OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 26 January 2006 [1]

I — Introduction

1. These cases concern four references for preliminary rulings, in which the Giudice di pace di Bitonto (Magistrates' Court, Bitonto) (Italy) poses five questions on the interpretation of Article 81 EC. The questions arose in connection with claims against a number of insurance companies for the repayment of excessive premiums. The claims were made after the Italian competition authority had established that the insurance companies were guilty of prohibited competitive practices.

2. The questions arose in disputes between Manfredi and Lloyd Adriatico Assicurazioni SpA (Case C-295/04), between Cannito and Fondiaria Sai Assicurazioni SpA (Case C-296/04), between Tricarico and Assitalia Assicurazioni SpA (Case C-297/04) and between Murgolo and Assitalia Assicurazioni SpA (Case C-298/04).

II — Applicable national legislation

3. Article 2(2) of Law No 287 of 10 October 1990, [2] the Italian competition law, prohibits cartel agreements between undertakings which serve to prevent, restrict or distort, or have the effect of preventing, restricting or distorting, competition on the national market or a part thereof.

4. According to Article 2(1) of that law, cartel agreements include agreements or concerted practices between undertakings and decisions, even if adopted on the basis

1 — Original language: Dutch.

2 — GURI No 240 of 13 October 1990.

of statute or regulation, of consortia, associations of undertakings and other, similar entities.

5. Article 2(3) of Law No 287/90 declares such prohibited agreements to be legally void.

6. Article 33 of the Italian competition law stipulates that applications for invalidity proceedings, claims for damages and requests for transitional arrangements with respect to infringements of the provisions of Titles I to IV of the law, which include Article 2, must be lodged with the Corte d'appello (Court of Appeal) having territorial jurisdiction.

III — The main action and the questions referred for a preliminary ruling

7. The referring court describes the background to the main actions as follows.

8. By measures of 8 September 1999, 10 November 1999 and 3 February 2000, the Italian Autorità garante della concorrenza e del mercato (the Italian competition authority) initiated proceedings for infringement of Article 2 of the Italian competition law (Law No 287/90) against various insurance companies, including the three defendants in the main action. They are accused of entering into an agreement inconsistent with that provision on the tied selling of various products and the exchange of information between competing undertakings. The cases here at issue concern only the latter practice.

9. The competition authority has established that in the period from 1994 to 1999 the rise in RC (civil liability) auto insurance premiums in Italy, unlike the rest of Europe, was excessive and exceptional. As such insurance is compulsory, the demand for it is inelastic. For consumers confronted with an increase in premiums, the choice is not to use their vehicle or to pay the higher premium.

10. The competition authority has also pointed out that the RC auto insurance market is characterised by high access barriers, especially as an efficient distribution network and a considerable network of agencies are needed throughout the country for the settlement of claims.

11. It is also evident from the extensive information gathered by the competition

authority that many insurance companies offering RC insurance have exchanged information on a considerable scale on all aspects of that activity, namely prices, deductions, receipts, the cost of damages, distribution costs, etc.

12. The investigations eventually resulted in the measure of 28 July 2000.[3] In that measure, the Italian competition authority stated that the insurance companies involved had adopted an unlawful agreement, contrary to antitrust rules, for the purpose of exchanging information on the insurance sector which enabled them to coordinate and control the prices of RC auto premiums and to impose on consumers, in a coherent fashion, premium increases which were not justified by market conditions and which consumers could not escape.

13. The competition authority's measure was challenged by the insurance companies. It was, however, upheld on appeal by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) and, at a higher level, by the Consiglio di Stato (Council of State).

14. The applicants in the main action brought an action before the Giudice di pace di Bitonto against the insurance companies concerned, demanding the repayment of the premium increases which they were forced to pay as a result of the unlawful competitive arrangement identified by the competition authority. According to the order for reference, repayment is demanded, because of the disadvantage suffered, for the period from 1997 to 2001.

15. It is clear from the documents before the court that the premiums were on average 20% higher than would have been the case if the agreement had not been reached by the insurance companies.

16. The insurance companies maintained during the national proceedings that, under Article 33 of the Italian competition law, the Giudice di pace did not have jurisdiction and that the claim for restitution and/or damages was out of time.

17. As insurance companies from other Member States were also operating in Italy and party to the agreement identified by the competition authority, the referring court takes the view that the contested competitive arrangement also infringes Article 81 EC. Pursuant to Article 81(2) EC, such agreements are void.

18. The referring court considers that any third party, including the consumer and end-

3 — Measure No 8546/2000, to be found at www.agcm.it.

user of a service, is entitled to rely on the invalidity of a cartel agreement prohibited under Article 81(1) EC and to claim damages where there is a causal relationship between the harm suffered and the prohibited agreement.

19. If that is the case, a provision such as Article 33 of the Italian competition law can be regarded as contrary to Community law. After all, proceedings before the Corte d'appello take longer and cost more than proceedings before the Giudice di pace, which may compromise the effectiveness of Article 81 EC.

20. The referring court also has doubts about the compatibility with Article 81 EC of the limitation periods for claiming damages and the amount of damages to be paid pursuant to national law.

21. In these circumstances, the Giudice de pace di Bitonto has decided to refer the following questions:

— Is Article 81 EC to be interpreted as meaning that it renders void an agreement or concerted practice between insurance companies consisting of a mutual exchange of information which makes it possible to increase civil liability auto insurance policy premiums which are not justified by market conditions, having regard, in particular, to the fact that undertakings from several Member States took part in the agreement or concerted practice? [4]

— Is Article 81 EC to be interpreted as meaning that it precludes the application of a national provision similar to that in Article 33 of Law [No 287/90] under which a claim for damages for infringement of Community and national provisions for anti-competitive arrangements must also be made by third parties before a court other than that which usually has jurisdiction for claims of similar value, thus involving a considerable increase in costs and time? [5]

— Is Article 81 EC to be interpreted as meaning that it entitles third parties who have a relevant legal interest to rely on the invalidity of an agreement or practice prohibited by that Community provision and claim damages for the

4 — This is the first question in Cases C-295/04 to C-298/04.

5 — This is the second question in Case C-298/04.

harm suffered where there is a causal relationship between the agreement or concerted practice and the harm? [6]

— Is Article 81 EC to be interpreted as meaning that for the purposes of the limitation period for bringing an action for damages based thereon, time begins to run from the day on which the agreement or concerted practice was adopted or the day on which the agreement or concerted practice came to an end? [7]

— Is Article 81 EC to be interpreted as meaning that where the national court sees that the damages that can be awarded on the basis of national law are in any event lower than the economic advantage gained by the infringing party to the prohibited agreement or concerted practice, it should also award of its own motion punitive damages to the injured third party, making the compensable amount higher than the advantage gained by the infringing party in order to deter the adoption of agreements or concerted practices prohibited under Article 81 EC? [8]

6 — This is the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04.

7 — This is the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04.

8 — This is the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04.

22. Assitalia, the Italian Government, the German Government, the Austrian Government and the Commission of the European Communities have submitted written comments. A hearing was held on 11 November 2005. Assitalia and the Commission explained their positions in greater detail on that occasion.

IV — Analysis

A — *Admissibility*

23. Assitalia claims that the references for preliminary rulings are inadmissible. Initially, the Commission also had doubts in this regard, but changed its mind during the hearing. It pointed out on that occasion that the limited information in the order for reference was not so limited as to prevent other interveners from forming on opinion on the questions referred. I agree with this view. The information obtained from the order for reference, supplemented by information supplied by parties to the main action, provides sufficiently sound a basis for the referring court to be given a useful answer.

24. In this context, I would refer once again to settled case-law which clearly demonstrates that the Court is in principle obliged to answer questions concerning the interpretation of Community law and that it may

refuse to give a ruling only if there is no link between the requested interpretation of Community law and an actual dispute or the subject-matter of the main action, if it is a question of a hypothetical nature or if the Court has insufficient information in fact and in law. [9]

25. Nor is it for the Court to give a ruling on whether or to what extent the referring court has stepped outside the bounds of the action, as Assitalia has argued. [10]

B — *Preliminary comments*

26. Before considering the substance of the questions, I have a number of general comments to make.

27. As will be clear from the following, most of the questions can be answered with the aid of existing case-law. None the less, the questions are of interest, if only because growing importance has been attached to private enforcement since the introduction of Regulation (EC) No 1/2003. [11]

28. Soon after the EEC Treaty entered into force, the Court held that the prohibitions laid down in Articles 81 EC and 82 EC were directly effective and thus that the national courts should safeguard the rights which litigants can derive from those provisions.

29. Despite that case-law, private enforcement in Europe is still in its infancy, or at least it is clearly not practised on the scale familiar from other jurisdictions, especially that of the United States, where some 90% of antitrust proceedings are initiated by private parties. In the European Union, the emphasis has traditionally lain on public enforcement, both by the European Commission and by national authorities.

30. The new rules created by Regulation No 1/2003 may provide greater scope and cause

9 — See, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24, and the case-law cited therein.

10 — Assitalia claims that the referring court raised the question of the applicability of Article 81 EC of its own volition and that the applicants in the main action are relying on the Italian competition authority's ruling to substantiate their claims for damages. That decision simply amounted to an infringement of national competition law. The national court had thus acted contrary to Article 112 of the Italian Code of Civil Procedure.

11 — Council regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

for private enforcement alongside public enforcement. This, in any case, is strongly advocated by the Commission. The advantages and/or desirability of private enforcement have been stressed in various policy documents, communications and speeches. [12] Besides the sanction of invalidity ensuing from Article 81(2) EC, an advantage mentioned in this context is that national courts may award damages. A court should also give a ruling in any dispute brought before it, and it should protect the rights of individuals. As public enforcers, on the other hand, act in the general interest, they often have certain priorities, and not every complaint is therefore considered as to its substance. Furthermore, civil actions may have a deterrent effect on (potential) offenders against the prohibition of cartels and so contribute to the enforcement of that prohibition and to the development of a culture of competition among market operators.

31. The initiative for private actions must come primarily from those whose interests are protected by competition law. Consumers such as those involved in the current main action also fall into this category. The actions themselves are governed, subject to a number of general conditions laid down by Community law, by national procedural and private law. [13] The *Courage and Crehan* judgment, [14] which will be discussed below, may stimulate an increase in the effectiveness of Articles 81 EC and 82 EC by civil law means. The growth in private enforcement may, however, vary from one Member State to another, depending on procedural culture, the restrictions imposed on jurisdiction, rules on the burden of proof, the possibility of class actions, etc. The effectiveness of that enforcement is, of course, partly determined by the accessibility of the national courts. That concern also plays a part in the present case.

C — *The first question: the first question in Cases C-295/04 to C-298/04*

32. The first question asks, in essence, whether the cartel agreements between the

12 — For example, the Commission notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ 2004 C 101, p. 65). Examples of speeches can be found on www.eu.int/comm/competition/speeches, one such being that given by the current Competition Commissioner, Neelie Kroes, 'Damages Actions for Breaches of EU Competition Rules: Realities and Potentials', Speech 05/613, and by her predecessor, Mario Monti, Speech 04/403.

13 — To provide a better insight into the various differences and options in the Member States and to obtain an analysis of constraints, the Commission had a study carried out. Entitled 'Study on the conditions of claims for damages in case of infringement of EC competition rules', it was conducted by the Ashurst consultancy and published on 31 August 2004. The Ashurst report and reports by the Member States can be found on the Commission's website. The Commission has also announced its intention of producing a Green Paper. Immediately before the publication of this Opinion, the Commission placed this Green Paper, entitled 'Damages actions for breaches of the EC antitrust rules' (COM(2005) 672 final), on its website, along with the associated working document of the Commission services (SEC(2005) 1732).

14 — Case C-453/99 [2001] ECR I-6297.

insurance companies not only infringe Article 2 of the Italian competition law but also breach Article 81 EC.

33. As is generally known, both national and European competition law can be applicable simultaneously, and national competition law may not be in breach of European competition law. Article 2 of the Italian competition law prohibits cartels which have the effect of restricting competition on the Italian market or on a part thereof. Article 81 EC also prohibits such cartels if they affect trade between Member States. The applicability of European competition law therefore depends on whether 'trade between Member States is affected'.

34. It follows from the Court's settled case-law that it is enough to show that an agreement may have such an effect. It does not need to be demonstrated that the agreement has actually affected trade patterns. [15] It is also evident from case-law that the criterion of affecting trade between Member States is satisfied where, on the basis of all objective factors of law or fact, it can be expected with sufficient a degree of certainty that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. [16] The effect must be appreciable. [17]

35. The mere fact that an agreement relates only to undertakings in a single Member State does not mean that that agreement is not capable of influencing intra-Community trade. [18] On the contrary, it may be a clear indication that that is indeed the case. The Court has, after all, pointed out on several occasions that an agreement extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about. [19]

36. The national court should therefore consider by reference to various factors, each of which need not be decisive in itself, whether the criterion of trade between Member States being affected has been satisfied. Only if it emerges that that criterion has not been satisfied is the conduct

15 — See Case 19/77 *Miller* [1978] ECR 131, paragraph 15.

16 — See, inter alia, Case 5/69 *Völk* [1969] ECR 295, paragraph 5; Case 99/79 *Lancôme and Cosparfrance* [1980] ECR 2511, paragraph 23; and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

17 — See, inter alia, Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 48.

18 — Judgment in Case 246/86 *Belasco and Others* [1989] ECR 2117.

19 — Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 95, and the case-law cited therein.

concerned subject to Italian competition law alone.

37. The referring court points out in its order for reference that a number of insurance companies from other Member States were party to the prohibited agreement. The mere fact that the participants also include foreign undertakings is an element in the assessment, and possibly an important one, but, taken alone, it is not so decisive as to justify the claim that the criterion of trade between Member States being affected has been satisfied.

38. From the documents before the court, and especially those submitted by Assitalia, it is clear that a large proportion, namely 87%, of the undertakings operating in Italy took part in the prohibited agreement. Seen in the light of the aforementioned case-law, this provides a clear indication that intra-Community trade may have been affected, certainly in combination with the fact that non-Italian undertakings also took part in the agreements.

D — *The second question: the second question in Case C-298/04*

39. By this question, the referring court seeks to establish whether European law precludes the application of a national provision such as Article 33(2) of the Italian competition law. According to this national provision, a claim for damages relating to a breach of competition law must be filed with a different court from that which usually has jurisdiction. This procedure, which departs from the normal competition rules, takes longer and costs more, according to the referring court. This may result in third parties being discouraged from filing claims for damages.

40. The Commission, Assitalia and the Italian Government all point out that it is for the Member State to designate the courts having jurisdiction and to adopt the procedural rules, provided that the principles of equivalence and effectiveness are observed.

41. The Commission also points out that the referring court's reading is based on a misinterpretation of Article 33(2) of the Italian competition law. That provision merely states that the Corte d'appello having territorial jurisdiction has exclusive jurisdiction for actions seeking annulments or damages and temporary arrangements based on the infringement of Italian competition law. The normal rules on jurisdiction apply to actions based on the infringement of Community competition law. Assitalia, too, is inclined to this view.

42. Both claim, albeit with different arguments, that the principle of equivalence has not been breached and that those involved in private law actions based on an infringement of Article 81 EC are essentially better off. The Commission bases its argument on the assumption that proceedings before the Corte d'appello would indeed take longer and cost more. Assitalia points out that, where a claim is based on Article 81 EC, an appeal to two courts is possible. [20]

43. During the hearing, Assitalia referred to the judgment of the Corte di cassazione (Court of Cassation) of 4 February 2005, [21] which essentially confirmed the Commission's view.

44. In an earlier judgment, [22] that judicial body had interpreted Article 33(2) of the Italian competition law to mean that individuals/consumers had no right to bring actions for damages before the Corte d'appello on the basis of that provision. As is evident from the judgment mentioned in point 43, however, that view has been modified.

20 — An objection to this may be that it can also increase the eventual duration of the proceedings.

21 — www.eius.it (click on giurisprudenza, 2005 and No 2207).

22 — Judgment No 17475 of 9 December 2002.

45. In the judgment of 4 February 2005, the Corte di cassazione rightly declared that actions for damages based on the infringement of Italian competition law might be brought before the Corte d'appello not only by undertakings but also by consumers.

46. This would mean that an individual now wanting to bring an action for damages because of harm suffered as a result of a breach of the Italian competition law should apply to the Corte d'appello, which has jurisdiction for such matters under Italian competition law.

47. Be that as it may, this specific jurisdictional rule applies only to actions for damages arising from an infringement of Italian competition law. Where actions for damages are brought because of an infringement of Article 81 EC or 82 EC, it is unconditionally true to say that, in the absence of a rule to the contrary, the court which has jurisdiction under the normal rules on competence has the right to take account of this dispute.

48. I would point out in passing that, since Regulation No 1/2003 entered into force, the requirement has been that, where national courts, including the Corte d'appello, apply national competition law, they should also

apply Article 81 EC, at least if the criterion of 'trade being affected' has been satisfied. From this, it can be deduced that that court similarly has jurisdiction where a claim is also based on the infringement of Article 81 EC. In theory, then, a litigant would have something of a choice depending on whether he based his claim solely on an infringement of European competition law (in which case the Giudice de pace or the Tribunale would have jurisdiction) or based it partly thereon (the Corte d'appello then having jurisdiction, given its exclusive competence to deliver judgments on claims for damages based on an infringement of national competition law).

49. This does not, however, detract from the answer to the question. It is settled case-law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that the principles of equivalence and effectiveness are observed. [23]

50. The principle of equivalence implies that the rules which apply to a claim based on European law must not be less favourable than those which govern similar claims under national law. There appears to be no indication of this, because a claim for damages can be filed either with the Giudice di pace (in which case, it may be argued that preferential treatment is accorded) or with the Corte d'appello [24] (in which case a claim based on European law is accorded the same treatment as a claim based on national law).

51. Where the Giudice di pace has jurisdiction for claims for damages relating to an infringement of European competition law, as in the present case, the question of the possible duration of the proceedings, and thus the question of a possible infringement of the principle of effectiveness, is irrelevant. I would point out — unnecessarily perhaps — that the duration and costs should be disproportionate if the exercise of the rights conferred by the Community legal system is to be frustrated.

23 — See Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and *Courage and Crehan* (cited in footnote 14), paragraph 29, and the case-law cited therein.

24 — It can be inferred from Italian legislation and literature that the Corte d'appello has exclusive jurisdiction only with respect to claims based on Italian competition law. Claims based on the infringement of Article 81 EC are governed by the normal jurisdictional rules. As is clear from point 48, Regulation No 1/2003 requires the Corte d'appello also to apply European competition law where all the criteria are satisfied. A division of claims does not seem desirable for practical reasons. It might, moreover, give rise to legal uncertainty and conflicts of competence.

E — *The third question: the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04*

52. This question asks whether third parties who have a relevant legal interest may rely on the invalidity of a prohibited agreement and claim damages where there is a causal relationship between the agreement or practice and the harm suffered.

53. The answer to this question can be derived from existing case-law. In this context, I make a distinction between the civil law consequences arising directly from the Treaty (the invalidity aspect) and other civil law consequences (such as the damages aspect).

54. Private enforcement plays, or may play, as important a role as administrative enforcement, given the civil law consequences of the infringement of Article 81 EC or 82 EC. The national courts have a part to play in this respect. Over 30 years ago the Court ruled that the prohibitions laid down by what are now Articles 81 EC and 82 EC produce, by their nature, direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard. [25] The importance of complying with the prohibition laid down in Article 81(1) EC is also underlined by the fact that any agreements or decisions prohibited pursuant to Article 81(2) EC are to be automatically void. [26] The Court has recalled and also further explained this in a number of judgments. [27] Such invalidity is absolute and may be relied on by anyone.

55. Consequently, it is obvious that this part of the question can be answered in the affirmative. During the hearing Assitalia claimed that the present case concerned a concerted practice, not an agreement or a decision. The invalidity aspect was therefore irrelevant. This may well be, but the particular importance of this question lies in the civil law consequences for third parties of practices prohibited by Article 81 EC. Invalidity is one thing, claims for damages are another.

56. The Treaty has less to say about the latter aspect than about invalidity. In principle, national law must therefore be con-

25 — Case 127/73 *BRT* [1974] ECR 51, paragraph 16.

26 — In this context, I refer once again to Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 36 and 39.

27 — For example, Case 56/65 *Société technique minière* [1966] ECR 235; Case 22/71 *Béguelin* [1971] ECR 949, paragraph 29; and Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 26. More recently, *Courage and Crehan* (cited in footnote 14).

sulted. However, this is subject to a number of general conditions, which can be inferred from the *Courage and Crehan* judgment. In that judgment, the Court considered the possibility of compensation. First of all, the Court states that: 'As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see inter alia the judgments in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and in Case C-213/89 *Factortame and Others* [1990] ECRI-2433, paragraph 19).' [28]

57. The Court goes on to say that '[t]he full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) 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' and adds that 'the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are 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'. [29]

58. From this, it is clear that this part of the question, too, can be answered in the affirmative.

F — *The fourth question: the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04*

59. This question focuses on the limitation periods for claims for damages: does the limitation period begin to run from the day on which the agreement or concerted practice was adopted or the day on which the agreement or concerted practice came to an end?

60. It should first be pointed out that there are no Community rules on this aspect. The only time-limits governed by rules are those laid down in Regulation No 1/2003 and Regulation (EEC) No 2988/74, [30] but they

28 — *Courage and Crehan* (cited in footnote 14), paragraph 25.

29 — *Courage and Crehan* (cited in footnote 14), paragraphs 26 and 27.

30 — Regulation of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

apply only in the context of administrative enforcement by the Commission. They are not relevant to civil actions for damages brought before national courts.

61. As, then, there are no Community rules, the answer is, as with the previous questions, that it is for the domestic legal system of each Member State to designate the court having jurisdiction and to lay down the procedural rules, provided that the principles of equivalence and effectiveness are observed. This means that the limitation periods for actions for damages based on the infringement of the European competition rules must not be less favourable than those applicable to similar national claims and that they must in no circumstances be such as to render impossible in practice the exercise of the rights which the national courts are required to safeguard.

G — *The fifth question: the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04*

62. This question considers the possibility of national courts awarding punitive damages of their own motion.

63. This question, too, should be answered in the light of the principles of equivalence and effectiveness. It is in the light of the effectiveness of Article 81(1) EC that the Court has declared that it must be possible for anyone to claim damages if he has suffered harm caused by an act which restricts competition. The details (before which court, procedural rules, etc.) are left to the domestic legal system, provided that the aforementioned two requirements are satisfied. [31]

64. Private enforcement and public enforcement exist side by side and independently of one another. In principle, they serve different purposes, although they may complement each other. The fines which may be imposed by the Commission (or the national competition authorities) for infringements of the antitrust rules are both a punishment and part of a general policy designed to control the conduct of undertakings. [32] The intention is that the fine imposed should have a sufficiently deterrent or preventive effect. When imposing fines, the Commission may also take into account the profit or financial advantage gained as well as other factors (leading to an increase or reduction in the fines); [33] this all primarily serves a public

31 — *Courage and Crehan* (cited in footnote 14), paragraph 29.

32 — See Joined Cases 100/80 to 103/80 *Musique Diffusion française* [1983] ECR 1825, paragraphs 105 and 106.

33 — See *Musique Diffusion française* (cited in the previous footnote), paragraph 129; see also the guidelines on the setting of fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

interest and is separate from any civil actions for damages and/or the desirability or effectiveness of more private enforcement.

65. A possible civil claim for damages, in addition to or separate from a fine, may well, of course, increase the deterrent effect. The US federal antitrust legislation, for example, provides for the possibility of claiming 'treble damages'. It goes without saying that making it possible for treble damages to be claimed raises the amount which may be involved in such claims to enormous proportions. The deterrent effect this may have is what the US federal legislator was seeking.

66. No such rule exists in Community law. [34]

67. By far the most Member States have no specific legislation governing claims for damages resulting from practices prohibited by competition law. They are governed by the normal rules laid down in the domestic legal system. Even those Member States which explicitly refer in their competition legislation to the possibility of damages largely confine themselves to designating a specific court to have jurisdiction for such claims. Only a few Member States provide for the possibility of punitive or exemplary sanctions in the context of actions for damages. [35] They do not include Italy.

68. In most Member States, the dominant view is that an action for damages primarily serves to compensate for a disadvantage arising from a prohibited concerted practice and not to enable the injured party to gain an economic advantage. Nor, as the German Government points out, does Community law oppose this view. [36]

69. Seen from the perspective of Community law, compensation for harm suffered as a result of the infringement of Community law should be appropriate to the harm suffered. As this aspect is not governed by provisions of Community law, it is for the domestic law of each Member State to set the criteria for determining the scale of the damages, provided that those criteria are no less favourable than those relating to similar claims based on national law and compensating for the harm suffered is not rendered impossible or excessively difficult. [37]

34 — One of the policy options referred to in the Green Paper is the possibility of awarding 'double damages' for horizontal cartels.

35 — According to the Ashurst report, they are the United Kingdom, Ireland and Cyprus.

36 — See *Courage and Crehan* (cited in footnote 14), paragraph 30.

37 — See, by analogy, Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 90.

70. Ensuring the useful effect of Article 81(1) EC does not, to my mind, necessitate the award of compensation greater than the harm suffered. On the other hand, where special forms of damages can be awarded under national competition law, they must also be available if the claims concerned are based on an infringement of Community competition law.

V — Conclusion

71. In view of the foregoing, I propose that the Court should answer the questions as follows:

— Article 81 EC should be interpreted as meaning that an agreement or concerted practice is prohibited under that provision if competition is restricted and if it is to be expected because of a number of objective factors, in fact and in law, that that agreement or concerted practice may affect trade between Member States directly or indirectly, actually or potentially. The fact that the practices underlying the main action cover the whole territory of a Member State and that the vast majority of the insurance undertakings operating there were participating in the competition-restricting practice of which they are accused indicates that trade between Member States was affected.

— Article 81 EC should be interpreted as meaning that third parties with a relevant legal interest may rely on the invalidity of an agreement which is prohibited under that provision and may claim damages if there is a causal relationship between the prohibited agreement or concerted practice and the harm suffered.

— In the absence of Community rules in this matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction, to set the limitation periods for filing claims for damages and to establish the criteria for fixing the amount of damages, provided that those rules are no less favourable than those governing similar claims under national law and the exercise of rights conferred by the Community legal system is not rendered impossible or excessively difficult in practice.