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The International Comparative Legal Guide to:

Competition Litigation 2012

A practical cross-border insight into competition litigation work

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Deputy Publisher
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Publisher
Richard Firth

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Global Legal Group Ltd.
59 Tanner Street
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Italy

Piero Fattori

Gianni, Origoni, Grippo & Partners

Michele Carpagnano

1 General

1.1 Please identify the scope of claims that may be brought in Italy for breach of competition law.

The following four actions may be brought in Italy for breach of EU and/or national competition law: i) action for interim relief; ii) action for declaratory relief; iii) action for damages; and iv) restitution (each action is described in detail in the answer to question 3.1).

The above mentioned actions may be filed in cases of anticompetitive agreements and abuses of dominant positions. The substantial provisions are established in articles 2 and 3 of the Law No. 287 of 1990 (the Italian Competition Law, "ICL") which respectively reflect the content of articles 101 and 102 TFEU.

A defendant may also use competition law as a "shield", asserting in court that an agreement is null and void (and thus not enforceable) on the basis of a breach of competition law provisions.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis for bringing an action for breach of competition law varies with respect to breaches of EU and national competition law.

Due to the principle of direct applicability of the EU Treaty provisions, actions concerning a violation of EU competition law are based on articles 101 and 102 of the Treaty on the Functioning of the European Union.

Actions for breach of national law are founded on article 33 (2) of the ICL.

Both types of action are governed by general civil law and procedure.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As reported above, the legal basis for competition claims in Italy derives both from national law and EU law (see question 1.2). According to article 1 of the ICL, national competition law applies only to infringements excluded from the scope of EU law.

1.4 Are there specialist courts in Italy to which competition law cases are assigned?

There are no specialist courts in Italy for competition law cases. Depending on the legal basis of the action, its single or collective nature and/or the rights involved in the case, different courts are competent to decide a competition law case.

The lower civil courts (i.e. *Giudice di Pace* and *Tribunale*) have jurisdiction as court of first instance with respect to actions under EU competition law. In particular, according to the case law, EU competition law is applicable to violations capable of hindering, directly or indirectly, actually or potentially, intra-community trade, notwithstanding the fact that the relevant market is national or sub-national (Milan Court of Appeals, 16 February 2010 and 25 January 2011).

Lower civil courts also have jurisdiction on actions based on alleged violations of unfair competition law; petitions for declaratory relief and actions for damages based on special competition rules on the telecommunication and broadcasting sectors and actions based on abuses of economic dependence. Moreover, in the context of ordinary civil actions, lower civil courts may have incidentally to consider matters involving the application of the ICL.

The Court of Appeals (i.e. *Corte d'Appello*) have exclusive jurisdiction at first and last instance (with regard to the merits of the trial) to decide cases based on national competition rules (see article 33 (2) of the ICL). According to the case law, the Court of Appeals should thus decline jurisdiction over infringement based on EU competition law (Milan Court of Appeals, 24 May 2007).

The Specialised Sections for industrial property rights instituted within the civil courts (i.e. *Sezioni Specializzate in materia di proprietà industriale ed intellettuale*) are competent to hear, as court of first instance, actions based on EU or national competition law that are related to a violation of industrial property rights - see articles 120 and 134 of the Code for Industrial Property Rights - (Milan Tribunal, Specialised Section for industrial property rights, 24 May 2010 and Milan Court of Appeals, 24 February 2010).

The lower civil court (i.e. *Tribunale*) of the capital city of the region where the defendant has its headquarter is competent, regardless of the amount of the claim, to hear at first instance with respect to "class actions" based on a breach of competition law (see article 140-*bis* of the Italian Consumer Code). Exceptions to this rule are established by law in relation to the determination of the competent court for small regions.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any legal or natural person has standing to bring action for breach

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of competition law, provided they have an actual interest (Court of Cassation No. 2207/2005 and No. 2305/2007).

Multiple claimants have the possibility to bring a "class action" (i.e. *azione di classe*, see article 140-*bis* of the Italian Consumer Code). Collective actions may be brought either by individual class members or by associations empowered by them or committees of which they are members for claims based on violations of consumer's right, as well as competition law infringements.

Within the types of claims that may be brought through a class action, the law expressly refers to declaratory relief, restitutions, as well as actions for damages suffered as a result of anti-competitive practices committed after the 15 August 2009. Rules on collective actions are applicable only to claims brought by consumers and not on behalf of individuals acting within the scope of their trade, business or profession.

Notwithstanding it was highly awaited by consumers and their associations, the class action still has a marginal impact in Italy at least in competition litigation.

According to public information, since January 2010 twelve collective claims have been brought before Italian courts, but none of them based on a violation of competition law.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Pursuant to the general rules on jurisdiction, a private action may be brought in Italy if it refers to infringements taking place or producing effects in the Italian territory.

For what concerns the competent court in Italy, damages actions may be filed before the court of the place of residence or domicile of the defendant, if this is a natural person, or the place where the defendant company has its registered office or a branch and an agent authorised to act for the defendant in court proceedings. Alternatively, the action may be brought before the court of the place where the alleged obligation arose or must be performed (the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the harm occurred, which is usually the residence or registered office of the plaintiff). In matters relating to contracts concluded by consumers, the only competent court on antitrust actions based on contract violations is the court where the consumer has its residence or domicile (art. 1469-*bis* c.c., confirmed by Court of Cassation No. 9922/10).

In order to establish the competent court between the lower civil courts, the main criterion is the value of the claim (i.e. *Giudice di Pace* for claims whose value does not exceed Euro 5,000 and *Tribunale* for claims whose value exceed that amount).

As reported above (see question 1.4), special rules apply in case of consumers' "class actions", which must be brought before the court in the capital city of the region where the defendant has its headquarters.

Neither the ICL nor any other statute on competition matter provides specific criteria for the coordination of private actions that may be brought before different jurisdictions. Hence, the possibility exists of parallel proceedings being instituted between the same parties, with the ensuing risk of conflicting decisions being rendered.

1.7 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim measures may be granted according to articles 700 of the Civil Procedure Code ("CPC").

2.2 What interim remedies are available and under what conditions will a court grant them?

Courts may grant temporary injunctions and any other remedy, including seizure, that is deemed appropriate in order to preserve the plaintiff's rights until the final judgment is issued. In order for an interim measure to be accorded by courts, the claimant must prove the existence of a *fumus boni iuris* (i.e. the claimant is able to show on a *prima facie* assessment that his claim is founded) and a *periculum in mora* (i.e. the claimant shows that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings).

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Competition law claims may be brought to obtain: i) declaratory relief (e.g. to obtain a declaration that an agreement violating national or EU law is null or void or that a certain conduct is legal or illegal); ii) compensation of damages suffered as a consequence of the alleged anticompetitive conduct (in order for damages to be granted, the general requirements of civil liability must concur: the existence of an unfair damage – i.e. a breach of interests recognised as relevant by the legal system –, its amount, the causal link between the conduct and the damage and the defendant's fault); and iii) restitution of any sum paid as a result of an anticompetitive conduct (e.g. following a declaration that an agreement violating national or EU law is null or void).

Actions for negative declarations (e.g. seeking a court decision establishing that an agreement is not anticompetitive and/or it has no anticompetitive effect) cannot, in principle, be excluded (the question has been dealt for the first time by the Milan Tribunal, 11 May 2009).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

In Italy, damages awarded by courts are compensatory in nature, therefore it is possible for the injured party to recover only the monetary damages actually incurred. The Court of Cassation has recently established that "*punitive damages appear to be against public law*" (Court of Cassation No. 1183/2007).

Thus, exemplary or punitive damages are not available in Italy and the injured party can recover the actual loss, the loss of profits and interests.

In order to establish the *quantum* of damages, courts may request the assistance of an expert. Where a precise amount cannot be proven, the court may award a fair estimate of damages suffered by the injured party (Court of Cassation No. 2305/07).

There is considerable case law in Italy dealing with damages

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actions based on competition law, most of them in cases of abuse of dominance.

In the *Telsystem* case, the court commissioned an expert's report on the calculation of the lost income of a potential new entrant into the leased lines market, which failed to have market access because of the dominant company's refusal to supply leased-line interconnectivity. The damage liquidation was based, *inter alia*, on the principle that in a free-market economy every monopolist rent, such as that of a first mover on the market, tends to be neutralised by competition within a certain time-frame and in order to award damages it is necessary to determine such time-frame in the relevant market. However, no damages were awarded for lost opportunity for entry into the new market because the court considered that "*after the obstacles have been overcome and Telsystem has reacquired full operational capacity, there is no reason to believe that the planned activity could no longer be put into effect*". The damages calculation was therefore concentrated on the plaintiff's lost business and profits foregone as a direct result of the infringements (Milan Court of Appeal, 24 December 1996).

In the *Albacom* case, another exclusionary abuse case, the court condemned an incumbent operator to pay the damage suffered by a new entrant for the delay in access to the network and to the market determined by its abusive conduct. To calculate the damages suffered by the plaintiff, the court applied the "but for" economic model. The court awarded to *Albacom* an amount of damages which would compensate its lost of profit in the period during which it was foreclosed from the market due to an incumbent's abusive conduct taking into account the incumbent's turnover on the same market during the foreclosure period. The amount of the profit which *Albacom* would have presumably gained in the absence of the illegal conduct was reduced by the court on the assumption that with *Albacom* being a newcomer, it would be subject to higher operational costs (Rome Court of Appeal, 20 January 2003).

In *Valgrana* the plaintiff was awarded damages on the basis of a fair estimate of the harm suffered. Its loss of profits was calculated considering the extra volumes of Grana Padano cheese that the plaintiff would have otherwise produced during the term of the infringement and multiplying such volumes by the plaintiff's average profit per tonne. The sum was then reduced to take into account the estimated fall in prices that would very likely have resulted from the increase of the total market supply (Turin Court of Appeal, 7 February 2002).

Since 2000, more than one thousand follow-on single actions for damages have been brought by end consumers in relation to a price-fixing conspiracy among insurers in the motor insurance market. Several courts (among others, Naples Court of Appeals, 3 May 2005, set aside by Court of Cassation No. 2305/2007) awarded damages to end consumers based on a fair estimate of the overprice paid by the plaintiffs, amounting to 20 per cent of the total premiums. Such percentage, according to the Italian Competition Authority ("ICA"), was held to correspond to the premiums' average annual price increase during the existence of the cartel.

Although, as mentioned before, exemplary and/or punitive damages are not available in the Italian legal system, an isolated case of a lower court has been reported that has awarded double damages to a consumer, in the context of a litigation that followed the motor insurance cartel case (*Giudice di Pace of Bitonto*, 21 May 2007). The reasoning of the judge, however, appears not in line with the decision of the Court of Cassation mentioned before (No. 1183/2007) and is currently under review by the same Court of Cassation.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

The compensatory nature of the damages awarded by the courts in the Italian legal system excludes that relevance could be given by courts to the fines eventually imposed to the injuring party by ICA.

4 Evidence

4.1 What is the standard of proof?

According to general civil procedure rules, the court may weigh any evidence provided by the parties, except where the value of a given means of proof is specifically mandated by law (e.g. facts confessed by a party and concerning its disposable rights are incontrovertible). The court may base its findings of fact on circumstantial evidence provided that it is strong, precise and conclusive.

4.2 Who bears the evidential burden of proof?

The burden of proof lies with the plaintiff, who must prove each fact supporting its claim. In turn, the defendant must give evidence of the facts supporting any relevant objections.

With respect to action for damages, the plaintiff has to prove the existence of an unfair damage, its amount, the defendant's fault and a casual link between the conduct and the damage. In relation to causation, the Court of Cassation recently held that, based on the laws of probability, a direct link between a cartel and the damages suffered by a consumer may be presumed, in consideration of the fact that downstream contracts between cartel participants and consumers are normally the means by which the cartel is put into effect (No. 2305/07). As a result, in such circumstances, the plaintiff is only required to prove the existence of a cartel, to provide a copy of the agreement it entered into with a cartel participant and a reasonable estimate of the overcharge paid as a result of the cartel. The presumption in favour of the plaintiff is however rebuttable.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

All evidence normally admitted in civil proceedings, including witness testimonies, documents and expert opinions, is admissible in private competition litigation. Circumstantial evidence is admissible as well and may be sufficient to support the findings of the court, provided that it is strong, precise and consistent.

Parties may appoint their experts (often economists) who are admitted to introduce their observations and contradict the findings of the court and other parties. An expert may also be appointed by the court, at its discretion, to assist in matters requiring specific technical expertise (e.g. the definition of the quantum of the antitrust damage and its liquidation).

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

In Italy there is no pre-trial discovery.

According to the civil procedure rules, access to documents held by one of the parties or a third party can be obtained though a court

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order, provided that the document is specifically identified by the party. The court may issue an order of disclosure if indispensable (i.e., the facts cannot be proved by means other than the document for which disclosure is sought) and if the disclosure does not harm the other party and/or third party's legitimate interests. According to the case law, the right to confidentiality may be limited to protect the right to bring or defend actions in civil proceedings, subject to the principle of fairness, relevance and proportionality (Court of Cassation No. 3034/2011).

In case the party required to submit the document refuses to disclose, it cannot be fined by the judge. Yet, such conduct will be taken into account in the final decision.

Courts may also request documents from the ICA's file or, in proceedings concerning articles 101 and 102 TFEU, in the possession of the Commission, as established in article 15 Regulation 1/2003. In the *International Broker litigation*, following a request from the Rome Court of Appeals, the ICA disclosed to the court the minutes of a hearing of the defendants' representatives as well as the documents seized in a dawn raid at the defendants' premises.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

If a witness fails to appear without justification, the judge may impose a fine (from a minimum of Euro 100 up to Euro 1,000). If a witness repeatedly does not appear without a sound reason, the court may order to bring him before the judge and may impose a fine (from a minimum of Euro 200 up to Euro 1,000, see article 255 CPC).

Cross-examination is not available in Italy, where the judge rather than the counsellor has the power of developing evidence. The interrogation is carried out on specific questions proposed in advance by the parties and admitted by the judge. In case the party does not answer or does not appear without justification, the judge may deem proved the facts alleged in the questions.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

According to article 16.1 of EC Regulation 1/2003, national courts cannot take decisions running counter to the decision adopted by the European Commission when the same issues and the same parties are implicated.

Differently, any infringement as well as any findings made by the ICA and decisions of Competition Authorities from other countries in the context of administrative proceedings does not bind the court in civil proceedings, although they may create rebuttable presumptions (Court of Cassation No. 5941/2011). Procedural acts, different from the final administrative decision, as the statement of objections, have not been given any probative value in civil proceedings (Order of the Court of Milan, 22 May 2011).

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

According to civil procedure rules, parties have to file any document or piece of evidence on which they intend to rely to the court registry. Therefore, each party of the proceeding has granted full access to any document or piece of evidence produced by the other party or third parties during the process. In the CPC, there are no specific provisions providing for the protection of the parties' (or third parties') business secrets. However, disclosure of documents held by the other party can be refused where it would cause a serious harm to the party (see question 4.4).

Third parties, who do not have access to the file, may request a copy of the court's judgment.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The substantive provisions of the national competition law do not apply to legal entities entrusted by law with the operation of services of general economic interest in so far as it is necessary to perform the particular tasks assigned to them (see article 8(2) ICL that mirrors article 106(2) TFEU).

In general, however, according to ICA's precedents, the mere facilitation of such conduct by law will not exclude the application of the competition provisions to the case (see the ICA decision in the case *Riciclaggio delle Batterie Esauste* No. 17890/2008, confirmed on appeal by the Administrative Supreme Court, see *Consiglio di Stato* Decision, 20 May 2011).

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

In Italy, the "passing on defence" is not recognised as such. Yet, considering that damages are compensatory and measured by reference to the loss actually suffered, it seems likely that Italian courts would give significance to such a defence in deciding whether to award damages and determining the amount. Deciding the *Juventus* case (Turin Court of Appeal, 6 July 2000, *Indaba Incentive co. v. società Juventus F. C. S.p.A.)* the court considered the "passing on" as a sort of contributory negligence and refused to award damages to the plaintiff who had intentionally passed the overcharge to the final consumer.

As far as indirect purchasers are concerned, the indirect purchaser should prove that the overcharge provoked by the cartel in the upstream chain has been transferred on him. This follows from the application of the rule on civil liability, requiring the damage to be the direct and immediate result of the conduct (article 2056 Civil Code). Indirect purchaser's standing has been recognised by courts, although incidentally (Rome Court of Appeals, 31 March 2008, Turin Court of Appeals 6 July 2000).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

According to general rules, declaratory relief concerning a declaration that a contract is void are not subject to any limitation period. Limitation periods for damages actions based on tort or breach of contract are, respectively, five and ten years. The Court of Cassation clarified that the limitation period for antitrust damages does not begin to run before the injured party becomes aware, or reasonably should have become aware, of the damage (Court of Cassation, No. 2305/2007).

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6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Petitions for interim relief in antitrust matters are normally decided within four to six weeks from the filing of the application.

The average duration of ordinary actions before the lower and the appellate courts is three to four years at each level of jurisdiction, while before Giudice di Pace they may range between one and two years. Such a time frame may become considerably longer in the event of an appeal to *Cassazione*. It is not possible to accelerate proceedings. Nevertheless, in exceptional cases and upon demand of the interested party, the court may anticipate the date of a hearing.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No permission of the court is needed to discontinue the action lodged with it.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

As a general rule, the unsuccessful party must pay all legal costs, including attorneys' fees. However, where each party succeeds on some and fails on other matters or where the court deems that there are other serious and exceptional reasons (e.g. the complexity of the matter or a new question of law arises), it may order that the costs be shared or that each party bears its own costs.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fee arrangements have been permitted in Italy since 2006. However, pursuant to the Italian Bar rules attorneys are obliged to charge fees that are proportionate to the amount of work performed. Therefore, 'no-win, no-fee' arrangements would seem to be of questionable enforceability.

8.3 Is third party funding of competition law claims permitted?

Although there are no specific rules on the issue, third party funding of competition law claims seems disputable under the general principles of contract law.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the *Giudice di Pace* that are not decided on an equitable basis may be appealed to the *Tribunale*. Decisions of the *Giudice di Pace* decided on an equitable basis may be appealed before *Corte di Cassazione* only on specific question of law provided by article 339 of the Italian Civil Procedure Law.

Furthermore, when *Tribunale* acts as a court of first instance, its decisions may be appealed to the court of appeals (*Corte d'Appello*).

"Class actions" must be appealed before the court of appeals having jurisdiction depending on the venue of the *Tribunale*.

The judgments of the courts of appeals (including where they have jurisdiction at first and last instance as in the case of competition litigation based on the ICL) may be appealed to the *Corte di Cassazione* on questions of law only.

10 Leniency

10.1 Is leniency offered by a national competition authority in Italy? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

A leniency programme has been available in Italy since February 2007 as a system of partial or total exoneration from the administrative penalties. Due to the administrative nature of the leniency programme, a successful applicant, as well as an unsuccessful one, are not granted immunity from civil claims. Therefore, actions for damages are not barred.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

No specific protection for the evidence disclosed by leniency applicants is provided by the ICA's communication on leniency. Accordingly, a judge might order a leniency applicant to bring that evidence before the court upon request from one of the parties to the civil proceeding.

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Piero Fattori

Gianni, Origoni, Grippo & Partners
Via delle Quattro Fontane 20
00184 Roma
Italy

Tel: +39 0647 8751
Fax: +39 0648 7110 1
Email: pfattori@gop.it
URL: www.gop.it

Piero Fattori is a partner of Gianni, Origoni, Grippo & Partners, based in the Rome office. He is a recognised expert in Italian and EC competition law as well as in Italian competition law procedure. He has often assisted companies and multinationals before the Italian Competition Authority and administrative court in charge of reviewing the Authority's decisions and before civil courts in private antitrust litigation.
Mr. Fattori is former Head of the Italian Competition Authority's Legal Service. He graduated from the Law School of Rome University.
Mr. Fattori regularly lectures on European and Italian competition law and often participates as speaker at conferences and seminars. He has written numerous articles on antitrust and competition law topics and has co-authored an authoritative book on the application of Italian competition Law. Mr. Fattori is a member of the board of the Italian Antitrust Association (AAI). He is also a member of the Rome Bar.

Michele Carpagnano

Gianni, Origoni, Grippo & Partners
Via delle Quattro Fontane 20
00184 Roma
Italy

Tel: +39 0647 8751
Fax: +39 0648 7110 1
Email: mcarpagnano@gop.it
URL: www.gop.it

Michele Carpagnano is an Associate of Gianni, Origoni, Grippo & Partners, based in the Rome office. His practice focuses on Italian and EU competition law and its enforcement.
He teaches Antitrust Law at Trento Faculty of Law.
Mr. Carpagnano is author of several articles on antitrust law and has co-authored three books on private antitrust litigation in Italy.
He holds a Degree in Law from Trento University (2003) and a PhD cum laude in EU and Private Comparative Law from Trento University and Autonoma University of Madrid (2008).
Mr. Carpagnano is member of the Rome Bar and Madrid Bar.

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