



The role of national judges in antitrust litigation in the light of the antitrust damages' directive (or the "indirect effects" of directives before the lapse of the implementation period, according to the Corte di Cassazione)

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In the annotated [judgement](#), the Italian *Corte di cassazione* (hereinafter, the "CC") seems to suggest that the recently enacted [directive](#) on antitrust damages (whose analysis has been carried out [here](#) by Prof. Rossi Dal Pozzo) enjoys a sort of "indirect effects" within the Italian legal order.

The case concerned a stand-alone damages action brought by a group of agricultural wholesalers against the undertaking running the Rome general market. The plaintiffs claimed that the defendant abused its dominant position on the (alleged) relevant market (*i.e.*, the wholesale distribution market in Rome), by imposing restrictive and discriminatory conditions. Acting as a first instance judge (according to the original version of Article 33 l. 287/1990), the Rome Court of Appeal considered that the plaintiffs did not meet their burden of proof, having failed to establish the contours of the relevant (geographic) market. Although claiming that it was limited to the city of Rome, the plaintiffs supported such assumption only with generic elements ("*generici riferimenti*"). With no definition of the (geographic) relevant market, one cannot establish a dominant position, nor its abuse. The action was therefore dismissed.

The CC annulled the judgement. Stressing out the differences between stand-alone and follow-on actions, the Court acknowledges that antitrust damages actions require complex analysis, based on evidence usually held by the defendants (or by third parties), and not accessible (or even known) by the plaintiffs. In the light of this peculiarity of antitrust litigation (and recalled that [reg. 1/2003](#) assigns to national courts an essential role in applying EU competition rules), the CC affirms that the Court of Appeal was wrong in mechanically applying ("*meccanica applicazione*") the principle of *onus probandi incumbit ei qui dicit*. According to the CC, the Court should have rather followed a sort of teleological approach to the Italian rules of civil procedure to ensure the compensation of the victims of the antitrust violation. For example, the Court should have used all the investigative powers that the Italian code of civil procedure assigned to the judges' discretion, such as the appointment of technical experts. The judgement suggests that this is necessary but not sufficient. Indeed, it seems mandatory, as well, that technical experts are empowered with particularly intense investigative tools, which should include the competence to *ex officio*



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acquire and evaluate data and information in order to establish the alleged breach of antitrust rules. According to the CC, this seems to be required by the *specific nature* of antitrust litigation.

What matters here is that (the need of) this impressive and purpose-oriented approach to national civil procedure seems to be rooted in the directive on antitrust damages. Indeed, the CC recalls many provisions of the directive, and particularly those on the disclosure of evidence. Of course, the CC also incidentally refers to the direct effect of Articles 101 and 102 TFEU, and even to the right to judicial protection enshrined in Articles 19 TEU and 47 Charter of Fundamental Rights of the European Union (hereinafter, the "CFREU"). While doing so, however, the CC seems merely to repeat - the exact wording of - some of the recitals of the directive. This reinforces the assumption that the judgement is substantially based on the recognition of a sort of "indirect effect" of this piece of EU legislation.

Indeed, saying that a given EU measure has "indirect effect" means that national authorities (including judges) shall interpret national legislation in the light of its provisions. This rationale represents a well-established principle of EU law ([Von Colson](#) § 26), also known as the duty of consistent interpretation. The annotated decision would therefore not draw much attention, were it not for the fact that the CC recognizes the existence of such duty well before the lapse of the directive's implementation period (27.12.2016). EU law does not impose such an obligation on Member States. National courts shall interpret domestic law in accordance with directives only once that their transposition period expired ([Adeneler](#) § 115). Before, directives only have a so-called blocking effect, *i.e.* Member States must refrain from taking measures that may compromise the attainment of the directives' results ([Inter-Environnement Wallonie](#) § 45). The obligation applies to both national legislators and courts, the latter having a sort of duty of "not-inconsistent interpretation". This means that (i) until the lapse of the transposition period, national judges do not have to interpret national law in accordance with the directives, but (ii) from the date of the directives' entrance into force, they must nonetheless refrain from interpreting national law in a manner which might compromise the (future) attainment of the objective pursued by the directives ([Adeneler](#) §§ 123-124).



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Of course, EU law does not either prohibit Member States from anticipating the effects of the duty of consistent interpretation. The CC has already followed this path with regard to the [directive](#) on the right to interpretation and translation in criminal proceeding (judgement no. 5486, 12.7.2012). This approach poses however some questions, which cannot be fully addressed here.

On the one hand, it suffices to say that this solution seems to reduce (even more) the difference between regulations and directives. If national courts consider themselves (and other national bodies) bounded by the duty of consistent application before the lapse of the transposition period, Member States shall essentially comply with directives since the date of their entrance into force. *Inter alia*, this means that Member States shall bear the financial burden of compliance, in a period when this is not required by EU law. On the other hand, risks that are (even) more serious arise in horizontal situations. The bottom line is that the duty of consistent interpretation (mainly) aims at ensuring that rights stemming from directives are not prejudiced only because Member States do not (timely) comply with their obligation to transpose. In horizontal relationships, preserving the rights of a party essentially means imposing obligations on the other, making its position worse. This is what happened in the annotated judgement. The teleological interpretation according to which the Court of Appeal was wrong in "mechanically applying" the burden of proof standard may favour the plaintiffs but clearly jeopardizes the defendant. If this seems fair once that the implementation period expired, one can doubt that the same holds true before that date (on these topics see Amalfitano-Condinanzi, *Unione europea: fonti, adattamento e rapporti tra ordinamenti*, Torino, 2015).

In a different perspective, the CC decision seems also to anticipate a more fundamental and systematic question that Member States should consider while dealing with the damages directive's transposition. The judgement essentially says that the "specific nature" of antitrust litigation requires national judges to use procedural rules in a "special manner". The directive follows the same rationale. It gives "special powers" to national courts in order to overcome the "specific obstacles" that have so far jeopardized the development of private enforcement. The question is then why only competition law should benefit from the



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enactment of these "special powers". On the one hand, one can of course rely on the quasi-constitutional role played by competition policy within the EU legal order, since the very adoption of the Treaty of Rome. On the other, one can however doubt that protecting the victims of antitrust violations more effectively than *all* the other victims of *all* the other tortious acts (including situations characterized by information asymmetry quite similar to antitrust litigation) is fully consistent with the principle of equality and the right to justice, enshrined in the constitutions of several Member States (not to mention the CFREU). Member States should therefore consider the systematic impact of the damages directive, while implementing it within national legal orders (on these topics see Munari, *Judicial assessment of anticompetitive behaviour in Italy*, in Cisotta-Marquis (eds.) *Litigation and Arbitration in EU Competition Law*, Cheltenham, 2015).