Private Antitrust Litigation 2022

Contributing editor
Elizabeth Morony

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2003
Nineteenth edition
ISBN 978-1-83862-698-3

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Private Antitrust Litigation
2022

Contributing editor
Elizabeth Morony
Clifford Chance LLP

Lexology Getting The Deal Through is delighted to publish the nineteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Elizabeth Morony of Clifford Chance LLP, for her assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
June 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Italy

Eva Cruellas Sada and Salvatore Gaudiello

Gianni & Origoni

LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In the years immediately following the adoption of the Law of 10 October 1990, No. 287 (the Competition Act), the number of cases brought before civil courts in relation to infringement of competition law was rather limited: according to unofficial data, from 1990 to 2010, roughly 150 private enforcement cases were commenced. Approximately 75 per cent of these cases were standalone actions.

The limited recourse to civil action was probably related to a certain lack of awareness among undertakings and consumers over competition law issues and certain procedural burdens. Furthermore, courts were initially cautious in admitting and deciding those cases (see, for example, Italian Supreme Court, 9 December 2002, No. 17475, which denied the legitimacy of consumers to claim damages against suppliers that were part of a cartel).

An increase in actions for damages caused by antitrust infringements occurred as a result of the finding by the Italian Competition Authority (ICA) of a cartel among the main insurance companies (ICA, 28.7.2000, Case No. 8546, I377, *RC AUTO*), which led to several key judgments from the local courts and the Italian Supreme Court.

The interest in private antitrust litigation continued to grow when the Court of Justice of the European Union (CJEU) laid down in the landmark cases *Courage* (CJEU, 20.9.2001, Case No. C-453/99) and *Manfredi* (CJEU, 13 July 2006, Case No. C-295/04) the main principles that would later be specified and codified by the European Commission in Directive 2014/104/EU on certain rules governing claims for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

The Directive was implemented in Italy with the Legislative Decree of 19 January 2017, No. 3 (the Decree), which included both substantial and procedural provisions and currently offers a comprehensive legal framework for actions commenced by anyone damaged by an infringement of competition law. The Decree is already fostering private antitrust litigation in Italy, with specific regard to follow-on actions related to cartel infringement decisions, by facilitating the victims of anticompetitive practices and abusive conducts in several aspects (eg, disclosure of evidence, legal standing and standard of proof) that were considered too burdensome in the previous regime.

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private enforcement actions are mandated by statute in Italy. Specifically, article 2043 of the Italian Civil Code sets out the basic elements of tort liability.

Compensation for damage can be sought by anyone damaged by a competition law infringement, regardless of whether the person is a direct or indirect purchaser.

In particular, indirect purchasers can claim and obtain compensation for damages to the extent that the same is passed on by its direct purchaser (eg, by raising its prices), as was confirmed by the Court of Justice of the European Union in the case *Otis II* (12.12.2019, Case No. C-435/18). In this regard, article 12 of the Decree provides for a rebuttable presumption of the passing on of the damage, provided that the indirect purchaser is able to prove that:

- the defendant committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Legislation

The legislative framework for private antitrust enforcement currently includes the following provisions:

- general civil law principles concerning tort liability and ordinary tort actions, namely articles 2043 et seq. of the Civil Code, as well as the applicable procedural rules laid down in the Code of Civil Procedure;
- article 33(2) of the Competition Act, which provides that claims for damages owing to infringements of the Competition Act can be brought before civil courts; and
- the Decree, which lays down the specific rules concerning claims for damages owing to infringements of EU and Italian competition law.

Courts

Pursuant to the Decree, the jurisdiction to decide over actions based on the breach of EU and Italian competition law belongs to the corporate-specialised sections of tribunals and of the courts of appeal of Milan, Rome and Naples, for both standalone and follow-on actions.

PRIVATE ACTIONS

Availability

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available in relation to damages caused by any kind of infringement of EU or national competition law by an undertaking, regardless of whether the infringement falls within the prohibition of collusive restrictive practices, such as cartels or abuses of dominant position.

The existence of a prior decision by a competition authority ascertaining the infringement is not a requirement to initiate a private antitrust claim, as the Italian legal system allows the parties to bring standalone actions, which are mainly construed as tort actions under article 2043 of the Civil Code.

As far as follow-on actions are concerned, the effect of a finding of infringement by a competition authority is expressly regulated by article 7 of Legislative Decree of 19 January 2017, No. 3 (the Decree). This provides that the decisions of the Italian Competition Authority (ICA) and the European Commission are binding as regards national judges in relation to the finding of a competition law infringement, provided that the decisions ascertain the existence of the infringement and are final in the sense that they cannot be subject to appeal.

Before the Decree, the final decisions of the ICA were considered only as prima facie evidence of the infringement (ie, the defendants could prove the lack of infringement (see Italian Supreme Court No. 3640/2009).

Moreover, a final decision by a competition authority or a court of another member state finding an infringement of competition law constitutes evidence in relation to the nature of the infringement and of its material, personal, temporal and territorial scope, which may be assessed together with other evidence.

Required nexus

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The ordinary rules and principles on jurisdiction are also applicable to private antitrust disputes. In particular, Regulation (EU) No. 1215/2012 and, on a residual basis, the Italian Law on Private International Law (Law of 31 May 1995, No. 218) apply. This was recently reaffirmed by the Court of Justice of the European Union (CJEU) in the *Booking* case (CJEU, 24.11.2020, Case No. C-59/19), where the CJEU held that private antitrust actions relate to 'tort, delict or quasi-delict' within the meaning of article 7, point 2, of Regulation (EU) No. 1215/2012.

As a consequence, Italian courts have jurisdiction over any private antitrust claim that meets at least one of the following criteria:

- the defendant is domiciled in Italy;
- the defendant has its place of business in Italy;
- the defendant has a legal representative formally authorised to represent it in Italian courts pursuant to article 77 of the Code of Civil Procedure;
- the harmful event occurred in Italy; or
- if the plaintiff is a consumer, the latter is domiciled in Italy.

The Court of Justice of the European Union (CJEU) clarified that, in the context of an action seeking compensation for damage caused by anticompetitive conduct, the notion of 'place where the harmful event occurred' may be understood to mean either the place of conclusion of an anticompetitive agreement contrary to article 101 of the Treaty on the Functioning of the European Union (TFEU) or the place in which the abusive prices were offered and applied in cases where those practices constituted an infringement of article 102 of the TFEU (CJEU, 5.7.2018, Case No. C-27/17, *AB flyLAL-Lithuanian Airlines v Starptautiska lidosta 'Riga' VAS*, 21.5.2015, Case No. C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA v Akzo Nobel and Others* and 29.7.2019, Case No. C-451/18, *Tibor-Trans v DAF Trucks NV*).

Private antitrust litigation can also be commenced before Italian courts in cases where even just one of multiple defendants is domiciled in Italy.

The parties may contractually elect to subject the claims arising from a contract to the Italian jurisdiction, including antitrust claims. This choice of jurisdiction is valid only if made in writing.

Restrictions

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, as far as the jurisdiction of Italian courts can be assessed pursuant to the applicable criteria.

PRIVATE ACTION PROCEDURE

Third-party funding

7 May litigation be funded by third parties? Are contingency fees available?

Third-party funding is not forbidden under Italian law, although it is rather uncommon. Given the lack of special regulation for third-party funding, contracts aimed at it will be governed by general principles of Italian contract law.

Contingency fees are forbidden under Italian law. More precisely, article 13, paragraph 4 of the Law of 31 December 2012, No. 247 bans agreements according to which the lawyer is granted as a fee the totality or part of the object of the dispute.

On the contrary, parties are free to arrange lawyers' fees relating them (eg, to the time taken) to a percentage of the value of the dispute, or they may charge a flat rate (see article 13, paragraph 3 of the Law of 31 December 2012, No. 247).

Jury trials

8 Are jury trials available?

No.

Discovery procedures

9 What pretrial discovery procedures are available?

Broadly speaking, Italy does not provide for any procedural tool such as US-style pretrial discovery. In the course of the proceedings, however, the judge can order a party or a third party to produce specific documents that he or she deems necessary for the conduct of the proceedings.

The Decree has introduced new rules allowing the plaintiff in antitrust private enforcement proceedings to request disclosure of certain categories of evidence.

Evidence from the defendant and third parties

If a party has presented a motivated request containing reasonably available facts and evidence sufficient to support the plausibility of its claim or its defence, the courts are able to order the counterparty or a

third party to disclose relevant evidence that lies in their control (article 3 of Legislative Decree of 19 January 2017, No. 3 (the Decree)).

For the purpose of admitting the request, the court will evaluate its proportionality by taking into account:

- the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- the scope and cost of disclosure; and
- whether the evidence to be disclosed contains confidential information.

Evidence from the file of a competition authority

Another novelty introduced by the Decree is the possibility for the courts to order the disclosure of evidence included in the file of a competition authority (article 4 of the Decree), provided that:

- the parties and third parties are not reasonably able to produce such evidence; and
- the request is proportional, considering, among other things, whether:
  - it has been formulated specifically with regard to the documents submitted to a competition authority;
  - the party requesting disclosure is doing so in relation to an action for damages; and
  - there is a need to safeguard the effectiveness of antitrust public enforcement.

The Italian Competition Authority (ICA) may provide the court with its views on the proportionality of disclosure requests.

In any case, the courts cannot order a party or a third party to disclose evidence related to leniency or settlement programmes.

Furthermore, if the disclosure of evidence relates to confidential information of personal, commercial, industrial and financial nature, the court has the power to adopt certain measures to protect the confidentiality (article 3(4) of the Decree), such as:

- the obligation of secrecy;
- the possibility of redacting the confidentiality of parts of a document;
- the setting-up of closed-door hearings;
- the limitation of the number of persons authorised to view the evidence; and
- the assignment to experts of the task to draft summaries of the confidential information.

In this regard, in 2020 the Commission has adopted a Communication on the protection of confidential information, which identifies the measures that courts may consider when dealing with the disclosure of sensitive documents and data, including the redaction of documents, the creation of confidentiality rings and the appointing of third-party experts to access certain information.

Admissible evidence

10 | What evidence is admissible?

Documents are always admissible evidence; however, the evidentiary value of documents varies depending on their source.

In addition, witness evidence is admissible but with some specific limitations. It is generally inadmissible in relation to contracts, and it is admissible, with specific limitations, in relation to agreements aimed at amending or contrary to a document.

Legal privilege protection

11 | What evidence is protected by legal privilege?

As a general rule, in the context of civil litigation, a defendant may challenge a request of disclosure by the plaintiff on the grounds that the documents requested are covered by legal professional privilege.

In this regard, article 3(6) of the Decree foresees that a court's power to order the parties or a third party to disclose relevant documents is without prejudice to the confidentiality of communications between the lawyers in charge of a party's representation and their clients.

The possibility to benefit from legal privilege protection requires an independent relationship between the client and the lawyer, who must not be bound to the former by an employment relationship. Therefore, the legal privilege does not cover communications between a party in proceedings and its in-house counsel (see Italian Council of State, 24 June 2010, No. 4016).

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions seeking compensation for antitrust damages are available even if an antitrust violation has been ascertained in the context of criminal proceedings. Article 651 of the Code of Criminal Procedure expressly provides that a decision pronounced at the outcome of a criminal proceeding, when it is final and binding, has a res judicata effect in the civil proceeding for the liquidation of the damages deriving from the criminal offence ascertained therein. The res judicata effect covers only the existence of the fact, its criminal relevance and the assessment that the condemned party committed it.

In the Italian legal framework, antitrust law does not provide for criminal sanctions for individuals. However, in limited and exceptional cases, a conduct that constitutes an antitrust infringement can also constitute a separate criminal offence, such as:

- bid rigging (articles 353, 353-bis and 354 of the Criminal Code);
- price increase, or the output limitation, of raw materials, food products or first need products (article 501-bis of the Criminal Code);
- the use of violence, threats or fraudulent means in carrying out commercial activities (articles 513 and 513-bis of the Criminal Code); and
- the implementation of anticompetitive practices with the corruption of public officials (articles 319 and 319 of the Criminal Code) or private individuals (article 2635 of the Civil Code).

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Italian law does not provide for the legal relevance in civil proceedings of evidence taken in criminal ones. However, under case law, criminal evidence is treated as 'atypical evidence' in the civil proceedings.

The judge can, at his or her discretion, take atypical evidence into account for the purpose of assessing circumstances that are otherwise unknown, only if it points to objective, precise and consistent conclusions.

Albeit not protected against private damages actions, leniency and settlement applicants are granted preferential treatment by the Decree by means of:

- the prohibition of the disclosure of leniency or settlement statements and the right of the leniency or settlement applicants to be heard in the event that the judge intends to access the leniency or settlement statements to verify their contents, for which the judge may request the support of the ICA (article 4(5) of the Decree); and
- a more favourable regime of joint liability, given that the leniency recipient is jointly and severally liable:
  - to its direct or indirect purchasers or providers; and

- to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law (article 9(3) of the Decree).

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under Italian civil procedural law, there are two typical kinds of suspension of the proceedings:

- compulsory (ie, under article 295 of the Code of Civil Procedure, when the judge or another judge is called upon to decide on a dispute on which the decision of the original case depends); and
- suspension that is jointly requested by all the parties if there are justified reasons (pursuant to article 296 of the Code of Civil Procedure).

A party alone can ask the court to stay the proceedings only when the decision of the case depends on the decision of another court such that the assessment of the merits of the former depends on the assessment of one or more issues pending in the latter (whether before the same or a different judge).

A challenge of the decision on an antitrust violation does not imply the compulsory suspension of the pending private enforcement proceedings. However, the judge has full discretion on this issue.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

As a general rule, a party who wants to exercise a right must prove the facts on which the right rests, while a party who contests the relevant rights or facts must prove the facts on which the contestation rests.

In assessing causation, the Italian civil courts take the view that the finding must be based on the balance of probabilities. It is, thus, sufficient for the plaintiff to prove that there is a 50 per cent plus one probability of causation to satisfy the relevant burden of proof (more probable than not rule).

The Decree, however, sets forth certain provisions that derogate from the general rule and grant to the plaintiff the benefit of certain presumptions. In particular:

- the final decision of the ICA that ascertained the infringement is binding for the judge (ie, the existence of the infringement), and its material, personal, temporal and territorial scope is deemed as proven and cannot be disputed in the civil proceedings;
- a rebuttable presumption is provided for by article 14 of the Decree, which states that the harm caused by cartel infringements is presumed unless the infringer proves otherwise;
- a rebuttable presumption is provided for by article 12 of the Decree concerning the passing on of the overcharge to indirect purchasers, provided that they are able to prove that:
  - the defendant committed a competition infringement;
  - the infringement has resulted in an overcharge for the direct purchaser; and
  - the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

On the other hand, the defendant bears the burden of proving that the plaintiff passed on the whole or part of the overcharge or damage resulting from the infringement of competition law (passing-on defence).

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The length of civil proceedings varies widely from court to court and from case to case. In particular, the main aspects that could significantly affect the duration of civil proceedings are

- how burdensome the discovery phase is (eg, if the judge is called to assess the nature of the evidence to exclude leniency documents, or when the evidence contains confidentiality information and the judge is called to adopt appropriate measures to protect them) and
- the need to involve a third-party expert appointed by the court for evidentiary purposes.

On average, Italian civil proceedings (including the appeals) last between two and three years.

Decisions rendered at the outcome of a first-degree proceeding are immediately enforceable, but if the decision is challenged, the appellant can ask the court of appeal to suspend the enforceability of the first-degree decision. The suspension will be granted if the appellant is able to demonstrate serious grounds for the appeal, also in relation to the risk of insolvency of one of the parties to the proceedings.

There is no way to accelerate proceedings. However, provided that the relevant requirements are met during the proceedings, a party can apply for anticipatory or interim measures. For example, a party can ask the judge to order the payment of the amount of the claim that is undisputed.

Limitation periods

17 | What are the relevant limitation periods?

As a general rule, actions for damages from non-contractual liability are subject to a limitation period of five years under article 2947 of the Italian Civil Code.

Also, in relation to antitrust damages actions, article 8 of the Decree establishes that the statutory limitation period of the right to damages is five years from the date of the harmful event. The Decree further clarifies that limitation periods do not begin to run before the infringement of competition law has ceased and the plaintiff knows, or can reasonably be expected to know:

- the behaviour and the fact that it constitutes an infringement of competition law;
- the damage caused by the infringement of competition law; and
- the identity of the infringer.

However, if the event is considered as a crime, the statutory limitation applicable for the relevant crime must also be taken into consideration for the purposes of damages.

The limitation period is suspended if the ICA takes action for the purpose of the investigation or if its proceedings in respect of an infringement of competition law to which the action for damages relates are still pending. The suspension ends at the earliest one year after the ICA's infringement decision has become final or after the proceedings are otherwise terminated.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Decisions rendered at the first degree by tribunals can be appealed before the competent court of appeal.

In the appellate proceedings, the appellant can request a full review of the merits of the case.

Court of Appeal decisions, in turn, can be challenged before the Court of Cassation only on grounds pertaining to legal issues: thus, the Court of Cassation cannot revise and affect the factual findings reached by the Court of Appeal.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Italy has special legislation on class action proceedings, provided by article 140-bis of the Legislative Decree of 6 September 2005, No. 206 (the Consumer Code).

That legislation has been recently amended by the Law of 12 April 2019, No. 31 (the Class Action Reform). The new legislation will apply only to class action proceedings for violations that occurred after the date of the legislation's entry into effect (which, after a few postponements, took place on 19 May 2021).

Class action proceedings are available also in respect of antitrust claims, as also acknowledged by article 1 of the Decree, which recalls class actions governed by article 140-bis of the Consumer Code. However, the Class Action Reform 'moved' the legal discipline of class actions from article 140-bis of the Consumer Code to the Code of Civil Procedure, introducing the new articles from 840-bis to 840-sexiesdecies. In light of the above, such reference must be intended as referring to the mentioned articles of the Code of Civil Procedure.

One of the most significant innovations of the Class Action Reform, with a direct impact also on antitrust class actions, is that every party (including companies and professionals) that shares 'homogeneous individual rights' can commence a class action, not just consumers and users.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

No. Consumers, users, companies and professionals are always free to commence individual proceedings, even when they are entitled to commence a class action or to opt in to a class action that has been already commenced.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Under the Class Action Reform, class action proceedings start with a phase aimed at assessing the eligibility of the claim, at the end of which – and no later than 30 days from the first hearing – the court issues a decision on the admissibility of the claim, which can be denied in the following cases:

- the application is manifestly ungrounded;
- lack of homogeneity among the individual rights;
- claimant's conflict of interest towards the defendant; or
- claimant's inadequacy to represent and protect the rights of the class.

The court's decision declaring the action admissible, which is then published on a public website within the next 15 days, can be appealed by the defendant in the following 30 days.

To our knowledge, only one class action in antitrust matters has been brought in Italy. It was initiated in 2011 before the Court of Genova for the damages arising from a cartel assessed by the Italian Competition Authority (ICA) that related to some ferry companies' tariffs (AGCM, 18.10.2011, I743, *Tariffe Traghetti da/per la Sardegna*). The court, however, stayed the proceedings owing to the challenge of the ICA's sanction by the relevant ferry companies. The proceedings were later extinguished owing to the annulment of those sanctions.

22 | Have courts certified collective proceedings in antitrust matters?

To our knowledge, no class action in antitrust matters has been certified in Italy so far. However, the recent amendments to the Italian class action legislation under the Class Action Reform make it likely that more class actions in antitrust matters will be commenced in the future.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Italian legislation on class actions (also under the Class Action Reform) has, in principle, adopted the opt-in system. However, a significant difference is introduced by the Reform. Indeed, under the current legislation, plaintiffs can opt in until the term fixed by the judge with the order admitting the class action at the outcome of the certification process.

However, the Class Action Reform introduces the possibility for class members to opt in even after the decision on the merits of the class action.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Under the current legislation no judicial authorisation is needed, while under the Class Action Reform the settlement agreement must be authorised by the judge if it is reached after the decision by the judge has been given.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No; however, class actions in general are likely to increase after the Class Action Reform enters into effect.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Compensation for damage can be sought by any victim that has suffered harm as a consequence of a competition law infringement, regardless of whether the person is a direct or indirect purchaser. The compensation includes the actual loss suffered as a direct consequence of the infringement, the loss of profits, the payment of interest and appreciation.

The Decree provides that to avoid overcompensation, the actual damage awarded in relation to damages at any level of the supply chain cannot exceed the harm suffered at that level.

The loss of profits, on the other hand, falls within the category of indirect damages, which, in accordance with Italian civil law, can be

awarded on the basis of the theory of causal regularity (ie, insofar as they can be construed as a 'normal effect' of the infringement).

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Interim measures

A party can be granted, on his or her application, interim measures prior to or pending ordinary proceedings.

The applicant must provide the judge with clear evidence of the existence of the compensation right related to the requested measure (*fumus boni iuris*) and of the serious and actual risk that the right may be harmed if not promptly and temporarily protected until the decision of the merits of the case (*periculum in mora*).

Summary proceedings

A party can file an application directly with the competent judge, who fixes the hearing. The applicant must then serve its application to the defendant, and at the hearing where both the parties appear, the judge will decide whether the parties' defences can be examined summarily. If so, the judge will proceed in the most appropriate manner and issue an order with the same effect as a decision. Otherwise, the summary proceedings are converted into ordinary ones.

Punitive damages

29 | Are punitive or exemplary damages available?

Italian law does not encompass the US concept of punitive damages, although in some specific instances, the portion of damages awardable in favour of a party can be increased owing to the behaviour of the losing party (eg, if the losing party acted in bad faith or with gross negligence in civil proceedings, the judge can order the party to pay the winning party not only the cost of the proceedings but also an extra sum (ie, for vexatious litigation)). As a consequence, punitive damages have traditionally been considered contrary to Italian public policy, and foreign decisions awarding punitive damages have typically not been granted recognition and execution in Italy.

This trend changed in 2017 when the Supreme Court stated that a foreign decision awarding punitive damages is not incompatible with Italian public policy, provided that the foreign judgment is based on legal provisions that precisely identify the cases in which those damages can be awarded and, in such cases, the awardable amounts can be reasonably foreseen (see Supreme Court, 5 July 2017, No. 16601).

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Under Italian law, in the case of tort, interest on damages accrues from the date the damage occurred.

The default interest rate is determined each year by the Ministry of Finance, based on the yield of annual government bonds and on the inflation rate.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

When awarding damages for infringements of competition law, the courts do not take into consideration fines imposed by the Competition Authorities.

With regard to the quantification of damages awarded by the courts in private enforcement cases, the Decree expressly refers to articles 1223, 1226 and 1227 of the Civil Code, which contain the main civil law principles regulating the calculation of damages arising from contractual responsibilities.

In addition to the above, article 14(3) of the Decree allows judges to request the ICA to assist the court with regard to the determination of the quantum of damages; however, it allows the ICA to refuse to provide assistance where it deems it inappropriate in relation to the need to safeguard the effectiveness of the public enforcement of competition law. This might be the case when the public enforcement proceeding:

- is still in a preliminary phase;
- was closed with commitments pursuant to article 14-ter of the Competition Act;
- was closed owing to a priority decision of the ICA; or
- was closed but the ICA's decision was annulled or suspended during the appeal.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In civil proceedings, as a general rule, legal costs follow the outcome.

Under article 91 of the Code of Civil Procedure, with the final decision of the proceedings, the judge orders the losing party to refund the legal costs borne by the counterparty (in practice, they are liquidated according to at the rates set by a ministerial decree) unless both the parties have partially lost or the question of law of the case was exceptionally new or there was an overruling.

In few cases have the courts found complex antitrust private enforcement cases to justify the entire compensation of the legal costs (see Court of Appeal of Milan, 15 October 2014, Case No. 85107/2010, *Fastweb SpA c Vodafone Omnitel NV SpA*).

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Article 2055 of the Civil Code provides that if the same harmful event is caused by several parties, they are held jointly liable in equal parts unless the presumption is rebutted by one of those parties that expressly proves otherwise.

In the case of different allocations of liability, those should be ultimately determined depending on the seriousness of each injuring party's liability and the effects of the respective portion of violation (ie, its contribution to the damage).

This principle is, however, derogated from by the Decree in relation to the following few cases (article 9 of the Decree).

Small and medium-sized enterprises

Small and medium-sized enterprises (SMEs) (as defined in Commission Recommendation 2003/361/EC) are liable only towards their direct and indirect purchasers, provided that their share in the relevant market was below 5 per cent during the infringement, and the joint and several liability regime would irretrievably jeopardise their economic viability and result in their assets losing all their value.

The exception does not apply if:

- the SME played a leading role in the context of the infringement or forced other undertakings to take part in it;
- the SME has previously been found to have committed other antitrust infringements; or
- the damaged party cannot seek full compensation for damages from the other companies involved.

Leniency applicants

Another exception to the ordinary regime is provided in relation to companies that benefited from a leniency programme, which are generally jointly and severally liable towards their direct or indirect purchasers or suppliers. However, those companies may be held jointly and severally liable with regard to other damaged parties where full compensation for their damages cannot be obtained from the other undertakings involved in the same infringement of competition law.

Settling co-infringers

Finally, pursuant to article 16 of the Decree, following a consensual settlement, non-settling co-infringers are not permitted to recover contributions for the remaining claim from the settling co-infringers. Moreover, if non-settling co-infringers are insolvent, the damaged party may seek compensation from the settling co-infringer unless this is expressly excluded in the settlement agreement.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Italian civil law provides for the possibility of contribution claims among defendants.

Pursuant to article 2055(2) of the Civil Code, a person who has compensated the damaged party has recourse against each of the others in proportion to the degree of fault of each defendant and to the consequences arising therefrom.

This principle also applies to damages awarded for competition law infringements, as the Decree expressly allows for the application of article 2055(2) of the Civil Code, with the sole exception of non-settling co-infringers.

One or more defendants may bring a lawsuit against the jointly liable debtors (either by suing them in the same proceedings commenced by the damaged party or by suing them after paying a share of the damages that exceeds his or her portion of liability) under the right of recourse to assess the appropriate allocation of liability and, if that is the case, to be indemnified.

Passing on

35 | Is the 'passing-on' defence allowed?

The defendant in an action for damages is able to invoke the fact that the plaintiff passed on the whole or part of the damage resulting from the infringement of competition law (article 11 of the Decree).

In such a case, the burden of proving that the overcharge was passed on is on the defendant, who may require disclosure from the plaintiff or from third parties to satisfy its burden of proof.

In determining the passing on (as well as for the calculation of the amount of damages), parties can appoint technical advisors, while judges frequently avail themselves of the assistance of a court-appointed expert witness.

In addition, the European Commission has recently adopted specific 'Passing-on Guidelines' (which include, among other things, an overview of the theory of passing on, techniques for assessing its extent and examples drawn from practical cases) with the purpose of assisting national courts in the estimation of passing on.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Besides passing-on defences, defendants can defend themselves against antitrust damages claims using ordinary tortious liability claims defences, such as force majeure, the absence of wrongdoing in standalone actions, absence of damage, lack of causal link between the wrongdoing and the damage or contribution to the damage by the plaintiff.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

The typical alternative dispute resolution methods are also available in relation to private enforcement cases. Article 15 of the Decree expressly mentions (for the purposes of the suspension of the statutory limitation periods) arbitration, mediation and negotiations conducted by lawyers.

Arbitration

Arbitration is widely relied upon as a method to solve civil and commercial disputes in Italy, in both domestic and international disputes. In most instances, it is much faster than court proceedings and offers the parties a better chance to have their dispute decided by professionals with significant experience in the relevant fields.

It is undisputed that claims for antitrust damages can be submitted to the jurisdiction of arbitral tribunals, the arbitrability criterion under Italian law being the possibility of the parties settling the dispute.

Mediation

Mediation proceedings and mediation institutions are governed by Legislative Decree of 4 March 2010, No. 28. If an agreement is reached at the outcome of such proceedings, it will be directly enforceable.

Negotiations assisted by lawyers

Lawyer negotiation is regulated by the Law Decree of 12 September 2014, No. 132. The result of the negotiation is a written agreement that, in the case of a breach of the obligations provided therein, can be executed in respect of the defaulting party.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Private antitrust litigation has been known and practised in Italy for a long time. The relatively recent entry into force of the Legislative Decree of 19 January 2017, No. 3 (the Decree) poses few new challenges for legal practitioners and judges who are required to apply the new rules.

Among these emerging trends, the coordination between the courts and the competition authorities, both the Italian Competition Authority and the European Commission, is particularly interesting, given that the effectiveness of this relationship will certainly have a crucial effect on the interests at stake in the proceedings. In this regard, in a recent follow-on action, we witnessed efficient cooperation between the judge and the European Commission pursuant to a request by the judge under article 4 of the Decree in relation to the accessibility of documents in the European Commission file and the identification of those documents that concern a leniency application and must be absent of documents disclosure orders.

Another controversial issue lies in the recently established practice of bringing antitrust actions using the procedure laid down in article 696-bis of the Code of Civil Procedure, which allows the judge to order

a preventive technical consultancy for the purposes of the composition of the dispute. While the courts have sometimes admitted this kind of request in the context of private antitrust litigation, in other recent cases, the courts have dismissed them, claiming that the procedure can only be used if the decision on the compensation does not require the prior resolution of complex legal questions or the appreciation of facts that are outside the scope of the technical investigation. According to some courts, this is not the case for antitrust actions, even in the event of follow-on actions, which require an in-depth (and often complex) analysis in respect of all the aspects of the liability, the damage and the causal link that are not covered by the antitrust decision.

Another relevant development that, in our view, will have a significant impact on private antitrust litigation in Italy is the reform of class action proceedings implemented with the Law of 12 April 2019, No. 31, which will presumably show its results in the following years.

Coronavirus

39 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No regulations have been implemented in Italy to address the covid-19 pandemic with specific regard to private antitrust actions.

However, antitrust litigation before Italian courts was, and still is, affected by certain measures and initiatives adopted to tackle the effects of the pandemic in the context of civil proceedings. In this regard, it is worth mentioning article 221 of the Law Decree No. 34 of 19 May 2020, as converted into Law No. 77 of 17 July 2020 (the Rilancio Decree), which allows civil courts to adopt several measures, such as:

- with the consent of the parties, to order hearings that require only the attendance of counsel to be held remotely or in writing (ie, through the exchange of written briefs); and
- to allow one or more parties to participate in a hearing via an audio-visual connection.

In our experience, courts are often making use of this provision to authorise the exchange of written briefs, as well as to have remote hearings, instead of having hearings in attendance.

GIANNI & ORIGONI

Eva Cruellas Sada
ecruellas@gop.it

Salvatore Gaudiello
sgaudiello@gop.it

Piazza Belgioioso, 2
20121 Milan
Italy
Tel: +39 02 76 3741
Fax: +39 02 7600 9628
www.gop.it

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-698-3