Private Antitrust Litigation 2020

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Getting The Deal Through

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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. Our coverage this year includes new chapters on Italy and Portugal a new global overview.

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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, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

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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 Italian competition Law of 10 October 1990, No. 287 (Italian Competition Act), the number of cases brought before civil courts in relation to infringement of competition law was rather limited: according to non-official data, from 1990 to 2010 roughly 150 private enforcement cases were commenced. Approximately 75 per cent of these cases were stand-alone actions.

The limited recourse to civil action was probably related to a certain lack of awareness among undertakings and consumers over competition law issues. 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 be later specified and codified by the European Commission in the 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 (Directive).

The Directive was implemented in Italy with the Legislative Decree of 19 January 2017, No. 3 (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 likely to foster 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, 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 (see question 3).

The compensation for damage can be sought by anyone damaged by a competition law infringement, regardless of whether such 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 (for example, by raising its prices). 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:

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

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 courts of appeal of Milan, Rome and Naples, both for stand-alone 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 and national competition law by an undertaking, regardless of whether such 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 stand-alone actions which are mainly construed as tort actions under article 2043 ICC.

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 the Decree. This provides that the decisions of the ICA and the European Commission are binding as regards national judges in relation to the finding of the competition law infringement, provided that such 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 a 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 of a competition authority or a Court of another member state finding an infringement of competition law shall constitute 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 applicable also to private antitrust disputes. In particular, Regulation (EU) No. 1215/2012 and, on a residual basis, Italian Law on Private International Law (ie, Law of 31 May 1995, No. 218) apply.

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 ICCP;
- the harmful event occurred in Italy; or
- if the plaintiff is a consumer, the latter is domiciled in Italy.

The 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 TFEU, or the place in which the predatory prices were offered and applied in cases where such practices constituted an infringement of article 102 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*).

Private antitrust litigations can be commenced before Italian courts also 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 the applicable criteria (see question 5).

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 the practice is rather uncommon. Given the lack of a special regulation of third-party funding, contracts aimed at such goal will be governed by general principles of Italian contract law.

Contingency fees are forbidden under Italian law. More precisely, article 13, paragraph 4 of Law of 31 December, 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 on the value of the dispute or in flat rate (see article 13, paragraph 3 of 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, courts are able to order the counterparty or a third party to disclose relevant evidence that lies in their control (article 3 of the Decree).

For the purpose of admitting the request, the court shall 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 courts to order the disclosure of evidence included in the file of a Competition Authority, provided that:

- the parties and third parties are not reasonably able to produce such evidence;
- the request is proportional, considering, among other things, if:
  - it is not a generic application concerning 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 ICA may provide the court with its views on the proportionality of disclosure requests.

In any case, courts cannot order a party or a third party to disclose evidence related to leniency or settlement programmes (see question 13).

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 such 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.

Admissible evidence

10 | What evidence is admissible?

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

Also witness evidences are admissible, but with some specific limitations. Witness evidences are generally inadmissible in relation to contracts). They are 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 ground 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 lawyers in charge of a party's representation and their clients.

The possibility to benefit from the 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 there has been a criminal conviction for the same matter.

Indeed, article 651 of the Italian Code of Criminal Procedure expressly provides that a decision pronounced at the outcome of a criminal proceedings, when it is final and binding, has a res judicata effect in the civil proceedings 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.

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 the 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 otherwise unknown, only if it points to objective, precise and consistent conclusions.

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

- the prohibition of the disclosure of leniency statements and the right of the leniency applicants to be heard in the event that the judge intends to access the leniency statements to verify their contents with the support of the ICA (article 4(5) of the Decree); and
- a more favourable regime of joint liability (see question 33).

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: the compulsory one and the one jointly asked by all the parties.

A party alone can ask the court to stay the proceedings only when the decision of the case depends on the decision of another, 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 before a different judge).

The 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, the party who wants to exercise a right has to prove the facts on which such right rests, while the party who contests the relevant rights or facts, has to prove the facts on which such contestation rests.

In assessing causation Italian civil courts take the view that the finding has to 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 of probability of causation to satisfy the relevant burden of proof (more probable than not rule).

The Decree, however, sets forth certain provisions that derogate 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), as well as its material, personal, temporal and territorial scope is deemed as proved and cannot be disputed in the civil proceedings (see question 4);
- another 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 an competition infringement;
  - such 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 (passing on offence); and
- on the other hand, the defendant bears the burden of proving that the plaintiff passed on the whole or part of the overcharge 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 (for example, if the judge is called to assess the nature of the evidence to exclude leniency documents or when the evidence contains confidentiality obligation 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 proceedings (including the appeals) last between two and three years.

Decisions rendered at the outcome of a first-degree proceedings 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. Such 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?

Pursuant to article 8 of the Decree, 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 is to be taken into consideration also 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 in 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 the grounds pertaining 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 a special legislation on class-action proceedings, provided by article 140-bis of the Legislative Decree of 6 September 2005, No. 206 (Consumer Code).

Such legislation has been recently amended by Law of 12 April 2019, No. 31 (Class Action Reform); the relevant amendments will enter into effect on 19 April 2020 and will apply only to class-action proceedings for violations occurred after such date.

Class-action proceedings are available also in respect of antitrust claims, as acknowledged also by article 1 of the Decree. This article 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 ICCP (introducing the new articles from 840-bis to 840-sexiesdecies). In light of the above, such reference will have to be intended as pointing to the mentioned articles of the ICCP.

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) who 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 a class action that has been already commenced.

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

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 from the cartel assessed by the ICA, relating to some ferry companies' tariffs (AGCM, 18.10.2011, I743 - Tariffe Traghetti da/per la Sardegna). The Court, however, stayed the proceedings due 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.

Accordingly, 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 (see question 19) make it likely that more class actions in antitrust matters will be commenced in the future.

Certification process

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 (see question 19) make it likely that more class actions in antitrust matters will be commenced in the future.

Opting in/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 Class Action 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 has to 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, for the reasons illustrated in question 19.

REMEDIES AND LIABILITY

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 such person is a direct or indirect purchaser. The compensation includes (i) the actual loss suffered as a direct consequence of the infringement, (ii) the loss of profits; as well as (iii) the payment of interests and (iv) 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 overcharge harm suffered at that level.

The loss of profits, on the other hand, falls within the category of the 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 of 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 due to the behaviour of the losing party (for example, if the losing party acted with bad faith or gross negligence in civil proceedings, the judge can order that party to pay the winning party not only the cost of the proceedings but also an extra sum – ie, the vexatious litigation). As a consequence, punitive damages have been traditionally 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 such 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 case of tort, interest on damages accrue 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, courts do not take into consideration fines imposed by the ICA.

With regard to the quantification of damages awarded by courts in private enforcement cases, the Decree expressly refers to articles 1223, 1226 and 1227 ICC, 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 respect to the determination of the quantum of damages, allowing, however, the ICA to refuse to provide such assistance whereas 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 proceedings:

- is still in a preliminary phase;
- was closed with commitments pursuant to article 14-ter of the Italian Competition Act;
- was closed due 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.

Indeed, under article 91 ICCP, 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 the courts have found complex antitrust private enforcement cases to justify the entire compensation of the legal costs (see Court of Appeal of Milan, 15 October 2017, case No. 85107/2010, *Fastweb S.p.A. c. Vodafone Omnitel N.V. S.p.A.*).

Joint and several liability

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

Article 2055 ICC 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 differently.

In the case of different allocation of liability, the same 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 by the Decree in relation to few cases.

Small and medium-sized enterprises (SMEs)

Pursuant to article 9 of the Decree, SMEs (as defined in the EU Recommendation 2003/361) 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 cause its assets to lose all their value.

Said exception does not apply in the event that:

- the SME played a leading role in the context of the infringement or forced other undertakings to take part in it;
- the SME has been previously found to have committed other anti-trust 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, said companies may be held liable vis-à-vis other damaged parties where full compensation for their damages cannot be obtained from the other businesses involved in the same infringement of competition law.

Settling co-infringers

Finally, it bears noting that, following a consensual settlement, non-settling co-infringers shall not be permitted to recover contribution 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 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.

In fact, pursuant to article 2055(2) ICC, the person who has compensated the damaged party has recourse against each of the others in proportion to the degree of fault of each 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) ICC, with the sole exception of non-settling co-infringers (see question 33).

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 which exceeds his or her portion of liability) under the right of recourse, in order 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 overcharge resulting from the infringement of competition law (article 11 of the Decree).

In such case, the burden of proving that the overcharge was passed on shall be on the defendant, who may require disclosure from the plaintiff or from third parties.

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 antirust damages claims using ordinary tortious liability claims defences such as force majeure, the absence of wrongdoing in stand-alone 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 ADR methods are available also 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, both in domestic and in international disputes. Indeed, 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 of settling the dispute.

Mediation

Mediation proceedings and mediation institutions are governed by Legislative Decree No. 28/2010. 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 Law Decree No. 132/2014. The result of this negotiation is a written agreement that – in the case of breach of the obligations provided therein – can be executed as regards the defaulting party.

UPDATE AND TRENDS

Hot topics

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

While private antitrust litigation has been known and practised in Italy for a long time, the rather recent entry into force of the Decree poses a few new challenges for legal practitioners and judges who are required to apply the new rules.

Among these emerging trends, the coordination between Courts and competition authorities, both the ICA 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 an efficient cooperation between the judge and the European Commission pursuant to a request by the judge under article 4 of the Decree (see question 9) in relation to accessibility to documents in the European Commission file and the identification of those documents which concern a leniency application and must be excluded from documents' disclosure orders.

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Another relevant development that in our view will have a significant impact on private antitrust litigation in Italy is the recent Class Action Reform (see questions 19–26), which will presumably show its results in the following years.

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