse of a dominant position.

At least from the point of view of the European legislator, therefore, an infringement of competition law cannot be grounds for a specific remedy on the contractual level. The victim of the infringement is protected entirely on the non-contractual level, by means of an award of compensation that should somehow ‘correct the distortion’ of a contract stipulated in a context of altered competitiveness. According to this approach, therefore, the remedy overrides the underlying contractual situation, leaving the functioning and effectiveness of the contract unaltered.<sup>90</sup>

This means that the claim for compensation can be filed relatively easily and quickly by any potentially interested subject. This explains the choice on the entitlement to bring actions and on the burden of proof, especially in the ‘follow-on’ cases. Upon further consideration, these very choices are found in the Directive’s premises, ie those precedents of scholarship and case law which prompted the indication to favour the development of initiatives which, arising from below, would stimulate market players to call for strict observance of the antitrust provisions. In view of this objective, a claim for compensation that is easy to bring, by almost any party, could – at least upon first sight – be a useful tool.

However, aside from these apparent initial openings, it must be recognized that the Directive imposes certain important restrictions on the full potential of civil liability. Such restrictions are the result of rules that limit the obligation to compensate to the harm effectively sustained

<sup>89</sup> On this subject, see G. Guizzi, ‘Contratto e intesa nella disciplina a tutela della concorrenza’, in A. Catricalà and E. Gabrielli eds, *I contratti nella concorrenza* n 21 above, 25, who emphasizes the fact that, for competition purposes, the contract is considered as an event, ie a fact that influences another fact, to be included among the competitive conditions of the relevant market.

<sup>90</sup> The Italian jurist notes the consequences of the distinction between rules of validity and rules of liability, in the wake of two notes on the Corte di Cassazione 19 December 2007 no 26724, *Foro italiano*, I, 784 (2008) and no 26725, *Giustizia civile*, 2775 (2008).

by the (allegedly) injured party,<sup>91</sup> and the absence of stimuli towards forms of aggregation of the many victims of an infringement of competition law,<sup>92</sup> which generally – and notoriously – affects a number of subjects.<sup>93</sup>

These limits may considerably affect the deterrent effect of the claim for damages, in the form contemplated by the Directive; consequently, one may seriously doubt the suitability of the Directive to foster observance of competition law on part of the market players. Bluntly, it is highly doubtful that cartel companies or companies in a dominant position can be induced to cease their behaviour because of the threat of a claim for damages brought pursuant to the Directive.<sup>94</sup>

More realistically, the claim for damages outlined by the Directive appears destined to perform a complementary role with respect to the measures (sanctions, prescriptions, orders on behaviour, etc) to be imposed by the relevant competition authorities within the sphere of public enforcement; in other words, thanks to the Directive, court action against an infringement of competition law will no longer be limited only to the assessment by the competition authority, but can develop further in a civil lawsuit. In particular, civil law protection is now also available<sup>95</sup> to restore

<sup>91</sup> On this subject, E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 50; P. Iannuccelli, 'Torniamo al Trattato!' n 7 above, 96.

<sup>92</sup> This profile is also examined by M.A. Sittenreich, n 80 above, 2724-2725.

<sup>93</sup> *Ex multis*, see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 181; L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 27. See also A. Rocchietti March, n 21 above, 507, who – with reference to the case of a price cartel – identifies the following categories of damaged parties: direct customers of the cartel members; indirect purchasers (assignees of the direct customers, to the extent that the overcharge has been transferred); customers of companies that are in competition with the cartel members but are not privy to the agreement, to the extent that they have aligned their own prices to the cartel; customers who, unwilling to participate in the price war of the cartel, have decided either to not make the purchase or to buy something different; suppliers of the cartel members who, because of the price increase, have suffered a reduction in demand; suppliers of services that are complementary to the goods sold by the cartel, to the extent that the cartel leads to a reduction in the offer on the market.

<sup>94</sup> In the same vein, see also C. Osti, 'Un approccio pragmatico all'attuazione giudiziale delle regole di concorrenza nell'ordinamento italiano' *Concorrenza e mercato*, 292 (2014). In US scholarship, see M.A. Sittenreich, n 80 above, 2708 (with reference to the preparatory works of the Directive).

<sup>95</sup> E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 338, observes that, with regard to the right to claim damages, the remedy intercepts only a fraction of the damaging sequence triggered by the competition breach. Although the intrinsic plurality of the nature of the offence is expressed through a series of market relationships, which all suffer from the alteration caused to the competitive dynamics, civil liability is capable of covering only the initial steps of this propagating mechanism, while actually, it can immediately be seen that the harm was caused by the

the harm that individual market parties (undertakings and consumers) have sustained due to the breach committed.<sup>96</sup> The compensatory action contemplated by the Directive does not appear to be capable of doing more than this.

To shift the discussion to the level of the trends identifiable within the legal system, it appears logical to maintain that, at least for the time being, private enforcement does not have the same legal strength as public enforcement, but rather plays an ancillary and subsidiary role.<sup>97</sup>

This statement is based on various points. One may recall the regulation of access to the relevant documentation, but this is a subject which – at least in the opinion of this author – interests mainly scholars of procedural and administrative law. Another point which deserves more attention here ensues from observing the environment in which the action for damages must be pursued, if the infringing company has adhered to a programme for leniency with the relevant competition authority.<sup>98</sup> As may be known, in the logics of public enforcement, these programmes are particularly important because they enable illicit behaviour to be revealed, especially when such behaviour consists of the formation of cartels of companies, and thus favour the authority's intervention in adopting the measures envisaged specifically for the case in hand.

However, it is evident that the clemency programmes would lose attractiveness if the 'repentant' company remained exposed to the risk of a claim for damages like its fellow cartel members, without obtaining any benefit from participating in the clemency programme.<sup>99</sup> A facilitation

illicit conduct and was the reason for the protection that should have been afforded by the provision breached.

<sup>96</sup> A similar evaluation in P. Iannuccelli, 'Il *private enforcement* del diritto della concorrenza in Italia' n 6 above, 753, assigns to civil law protection, in the competition environment, the function of guaranteeing an adequate level of distributive justice.

<sup>97</sup> Thus already P. Cassinis and G. Galasso, 'Il ruolo dell'Autorità Garante della Concorrenza e del Mercato tra *public e private enforcement*', in G.A. Benacchio and M. Carpagnano eds, *I rimedi civilistici agli illeciti concorrenziali* n 45 above, 25.

<sup>98</sup> In the CJEU's case law, the problem is well-known; however, in the absence of precise indications of law, the prevailing tendency has been to defer the problems to the national courts, on the basis of a case-by-case assessment. See Case C-536/11, *Bundswettbewerbsbehörde v Donau Chemie AG et al* (European Court of Justice 14 June 2011) para 34 and Case C-360/09, *Pfleiderer AG. v Bundeskartellamt* (European Court of Justice 14 June 2011) available at <http://curia.europa.eu/>.

<sup>99</sup> The trend towards conflict between the discipline of private enforcement and leniency programmes is widely discussed in scholarship. See A. Montanari, 'Programmi di clemenza e azione risarcitoria nella direttiva europea sul risarcimento del danno: convivenza possibile?' *Concorrenza e mercato*, 129 (2014); L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 95; M. Meli, 'I programmi di clemenza ("*leniency*") e l'azione privata', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* n 34 above, 248; E.A. Raffaelli and M. Bricchetto, *Public e private antitrust enforcement: auspicabili ma difficili sinergie*, in G.A. Benacchio and M.

has therefore been contemplated in the Directive: that company is released from joint liability. This company, in fact, would otherwise be exposed to claims for damages, which could be filed by all direct or indirect purchasers of all the undertakings adhering to the cartel. The repentant company's liability to pay damages is therefore limited to the prejudice caused to its 'own' direct or indirect purchasers (Art 11, para 5) – an evident derogation from the principle of joint liability. This is a crucial limit, especially if one considers the possible extent of the liability of damages for infringements of competition law, at least according to the most recent indications given by the European institutions, with reference to the case of the 'umbrella effects'.<sup>100</sup>

Questions of detail aside, this digression confirms that the Directive displays an ambivalent attitude towards tortious liability: on one hand, it values it; on the other, it limits it, according to the consequences to which it may lead in the case of the application of competition law, which is always based on a public enforcement logic.

This can be explained by a desire, on part of the European legislator, to adopt a prudent attitude. On one hand, said legislator is certainly aware

Carpagnano eds, *L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea* n 27 above, 154.

The critical nature is clearly apparent to the CJEU too, since it has been called upon to decide access to the relevant documentation. On this subject, see P. Iannuccelli, 'Il rinvio pregiudiziale e il *private enforcement* del antitrust dell'UE' n 2 above, 719, with references to the Pfleiderer judgment n 98 above.

<sup>100</sup> Thus, see Case C-557/12, *Kone AG et al v ÖBB-Infrastruktur AG* (European Court of Justice 5 June 2014) available at <http://curia.europa.eu>. The decision clearly reflects the strained interpretation of the provisions of Austrian national law on the causal link. See, in particular, paras 33-34: '(33) The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.

(34) Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied'.

On this subject, see E. Camilleri, 'Il trasferimento del sovrapprezzo anticoncorrenziale' n 14 above, 56; L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 149-154, who observes that, in case of umbrella effects, the damages must be compensated by those who participate in the agreement. This liability is justified by the causal link between the damage sustained by the victim and the risks created by the formation of the cartel.

of the persisting differences on this point at national level and, on the other, of the radical difference compared to the situation in the US.<sup>101</sup> Nor is it possible to presume that the Directive should not be read in experimental terms, as if its objective were to test the gradual introduction, ‘in small doses’, of compensation for damages caused by infringements of competition law.

## **VI. Towards a Sub-System of Liability Involving Compensation for Infringements of Competition Law**

In conclusion, there is a systematic aspect worthy of being emphasised from the perspective of civil law exquisitely. With the Directive, the European legislator addresses civil liability to endow the private enforcement of antitrust law with value, in an attempt to enhance this pillar with respect to the importance of public enforcement, the central position of which is however never placed in doubt. It cannot be denied that, upon this view, civil liability must perform a function that is not only private (ie having the purpose of protecting idiosyncratic interests), but that also regards interests of public or general importance.<sup>102</sup> Indeed, it may be known that the application of competition law and the deterrence and sanctioning

<sup>101</sup> A provoking observation is given in M. Barcellona, ‘Funzione compensativa della responsabilità e private enforcement della disciplina antitrust’ n 55 above, 143, according to whom the application of the system of punitive damages to the private enforcement of competition law transforms consumers into bounty hunters: the system of punitive damages would lead to the risk of arbitrary transfer of wealth and to the reallocation of resources in an economically inefficient manner.

<sup>102</sup> An interesting comment in E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 36, which links the protection of fair competition to the constitutional notion of social usefulness. This helps to explain the difficulties encountered in affirming, in this sector of the law, the strictly civil-law types of protection, such as those regarding contractual invalidity or claims for damages. On this subject, see also L. Castelli, *Disciplina antitrust e illecito civile* n 5 above, 27, which essentially distinguishes two levels of relevant interests: on one hand, there is a public interest in the correct functioning of the market; on the other, once a breach of this interest is ascertained, it is also possible to verify whether the behaviour has harmed the interests of individuals (consumers or rival entrepreneurs). A similar opinion is given in F. Scaglione, ‘Il mercato e le regole della correttezza’, in F. Galgano ed, *Trattato di diritto commerciale e diritto pubblico dell’economia* (Padova: Cedam, 2010). See also F. Longobucco, *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione “a valle”* (Napoli: Edizioni Scientifiche Italiane, 2009), 204. The author recognizes the particular social and organizational function that civil liability is called to perform in competition legislation: as regards remedial action, tortious liability stimulates a reaction to the wrong on the part of the victim, and thus conforms to and regulates the market within a paradigm that tends towards a critical compensation of the damaged party

of its breaches have always constituted a priority of European law, since its very evolution.

In Italy, civil liability has been used to pursue the aim of protecting not only private interests but also (and to the same extent) public interests. At least from a cultural point of view, the most interesting example is probably the environment.<sup>103</sup> To reducing a complex legal itinerary to an extreme summary, after a lively debate in scholarship and case law, in 1986<sup>104</sup> the legislator adopted legislative rulings that endowed civil liability with an important role for remedying the consequences of environmental wrongdoing.

For various reasons, however, this legal model was not particularly effective, if one merely considers the exiguous number of decisions taken by the courts. After twenty years, therefore, the legislator intervened again<sup>105</sup> to change the overall approach, to attribute a pre-eminent role to the public administration and to the exercise of authoritative powers; it relegated civil liability to the background, an ancillary and subordinate position.

This apparent lack of success may have various explanations; for example, the objective difficulties encountered by judges in ascertaining the existence of environmental contamination, but also the absence of tools for aggregating the parties that bring claims for damages (indeed, environmental damage also harms several parties), as well as the enduring uncertainty on the profile's subjective offence, with its unsolved ambiguity between traditional and strict liability and the relevant implications for the possibility of insuring against the damage sustained. However, a background contradiction remains between, on one hand, the use of a claim of civil liability to remedy a public law offence, and on the other its continuing use purely to obtain compensation, punitive purposes being excluded.

To draw an initial comparison between environmental liability (past) and antitrust infringement (future), the Directive probably provides a solution for the first problem, in the sense that it contains indications for ordinary judges and administrative authorities to interact with each other

(whether a consumer or a rival); the ultimate purpose is to make the victim indifferent to the wrong committed.

On this question, in general terms, see also M. Maugeri, 'Risarcimento del danno e diritto antitrust: le prospettive comunitarie', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* n 34 above, 154.

<sup>103</sup> This connection is shared by E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* n 35 above, 374-376. See also U. Salanitro, 'Tutela dell'ambiente e strumenti di diritto privato', in M. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* n 34 above, 381-382. In general terms, see L. Raiser, 'Antinomie nel diritto sulle limitazioni della concorrenza' n 24 above, 255.

<sup>104</sup> Legge 8 July 1986 no 349, Art 18.

<sup>105</sup> Art 298-ter and following of decreto legislativo 3 April 2005 no 152.

in constructing the damages case and the consequent obligation to compensate;<sup>106</sup> in this sense, therefore, the judge seised of the civil liability action is no longer alone in the investigation, which can be difficult.

However, the Directive does not appear to offer significant indications for the other problems arising in the historical vicissitudes of environmental liability in the Italian legal system. With regard to the collective aspect of compensable damages, this has already been discussed. With regard to the subjective profile of the infringement, it does not seem possible to doubt that, for the purposes of compensation, the infringement should be considered as either malicious intent or negligence. The recognition of strict liability is contrasted with the *per absurdum* argument, according to which it is conceptually unacceptable to even hypothesize an insurance against such damages.<sup>107</sup>

Even without reaching these extremes, it appears difficult to outline how undertakings could internalize the costs of the infringement of competition law. This result seems to be precluded by the broad discretion enjoyed, on one hand, by competition authorities in ascertaining the existence of the breaches and, on the other, by the judges in quantifying the compensable damages, in view of the widespread resort to techniques of an equitable nature.<sup>108</sup>

Infringements of competition law thus appear destined to remain within the traditional avenues of liability. Although, at a first glance, this conclusion may give cause for peace of mind, it also outlines a possible scenario of fragmentation of the system. The fact that the offence derives (or tends to derive) from a prior investigation carried out by the competition authority, and the importance of the equitable powers held by the judge,<sup>109</sup> are factors that can determine the evolution of the Directive's subject, in the sense that it turns antitrust infringements into 'an island unto itself' in the already complex context of civil liability.<sup>110</sup> In particular, the operating

<sup>106</sup> This might enable, *inter alia*, coordination of the various interests underlying an infringement of competition law, as well as the initiatives pursuing such interests; see E. Brodi, n 42 above, 1450.

<sup>107</sup> The question is analysed by L. Castelli, 'Violazione delle norme antitrust e risarcimento del danno' n 30 above, 346.

<sup>108</sup> In both Italian and US scholarship, the hypothesis is discussed according to which, in matters of antitrust, the damages need not be quantified precisely, since – for the purposes of the law – a calculation based on presumption (and therefore necessarily approximate) is sufficient. See A.I. Gavil, n 77 above, 170; A. Mitchell Polinsky, n 44 above, 1236; A. Genovese, 'Funzione e quantificazione del risarcimento' n 48 above, 244.

<sup>109</sup> Mentioned in V. Mouta Pereira, n 83 above, 114.

<sup>110</sup> This is the result hoped for by F.P. Maier-Rigaud, n 43 above, 360. See also G. Villa, n 12 above, 302, 303.

choices outlined (or even only suggested) in the Directive seem to favour the identification of operators – in both administrative and legal fields – that are specialized in the application of competition law, almost as if this sector were isolated, or could be isolated, from the legal system as a whole.<sup>111</sup>

Whether this result is positive or negative is too complex to explore here, also because of the wide range of opinions that may exist in this regard.<sup>112</sup> The problem will only be mentioned, in the hope that the national legislator, and especially the operators who will be called upon to implement the discipline analysed herein,<sup>113</sup> are aware of it.

<sup>111</sup> Comments are also made in C. Osti, n 94 above, 296, who reports the existence of a democratic deficit in the application of competition law. In particular, this application is relegated to a public authority (a bureaucratic body that is conditioned by political choices in any case (in terms of the appointment of the top executives or funding for the performance of institutional activities)), which leaves the citizens and companies that suffer due to certain types of behaviour without remedies.

A discussion is also expounded in M. Libertini, 'Il ruolo necessariamente complementare di "private" e "public enforcement" in materia di antitrust' n 34 above, 172-174, who recognizes that the administrative action on competition matters is necessarily selective, since the authority has the discretion to select the cases and sectors in which to intervene. In this author's opinion, however, this is a positive solution, since the pursuit of the public interest thus defined is protected in the typical situation of legitimate interests; consequently, the strictly private interests are sacrificed to the competition authority, as occurs for those of owners in environmental or landscape issues.

A different evaluation was expressed by F. Denozza, *Antitrust* (Bologna: Il Mulino, 1988), 9, according to whom antitrust law must not be a tool of industrial policy; this implies that its application cannot be entrusted to an administrative authority having final decisional powers. The administrative authority must be biased in its functions and must not be a judge: it is useful for it to be active in bringing dubious cases before the ordinary jurisdiction.

<sup>112</sup> An interesting observation is made by M.A. Sittenreich, n 80 above, 2739: 'antitrust litigation is in essence an exchange between rational financial actors. Each party responds to economic incentives potential plaintiffs are more likely to sue when their probability of success is higher, litigation costs are lower, and potential damages are higher; potential defendants will more likely abandon certain conduct if the probability that a lawsuit will be brought, the probability of losing that suit, the litigation costs, and the potential damages are higher' (reprocessing the thought of S.C. Salop and L.J. White, 'Economic Analysis of Private Antitrust Litigation' 74 *Georgetown Law Journal*, 1001 (1986)).

<sup>113</sup> In the background, the issue of the duties and functions of private law within the framework of the overall legal system remains. Specifically regarding the issues discussed herein, see L. Raiser, 'La Costituzione e il diritto privato', in Id, *Il compito del diritto privato* n 24 above, 191. See also A. Douglas Melamed, 'Afterword: The Purposes of Antitrust Remedies' 76 *Antitrust Law Journal*, 359 (2009).