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Antitrust Rules and Competition Violations. The Evolution of Consumer Protection

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According to the order of the Court of Verona of 01.10.2018, No. 3763, a prohibited agreement pursuant to Art. 2, Law No. 287/1990, can also be harmful to consumer or entrepreneur, who has not taken part in it. In order to recognize an interest in invoking the protection referred to in Art. 33, para. 2, Law No. 287/1990, it is not sufficient to allege the nullity of the agreement itself but it is also necessary to specify the consequence that this failure has produced regarding the right to an effective choice between a plurality of competing products. This paper intends to investigate the institutions of the omnibus guarantee and its consequent nullity for violation of the discipline that governs agreements restricting competition. It also provides an analysis of the remedies and safeguards available to consumers who have remained extraneous to the competitive agreement, and who have entered into a subsequent contract of the latter.

Keyword: competition, antitrust discipline, consumer protection, prohibition of restrictive agreements, nullity, subsequent contracts.

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Introduction

In the light of the lessons of the Supreme Court in Joint Sections of 2005, the current article aims to analyse the evolution of the protection of consumers harmed by agreements restricting the freedom of competition, the tools available to them, as well as the probative duties of the latter, necessary to assert their rights in court.

This paper, starting from the case decided by the court of Verona in 2018, underlines how the ruling of the Supreme Court of 2005, enabled to highlight

the circumstance that the Law No. 287/1990[1] moved in two directions: on the one hand, towards entrepreneurs, on the other – hand towards consumers. In particular, both in doctrine[2] and in jurisprudence[3] it was noted that this law was aimed at protecting not only the position of the entrepreneur, but also that of the market operators, thus also including consumers.

In light of this, according to the approach adopted by the Supreme Court, every individual entrepreneur or consumer having a significant procedural interest, would be entitled to take legal action, in the face of an alleged or found violation of the antitrust provisions.

Therefore, when there is an unlawful functioning of the market, the consumer i salso entitled to propose the action aimed at obtaining the declaration of nullity of anticompetitive commercial practices. The judges also specify that the consumer, in addition to bringing the action aimed at ascertaining the nullity, can also propose the compensation action in order to obtain compensation for the damages suffered as a result of such practices.

The Supreme Court, therefore, admitting full protection in favour of the consumer, recognized the compensation of the latter's interest in "not seeing the competition distorted"[4], however, it specified that with renard to the allegation of the nullity of the agreement, it is also necessary for the latter to specify the consequence that this failure has produced on its right to an effective choice between a plurality of competing products.

With the order of 2018, the Court of Verona[5], specifically dealt with the relationship between the institutions of the omnibus guarantee and the restrictive agreements on competition. A guarantee had been stipulated in accordance with the guidelines prepared by the Italian Banking Association in 2003, according

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1 Law "Norme per la tutela della concorrenza e del mercato" [Standard for the protection of competition and the market], No. 287 (10.10.1990) (Gazzetta Ufficiale No. 240, 13.10.1990). Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato [last viewed 13.07.2021].

2 *Alessi, R., Cannizzaro, E. C., Bozza, E.* Codice della concorrenza: norme italiane e comunitarie per la tutela della concorrenza e del mercato [Competition Code: Italian and EU regulations for the protection of competition and the market]. Torino, Giappichelli, 2008; see also *De Vita, M.* Il diritto della concorrenza nella giurisprudenza. Torino, Giappichelli, 2009.

3 Corte d Appello, Napoli, sez. I civile, sentenza 19/10/2007, according to which, the legitimacy to act pursuant to Art. 33, Law No. 287/90 must be recognized not only on behalf of the entrepreneur but also of the consumer. This action must be considered practicable by all those market subjects who have an interest in maintaining its competitive character to the point of being able to attach a specific prejudice resulting from the disruption or reduction of this character. The consumer, therefore, as the final purchaser of the product offered by the market, has the right to take action for damages if, faced with a restrictive agreement, his right to choose between multiple competing products is circumvented. In the present case, the consumer had complained about the existence of an agreement restricting the freedom of competition put in place by numerous insurance companies, including the defendant company, aimed at increasing the costs of the policies, procuring them an unfair profit to the detriment of the contractors. The Naples Court of Appeal rejected the proposed application because it considered that the actual damage suffered as a result of the anti-competitive agreement was not proven by the plaintiff.

4 Cass., Sezioni Unite, 4 febbraio 2005, sentenza No. 2207. Available: https://st.ilsole24ore.com/art/SoleOnLine4/Speciali/2006/documenti_lunedi/02gennaio2006/SEN_04_02_2005_%202207.pdf?cmd%3Dart [last viewed 15.07.2021].

5 Ordinary Court of Verona, Third Civil Section, Judge Dr. Massimo Vaccari, Ordinance of 01.10.2018, No. 3763, Available: https://www.expartecreditoris.it/wp-content/uploads/2018/10/ord.-Trib-Verona-01.10.2018_pdf.pdf. [last viewed 15.07.2021].

to a model that the Bank of Italy, (provision No. 55 of May 2, 2005), considered contrary to the prohibition of anti-competitive agreements of Art. 2, para. 2, lett. a), of Law No. 287/1990.

The guarantors, who had opposed the injunction issued pursuant to the guarantee contract, acted as partners of a limited liability company (Ltd.), in favour of which they had lent the guarantee and, therefore, as consumers, users of the competitive system distorted by the prohibited agreement.

In support of their opposition, they also deduced the extinction of the guarantee pursuant to Articles 1956 and 1957 of Italian Civil Code since the BPM would have been guilty of failing to prevent the increase in debt exposure.

The court noted the generic prospectus with respect to the interest in enforcing the invalidity of the guarantee, in light of what was decided by the Supreme Court of Cassation in Joint Sections in sentence No. 2207/2005.

It was considered that the plaintiffs did not clarify by virtue of which mechanism the verified nullity of the restrictive understanding of the competition would have determined the invalidity of the single contracts, nor even by what type of nullity these would have been affected. The same invocation of the most recent ruling by the Court of Cassation No. 29810/2017[6] was not relevant, according to the court, having examined the matter only incidentally.

1. Regulation of the Omnibus Guarantee and Its Nullity Concerning Violation of the Antitrust Discipline

The omnibus guarantee, also known as the bank guarantee, or general guarantee (the adjective general is preferred to the omnibus by some, based on the argument that the bank guarantee can never be *omnibus debitis*[7]), or "guarantee without limit maximum guarantee of any operation", is a contract created in banking practice and regulated by uniform banking regulations prepared by the ABI (Italian Bankers' Association)[8].

It takes its name from the most characteristic and most famous clause that characterizes it, the omnibus one, or extension clause[9], which extends the content of the guarantor's commitment to all present and future obligations of the principal

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[6] Cass. Civ., sez. I, 12 Dicembre 2017, No. 29810. Available: http://mobile.ilcaso.it/sentenze/ultime/18676#gsc.tab=0 [last viewed 18.07.2021].

[7] *Ravazzoni, A.* Sulla c.d. polizza fideiussoria, [On the so-called surety policy]. *Foro it*., 1957; Id., item Fideiussione, in Dig. disc. priv., Civil Division, VIII, Turin, 1992, 254 pp.

[8] Schema ABI: condizioni generali di contratto per la fideiussione a garanzia delle operazioni bancarie – measure No. 14251/2003 [ABI scheme: general contractual conditions for the surety guaranteeing banking operations – measure No. 14251/2003]. This scheme is characterized by the omnibus clause, by virtue of which the guarantor provides a guarentees to the debtor of a bank for all present and future obligations assumed towards a bank. It is made up of 13 articles, which define: the subject of the guarantee (Art. 1), the obligations of the guarantor (Articles 2, 3, 4, 6, 7, 8 and 10), the obligations of the bank (Art. 5), the faculties of the bank (Articles 9, 11 and 12), the clauses not applicable to guarantors who act as consumers pursuant to Art. 1469 bis, para. 2, of the Italian Civil Code and provide guarantees in favor of subjects having the same quality (Art. 13). Available: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/59570E8C503E753BC1256FFC0045223C/$File/p14251.pdf [last viewed 20.06.2021].

[9] In a contractual practice, the extension can refer to all the obligations of the principal debtor deriving from banking operations carried out with the creditor bank, or even to all the obligations of principal debtor, even not deriving from strictly banking operations. The extension, as well as objective, can be subjective, in the sense that the guarantor is responsible not only for the obligations of the principal debtor, but also for those of his assignees; furthermore, the extension can be subjective in the sense

debtor towards the bank, in the past without indication of maximum value, and without time limits. The omnibus clause can therefore have greater or lesser amplitude, depending on whether or not the maximum value of the guarantor's commitment is indicated, and the expiry date of its bond; depending on whether or not its commitment refers only to the obligations of the principal debtor arising from banking transactions, and whether the type of banking operations giving rise to obligations is specified or not. In the most recent practice, a number of guarantee models have been introduced, containing a different extension of the guarantor's commitment. The most significant change is that an omnibus bank guarantee form was introduced with an indication of the maximum amount for which the guarantee is given.

The Bank of Italy with the provision No. 55 of 2 May 2005[10], had considered the guarantees, stipulated in accordance with the contract draft prepared by the ABI in 2003[11], in contrast with the prohibition of competitive agreements pursuant to Art. 2, co. 2, lett. a), of Law No. 287/1990, with the consequent nullity of the same[12].

Recently, courts have finally opened a front of particular interest with regard to the judgment of validity of the omnibus guarantee contracts stipulated in compliance with the 2003 ABI model. The problem arose of the fate of the guaranteeagreements reproducing the model deemed anti-competitive stipulated before the provision of the Bank of Italy[13]. The story originates from the provision of

of the transmission of the guarantor's obligation to his heirs and assignees, jointly and severally, in derogation of the civil law principle, which excludes solidarity between the debtor's coheirs.

[10] Bank of Italy, measure No. 55 del 2 maggio 2005. ABI – Condizioni generali di contratto per la Fideiussione a garanzia delle operazioni bancarie [ABI – General contractual conditions for the surety guaranteeing banking operations]. Available: https://www.bancaditalia.it/compiti/vigilanza/avvisi-pub/tutela-concorrenza/provvedimenti/prov_55.pdf [last viewed 13.06.2021].

[11] On the point see *Sparano E.,* "Diritto della banca e del mercato finanziario" [Bank and financial market law] Vol. XV, No. 4, 2001.

[12] Treviso Court Section III, judgement No. 1632/2018, which addresses the problem of the clauses referred to in Articles 2, 6 and 8 of the standard guarantee scheme, drawn up by ABI in October 2002. These are the articles relating to the so-called "reviviscence" clause, or the clause that requires the guarantor to hold the bank harmless from events subsequent to the fulfillment by virtue of which the bank found itself having to return the payment received (the most recurrent, the declaration of ineffectiveness of the payment pursuant to Art. 67 LF), of the clause derogating from Art. 1957 of the Italian Civil Code and the clause that extends the guarantee also to the obligations of restitution of the debtor deriving from the invalidity of the basic legale relationship. As part of a special enforcement proceeding promoted by the Bank of Italy pursuant to Art. 2 and 14 of Law No. 287/1990 and aimed at ascertaining whether the provisions of the aforementioned negotiation method could take on anti-competitive characteristics, the opinion of 22 August 2003 of the AGCM was acquired. The anti-competitive nature of the clauses was in particular identified in the attitude of the clauses in question, rather than guaranteeing access to credit (a function recognized and deemed to be adequately pursued also by the "first request" payment clause), to impose liability on the gurantor of the negative consequences deriving from non-compliance with the bank's due diligence obligations, or from the invalidity or ineffectiveness of the principal obligation and of the acts in settlement of the same. At the end of the administrative procedure, the Bank of Italy issued provision No. 55 of 2005, ascertaining that Articles 2, 6 and 8 of the contractual basis, prepared by the ABI for the bank operations guarantee (omnibus guarantee) contained provisions which, if applied uniformly, were in conflict with Art. 2, para. 2, letter a), of Law No. 287/90 and sending the ABI to disseminate new contractual basis to the banking system, as amended by the aforementioned provisions. Available: https://www.expartecreditoris.it/wp-content/uploads/2018/09/tb-treviso-dott.-cambi.pdf

[13] Before being disclosed to associated banks, by letter received on 7 March 2003, the ABI communicated the contractual basis pursuant to Art. 13 of the Law No. 287/90, considering that it did not constitute a violation of the provisions of Art. 2 of the aforementioned law. In April and May 2003, the Bank of Italy invited the ABI to eliminate some provisions that were critical from a competitive point of view from the negotiation schedules. By letter received on 11 July 2003, the ABI sent a new version of

the Bank of Italy No. 55 of 2 May 2005 made by the Supervisory Authority by virtue of its function as Authority for competition between credit institutions pursuant to Law No. 287 of 1990, Articles 14 and 20[14], (in force until the transfer of powers to the AGCM, with the Law No. 262 of 2005[15], starting from 12 January 2016), concerning the possible contrast of the omnibus guarantee scheme prepared by the ABI with Art. 2 of Law No. 287 of 1990.

The Bank of Italy's preliminary investigation focused on the clauses of the ABI Scheme "which could have anti-competitive effects after a general adoption by the banks, lacking a balanced reconciliation of the interests of the parties". Specifically, the Authority had focused on the provisions that placed on the guarantor obligations not provided for by the regulatory system of the surety, as an exception to the regulation itself. The Bank of Italy had considered the aforementioned clauses relevant since, being included in the ABI Scheme, could have a diffusion that could lead to a standardization of the offer on the national territory, excluding the aforementioned "reconciliation of the interests of the parties".

2. The Prohibition of Restrictive Agreements

Competition laws carry many prohibitions, but not as many remedies. They govern the interventions of the authorities (or public enforcement). But only in two cases do they indicate the consequences of the violation of antitrust rules in relations between private individuals (or private enforcement): the nullity of agreements and the nullity of the acts of concentration.

This is the case of the so-called "downstream contracts". Those contracts, abstractly legitimate – because otherwise nothing would stand in the way of concluding them in those terms – are instruments of a violation of the free market, as through them the companies participating in an agreement or holders of a dominant position implement in relations with third parties their anti-competitive purposes. Contracts whose 'vice' is therefore a reflection of something upstream.

Given the reflex character of the vice, a mention of the warnings present in the law regarding precise definition of upstream is preliminary to the discourse. The first case, expressly regulated, is that of agreements.

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the contractual basis. In order to ascertain whether the notified contractual scheme could constitute an anticompetitive restricting agreement, the Bank of Italy – also considering the guidelines of the *Autorità garante della concorrenza e del mercato*, expressed in the opinion of 22 August 2003 – opened on 8 November 2003 the measure of inquiry by Articles 2 and 14 of the law No. 287/90. 6. On 1 September 2004 a request for information was sent to some banks, aimed at ascertaining whether the contractual clauses used by them for the omnibus guarantee differed from those contained in the scheme prepared by the ABI. The replies from the banks were received during the same month. On 1 September 2004, the ABI sent a statement of defense to the Institute, followed on 20 September by a request for extension of the procedure, motivated in relation to the need to carry out further information on the legal status of the omnibus guarantee and on the role of it in banking practice; a second defense was sent by the ABI on 28 December 2004. On 9 March 2005 the ABI had access to the procedural file. On 25 March 2005, the final statement of the ABI was received.

[14] Law No. 287 of 1990, Articles 14 and 20. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato [last viewed 20.08.2021].

[15] Legge 28 dicembre 2005, No. 262 "Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari" [Provisions for the protection of savings and discipline financial markets]. *Gazzetta Ufficiale* No. 301 del 28 dicembre 2005, Supplemento ordinario No. 208. Available: https://www.gazzettaufficiale.it/eli/gu/2005/12/28/301/so/208/sg/pdf [last viewed 12.08.2021].

Such are the agreements, or the concerted practices, or the resolutions of bodies that group companies, which have the object or effect of "preventing, restricting or distorting the game of competition". Such object or effect is prohibited, and these cartel agreements or practices are therefore illegal. Textual consequence of the prohibition is the "nullity" of the agreement. Invalidity ill referable to those understandings that are mere "practices", and not agreements or resolutions, but which in any case express the prohibition of the distortion of competition, whether or not the way to perpetrate it is negotiated. The agreements that the use defines as exploitation, but also those of sharing, as an alternative to those of exclusion, achieve their anti-competitive purpose through the stipulation with third parties of contracts of instrumental content to the agreement. The ruling declaring the agreement null and void removes its legal effects – the constraint on the autonomy of the participants – but does not in itself remove its material or economic effects, such as contracts concluded with third parties in implementation of the agreement.

With respect to which a different and autonomous judicial request is required.

The second case is the abuse of a dominant position, no matter how acquired. This abuse is also prohibited and therefore illegal. The abuse is also mainly perpetrated through the stipulation with third parties of instrumental content contracts. That being an expression of it – because they are direct exercise of the dominant position and precisely tools for the concrete restriction of competition, and therefore "abuses" – are also affected by the prohibition.

On closer inspection, the first case approaches the second: the agreement would not be able to be significantly restrictive and then prohibited if the companies participating in the cartel did not acquire, by understanding each other, a position of power in the market that would allow them to impose own conditions to third parties. And imposing them, restricting competition, is an exercise – obviously abusive as it is precisely restrictive – of the position constituted by the cartel, therefore included in the prohibition[16].

EU[17] and national legislation provide a general definition of prohibited agreements and a list of the operations considered to be included in the prohibition. Both legislators do not limit themselves to prohibiting formal contractual agreements but also refer to concerted practices and therefore to those behaviors knowingly common to several companies and to decisions and resolutions of business associations and others like these[18].

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[16] *Gentili, A.* La nullità dei "contratti a valle" come pratica concordata anticoncorrenziale (Il caso delle fideiussioni ABI), [The nullity of "downstream contracts" as an anti-competitive concerted practice (The case of ABI sureties)], Giustizia Civile, fasc.4, 1 aprile 2019, p. 675.

[17] Art. 81, para. 1 of the EC Treaty, prohibits all agreements between undertakings and concerted practices "which may affect trade between Member States and which have the object or effect of preventing, restricting or distorting internal competition. of the common market". An "understanding" is defined as an agreement between companies aimed at limiting or eliminating competition between competing companies, in order to increase prices and profits without producing objective compensatory advantages.

Also the Art. 81.1 prohibits not only agreements by which competing companies in the same market limit their competition with each other (horizontal agreements, such as common agreements for the fixing of prices, sharing of markets, limitation of production, etc.) but also those cd vertical, through which companies that are at different stages of the production or distribution of a product restrict competition between one of them and third parties (for example exclusive procurement, exclusive distribution, selective distribution, price resale, twinning, franchising, etc.).

[18] *Buonocore, V.* L'impresa, in Trattato di diritto commerciale [The company, in the Commercial Law Treaty]. Torino, 2002.

Both disciplines require that the restrictive agreements of competition are prohibited but provide for the possibility of derogations or exemptions if the agreement is justified in the perspective of economic progress and goes in favor of consumers. However, the operation of these exceptions is different in the two systems. For the Italian legislator the restrictive agreements are considered in themselves prohibited, unless they are authorized by the Authority for competition and the market[19], while the European legislator provides for the system of the legal exception, that is the rule for which the restrictive agreements that comply with the criteria set for the derogation are in themselves lawful regardless of a prior decision to do so (except for the existence of the burden of proof on the company with regard to the existence of such conditions).

In both jurisdictions the violation of the prohibition results in the invalidity of the agreements even if this type of sanction can be ineffective because of the agreements, even if invalid, can be voluntarily performed by the parties or may be de facto behavior such as the concerted practices, for which the sanction of invalidity is not significant[20]. Therefore, the European regulation provides that the Commission can impose fines or periodic penalty payments on the companies and the Italian legislation provides for the authority to apply administrative sanctions calculated on the turnover of the companies involved.

The concerted practices, which refer to the conscious parallelism[21] of companies that standardize their behavior on the market, are particularly important; however, there is a tendency to point out that such conduct, in order to integrate an agreement, must be accompanied by factual elements that "qualify" it as the result of an informed choice of companies (for example, evidence of information exchanges[22]).

Both the Italian and the Community standard contain a list of examples, not mandatory, of agreements considered anti-competitive. The "black list" includes both horizontal agreements, that is among companies that operate at the same

[19] *Calamia, A. M.* La nuova disciplina della concorrenza nel diritto comunitario [The new competition rules in Community law]. Milano, Giuffrè, 2004.

[20] *Risso, F.* Le intese anticoncorrenziali: prova, sanzioni e autorizzazioni in deroga [Anti-competitive agreements: evidence, sanctions and authorizations in derogation]. Foro Amministrativo: Consiglio di Stato, 2008.

[21] Antitrust Authority, 11/06/2013, No. 24405 according to whom some pipelines built in the sector of liner shipping to and from Sardinia which resulted in a significant increase in ticket prices are the result of an understanding, in the form of a concerted practice, which finds no alternative justification except in the concertation between the shipping companies that ferried on the same routes during the summer season 2011 with the effect of causing an alteration of the competitive process in the passenger transport market on the Civitavecchia-Olbia, Genoa-Olbia and Genoa-Porto Torres routes. Antitrust Authority, 23/04/2013, No. 24327: in the legal assistance professional service market, some evaluation practices, resolutions and regulations, adopted by many Bar Councils regarding enrollment in the special section of the Community lawyers established therein (in this case, Chieti, Rome, Milan, Latina, Civitavecchia, Tivoli, Velletri, Tempio Pausania, Modena, Matera, Taranto and Sassari), have entered into anticompetitive restrictive agreements by imposing, for example in different ways, significantly onerous conditions held by professionals interested in the recognition in Italy of the title of lawyer obtained abroad, whose registration is subject to the passing of the mandatory "test" by the applicants, with the effect of discouraging Community lawyers from establishing and exercising their professional activity in Italy.

[22] *Guglielmetti, G.* Le nozioni di impresa e di intesa [The notions of business and understanding]. In: *Ghidini, G., Libonati, B., Marchetti, P.* (eds.), Concorrenza e mercato. Rassegna degli orientamenti dell'Autorità Garante, [Competition and the market. Review of the guidelines of the Guarantor Authority], Milano, 1995, 19.

economic level, and vertical agreements, for example those between manufacturer and retailer.

The typical hypotheses concern:

- agreements on purchase prices, sales prices or contractual conditions;
- agreements that limit market access;
- market sharing agreements;
- agreements that violate equal treatment;
- agreements imposing additional services not linked to the subject of the contract.

The agreements are not prohibited in general, but only when they consistently prevent, restrict or falsify the game of competition within the national (or Community) market or one of its "relevant parts"[23]. This the concept of a relevant market appears, which takes the form of a general parameter in light of which to assess the existence of an effective injury to competition.

3. The Consumer Compensation in the Light of Sentence No. 2207/2005 of the Joint Sessions of the Supreme Court and Its Jurisprudential Evolution

The main junction of the Verona Court Ordinance is the reference to the well-known sentence of the Supreme Court in Joint Sections No. 2207/2005, concerning the legitimization of the request for compensation of the damages of the consumer who remained extraneous to the anti-competitive agreement, and who has stipulated a contract constituting the consequence of the latter.

According to the Judges of Piazza Cavour, the "Antitrust" Law No. 287/1990 provides rules to protect the freedom of competition having as recipients not only the entrepreneurs, but also the other subjects of the market, or anyone who has an interest, processually relevant, to the preservation of its competitive character to the point of being able to allege a specific consequent prejudice caused by the prohibited agreement. Taking this into account, on the one hand, that, as a result of an agreement restricting the freedom of competition, the consumer, the final purchaser of the product, sees his right to an effective choice between competing products impaired, and, on the other hand, that the consequent contract[24] constitutes the consequence of the prohibited agreement, which is essential for achieving and implementing its effects.

Therefore, since the violation of interests recognized as relevant by the legal system integrates, at least potentially, the un fair damage *ex* Art. 2043 cc[25], the final

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[23] In the judgement of June 4, 2009, case No. C-8/08, T-Mobile Netherlands, the Supreme Court of UE, addressed the issue concerning the necessary number of contacts to talk about the agreement, concluding that "the number among the concerned operators is not so much relevant, as the fact of ascertaining whether the contact, or the contacts that have taken place, have allowed them to take into account the information exchanged with competitors to determine their behavior on the market and to knowingly replace practical cooperation between them for the risks of competition". Within the same, it is also affirmed the principle according to which even the single contact, if regarded as causing damage, can be considered as an agreement.

[24] *Longobucco, F.* Violazione di norme antitrust e disciplina dei rimedi nella contrattazione "a valle", [Violation of antitrust rules and discipline of remedies in "downstream" bargaining], Edizioni Scientifiche Italiane, 2009.

[25] Art. 2043 Civil Code: Compensation for unlawful acts. "Any intentional or negligent act, which causes unjust damage to others, obliges the person who committed the act to compensate the damage". Civil code, Book 4, "Of the obligations", ix "Of illicit facts".

consumer, who suffers damage from a contract that does not admit alternatives due to the collusion, has at his disposal, even if he is not part of a competitive relationship with the entrepreneurs who are the authors of the collusion, the action of ascertaining the invalidity of the agreement and compensation for damage pursuant to Art. 33 of the Law No. 287 of 1990[26], action whose knowledge is referred to by the latter rule to the jurisdiction of the competent Court for the territory where the specialized section is established (referred to in Art. 1 of Legislative Decree of 26 June 2003, No. 168[27], and subsequent modifications[28]).

In this ruling, the Joined Sessions of the Supreme Court, faced first and foremost, the problem of the nature and purpose of the law antitrust emphasizing as the same – to be read moreover which is the implementation of the Art. 41 of the Constitution[29] – its object was the protection of the competitive structure of the market.

Secondly, they dealt with the existence, for the consumer, of the right to act pursuant to Art. 33 of the Law No. 287 of 1990 ("[..]The action of the consumer tending to the elimination of the prejudicial consequences deriving from an agreement restricting competition pursuant to Art. 2, para. 2 of Law No. 287 of 1990, assuming the ascertainment of the nullity of the agreement itself, still implies the allegation of an illicit fact in the structure of which the psychological element of intent or guilt is inherent, so that, regardless of the formal denomination conferred, it must be qualified as a compensatory action and not a restitution, with the consequence that it becomes relevant to establish whether this action can be carried out pursuant to Art. 33, para. 2 of Law No. 287 of 1990 [..]").

With this innovative decision, the Joined Sessions distanced themselves from the previous Supreme Court sentence of December 9, 2002, No. 17475[30] – which

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26 Art. 33 of the Law No. 287 of 1990: "Jurisdiction": 1. Judicial protection before the administrative judge is governed by the administrative process code. 2. Actions for nullity and compensation for damage, as well as appeals aimed at obtaining urgent measures in relation to the violation of the provisions referred to in titles from I to IV are promoted before the competent court for the territory in which the section is established specialized referred to in Art. 1 of Legislative Decree 26 June 2003, No. 168, and subsequent amendments. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato

27 Art. 1 of Legislative Decree 26 June 2003, No. 168 "Establishment of specialized sections on business matters": "They are established in the courts and appellate courts of Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice sections specialized in the field of company, without additional charges for the state budget or increases in staffing resources". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003;168

28 In the present case, after the imposition by the Antitrust Authority of numerous insurance companies of a sanction for participating in an anticompetitive restricting agreement, the consumer had sued before the lay magistrate, its insurance company, requesting reimbursement of a part (20%) of the premium paid for a motor liability insurance policy, assuming that the amount of the premium had been abusively influenced by the participation of the insurance company in the prohibited agreement.

29 Art. 41 of Italian Constitution: "Private economic initiative is free. It cannot take place in conflict with social utility or in a way that could damage security, freedom, human dignity".

30 With sentence No. 17475 of 27 June / 9 December 2002, the Supreme Court of Cassation, with reference to the action brought against the Insurance Companies condemned by the Competition and Market Authority with provision No. 8546 of 28 July 2000 for illegitimate establishment of a cartel to the detriment of its customers, stated that the aforementioned request: a) must be qualified as an ordinary liability action subject to the ordinary criteria of jurisdiction provided for by the code of civil procedure (value and territory), and not those of the action pursuant to Art. 33, para. 2 of Law No. 287/90, which provide for the exclusive knowledge of the Court of Appeal in a single degree of merit; b) can be proposed to the individual Insurance Company, without the need to extend the same to other Insurance Companies condemned by the Guarantor Authority, but not to ISVAP

had excluded the legitimization of the consumer to the aforementioned actions on the assumption that the antitrust law was intended essentially to regulate relations between entrepreneurs.

In the subsequent pronouncement of legitimacy on the subject (Cass. Civ., 28 October 2005, No. 21081)[31], while reiterating the principle dictated by the Joined Sessions in matters of legitimacy to act, the real procedural difficulty in which the consumer who decides to take legal action pursuant to Art. 33, Law No. 287 of 1990 may incur, was examined. Beginning with the identification of the subjective element of the person committing the infraction, the quantification of the damage, the burden of proof[32]: problems that have not been fully addressed in the aforementioned decisions and remain an unknown factor which only the application practice will be able to cope[33]. Thus, for example, on the burden of proof, in a more recent judgment of merit, it was stated that "the consumer who promotes the compensation action pursuant to Art. 33, Law No. 287/90, [..], cannot exempt from the burden of proving to have suffered an actual prejudice as a result of the anticompetitive act, in homage to the general principle sanctioned by the Art. 2697 of the Civil Code, according to which those who want to assert a right in court must prove the facts that constitute their basis"[34].

In other decisions (eg Court of Cassation, 13 July 2005, No. 14176; Court of Cassation, 26 August 2005, No. 17398[35]), the Court expressed the clear opinion of maintaining the substantial system described, insisting on the burden of proof charged to the plaintiff who wants to prove his damage. Therefore, the need to produce the ascertainment of the anticompetitive agreement, from which the judge will be able with legal criteria to ascertain the existence of the element that guarantees the possibility of obtaining compensation for damage, that is the existence of the "causal link", not always easy to demonstrate.

The Supreme Court recently returned to the question (with sentence No. 29810 of 12.12.2017)[36] and reiterating that "faced with an agreement restricting the freedom

(lacking passive legitimacy). Available: http://www.ordineavvocatifrosinone.it/sites/default/files/uploaded/2003%20Sentenza%20n.%2017475%20del%2027-06-2002%20Cassazione.pdf [last viewed 03.08.2021].

[31] Cass. Civ., 28 October 2005, No. 21081. Available: https://www.webgiuridico.it/sentenze2015/21081-2015.htm [last viewed 03.08.2021].

[32] It is true, however, that the combined chambers of 2006 had considered that: "Consumer's action aimed at eliminating the prejudicial consequences deriving from a competitive restricting agreement pursuant to Art. 2 para. 2 of Law No. 287 of 1990, presupposing the ascertainment of the nullity of the agreement itself, still implies the allegation of an illicit fact in the structure of which the psychological element of willfulness or guilt is inherent, so that, regardless of the denomination formal conferral, must be qualified as a compensation and non-restitution action".

[33] *Poncibò, C.* Profili di risarcibilità del danno per violazione della normativa antitrust [Damage compensation profiles for violation of antitrust legislation]. Giust. Civ., 2006.

[34] Naples Court of Appeal, Civil Decision. 19 October 2007. Available: https://www.altalex.com/documents/news/2008/09/24/concorrenza-e-risarcimento-sulla-legittimazione-ad-agire-del-consumatore [last viewed 04.08.2021].

[35] Court of Cassation, 13 July 2005, No. 14176. Available: https://renatodisa.com/corte-di-cassazione-sezione-vi-ordinanza-8-luglio-2015-n-14176-la-presunzione-di-distribuzione-ai-soci-degli-utili-non-contabilizzati-puo-operare-a-condizione-che-la-ristrettissima-base-sociale-o/ [last viewed 05.08.2021]; Court of Cassation, 26 August 26 2005, No. 17398. Available: https://www.altalex.com/documents/news/2006/09/15/le-azioni-individuali-dei-consumatori-nel-diritto-antitrust-italiano [last viewed 05.08.2021].

[36] Court of Cassation sentence No. 29810 of 12.12.2017, according to which "They are not excluded from the verification of nullity pursuant to Art. 2, co. 3, Law 287/1990, contracts that constitute "downstream" application of an anti-competitive agreement prohibited by Art. 2 Law 287/1990 for

of competition, the consumer, the final purchaser of the product offered by the market, sees debased (if not trampled on) its right to an effective choice between competing products and, on the other, that the subsequent contract constitutes the consequence of the prohibited agreement, essential to achieving and implementing its effects", established that between the subsequent contracts[37] or shops of the illegal agreements (previously concluded), also include the contracts stipulated before the ascertainment of the agreement by the Authority, provided that the agreement is prior to the disputed store, concerning the regulation of anticompetitive acts all the subsequent events that create distortive effects on competition.

The question of law addressed in this ruling (very similar to that of the Court of Verona in question), concerns a subsequent contract (in this case, a guarantee agreement that accesses a bank account contract), and in particular its nullity for violation of Art. 2 of the Law No. 287 of 1990[38], by virtue of the same provision of the Bank of Italy, which occurred upon stipulation of the guarantee agreement[39]. In particular, according to the Supreme Court the nullity of which is discussed and which would be affected the guarantee agreement derives from the violation of the mandatory rule, pursuant to Art. 1418, para. 1[40], of the Italian Civil Code and, in particular, of the regulation deemed to be of an economic public nature contained in Art. 2, para. 2, lett. a) of the Law No. 287 of 1990.

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the sole fact of having been stipulated prior to the recognition of the unlawfulness of the agreement by the Guarantor Authority".

[37] With regard to the protection of competition, the concept of negotiation link is also widespread in other European legal systems. In Germany, there is talk of instrumental acts of the anti-competitive agreement (*Ausführungsvertrage*) when these are put in place according to a model of "external competition" to anti-competitive behavior. Following the recognition of the recourse of the negotiating link, the principle of simul stabunt simul cadent will be applicable, according to which, following the declaration of invalidity of the agreement, the same fate will also be reserved for contracts stipulated in execution of this.

[38] Art. 2 of the Law No. 287 of 1990, "Agreements restricting the freedom of competition". 1. Agreements and/or concerted practices between companies as well as resolutions, even if adopted pursuant to statutory or regulatory provisions, of consortia, business associations and other similar bodies are considered to be understood. 2. Agreements between companies which have the object or effect of preventing, restricting or significantly distorting competition within the national market or in a significant part of it are prohibited, including through activities consisting in:
a) directly or indirectly fix the purchase or sale prices or other contractual conditions;
b) prevent or limit production, market outlets or accesses, investments, technical development or technological progress;
c) share markets or sources of supply;
d) apply, in commercial relations with other contracting parties, objectively different conditions for equivalent services, so as to determine unjustified competitive disadvantages for them;
e) make the conclusion of contracts subject to the acceptance by the other contracting parties of supplementary services which, by their nature or according to commercial usage, have no relationship with the object of the contracts themselves. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato.
3. Prohibited agreements are void for all purposes.

[39] *Belli, C.* Contratto a "valle" in violazione di intese vietate dalla Legge Antitrust [Downstream contract in violation of agreements prohibited by the Antitrust Law]. *GiustiziaCivile.com,* 25 maggio 2018. See also *D'Orsi, S.* Nullità dell'intesa e contratto "a valle" nel diritto antitrust [Nullity of the understanding and "downstream" contract in antitrust law]. *Giurisprudenza Commerciale,* fasc. 3, 2019, p. 575.

[40] Art. 1418, para. 1 of Civil Code "Causes of nullity of the contract". 1.The contract is void when it is contrary to mandatory rules, except that the law provides otherwise. 2.The lack of one of the requirements produces nullity of the contract indicated by Art. 1325, the unlawfulness of the cause, the unlawfulness of thevreasons in the case indicated by Art. 1345 and the lack in the object of the requirements established by Art. 1346. 3. The contract is also null and void in the other cases established by the law.

As stated above, the order of the Verona court also ruled on the invalidity of the guarantee issued by the opponents as members of the beneficiary company; however the Verona judge overrode their application, since even if consumers, they would not have deduced anything on the point, failing to the indications of the Joined Sessions of 2005 according to which "it is not enough that the consumer attaches the nullity of the agreement, but it is also necessary that specifies the consequence that this failure has produced on its right to an effective choice between a plurality of competing products".

The nullity of the agreement would not be comparable for the peaceful opinion of most of the doctrine[41] to the "nullity of protection" of the consumer, wanting here the legislator to immediately protect the general interest in the freedom of competition set forth in Art. 41 of the Constitution and the relevant Community principles.

So, just the Art 2 co. 2 lett. a) of the Law No. 287/1990, moving in a clear "pro-competitive" perspective, would be in fact violated every time the subsequent contract stipulates, for banking practice, the uniform application by the banks of clauses that involve a clear increase in the positions of the guarantors by virtue of an agreement, previously stipulatedbetween the banks themselves and prohibited pursuant to the aforementioned law.

Summary

This study reaches the following conclusions:

1. According to sentence No. 2207/2005 of the United Sections of the Supreme Court, the "Antitrust" Law of 1990 concerns not only entrepreneurs, but also all the other market players, who have a procedurally relevant interest in its competitiveness and who can demonstrate to having suffered injury as a result of restrictive agreements;
2. The procedural tools available to the final consumer are the action to ascertain the nullity of the restrictive agreement and that of compensation for damage pursuant to Art. 33 of the law No. 287 of 1990, an action whose knowledge is left by the latter provision to the competence of the court pertaining to the territory in which the specialized section is established;
3. Recent case (Cass. Civ. Sent. No. 29810/2017) has established that "subsequent contract" of illicit agreements (concluded "upstream") also include contracts stipulated prior to the assessment of agreement by the Authority, provided that the agreement is prior to the contested transaction, concerning the discipline on anti-competitive acts all subsequent events that distort competition. In the present case, according to the Supreme Court, the nullity from which the surety contract would be affected derives from the violation of the mandatory rule, pursuant to Art. 1418, para. 1, of the Italian Civil Code

[41] *Allegri, V.* Nuove esigenze di trasparenza del rapporto banca-impresa nell'ottica della tutela del contraente debole [New transparency requirements of the bank-company relationship with a view to protecting the weak contractor]. Banca borsa, 1987, I, 49 e*t seq*.; *Alpa, P. G.* Illecito e danno antitrust: Casi e materiali [Tort and antitrust damage: Cases and materials]. Turin, 2016, 2 pp. and 155 pp; *Amadio, G., Macario F.,* (eds.), VV. Diritto civile. Norme, questioni, concetti [Civil right. Norms, issues, concepts]. Parte I, Bologna, 2014, p. 578; *Catricala', A., Gabrielli, E.* I contratti della concorrenza [Competition contracts]. Turin, 2011, 82 pp.

and, in particular, of the provision deemed to be of economic public order contained in Art. 2, para. 2, lett. a) of the Law No. 287 of 1990;

4. Finally, the order of the Court of Verona of 1 October 2018 also pronounces on the nullity of the guarentee issued by the opponents as shareholders of the beneficiary company; however, the Veronese judge overrides their request, since even if consumers, they would not have deduced anything on the point, failing to comply with the indications of the United Sections of 2005 according to which: "it is not enough for the consumer to allege the nullity of the agreement, he must also specify the consequence that this flaw has produced to his right to an effective choice between a plurality of competing products".

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