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Antitrust Litigation

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3D Legal - Dandria Studio Legale

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3D Legal – DANDRIA Studio Legale was founded in 2011 and has 15 lawyers, including two partners, based in offices in Rome and Milan. Contracts and litigation as well as antitrust and regulation are the two key areas of practice, and the firm's clientele primarily consists of multinational corporations. Recommended for its expertise in competition law and dispute resolution, the firm is also known for its highly responsive approach and the transparency of its rates. 3D Legal – DANDRIA Studio Legale is a member of the Italian Antitrust Association and is regularly involved in antitrust investigations relating to violations of both EU and Italian competition law. The firm has also been retained to provide advice in follow-on lawsuits in the cosmetics, cement, window fittings and healthcare sectors, among others.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

In recent years, antitrust damage actions have become quite popular in Italy. In particular, customers are increasingly becoming aware of their right to compensation, especially in connection with the decisions of the Italian Antitrust Authority (Agcm).

It can be assumed that there are several judicial cases pending; however, the details will not become public until, and if, a ruling is issued. In practice and given the lack of recent precedents, virtually all Italian cartel damages claims so far have been settled at some point. Apart from a few short rulings that rejected claims based (also) on the EU Libor cartel, the only notable exception is an old car insurance case, in which hundreds of motorists were granted redress (calculated as a fraction of the insurance policy) by lower courts throughout Italy. In most cases, the eagerness to settle lies in the fact that defendants prefer not to take the risk of an adverse decision being published and attracting more claimants. This trend may well soon change, however, as claims increase, and the cost of settlement is likely to outweigh the advantages of secrecy.

However, there have been a number of rulings on abuse of dominance cases (especially in the telecoms sector) – both follow-on and standalone – where the victim was able to get either an injunction and/or a damages award.

Another factor contributing to the increase of antitrust litigation in Italy is the specific rules that have been introduced following the implementation of Directive 2014/104 on actions for damages under national law for infringements of the competition law provisions of EU member states and of the European Union. Not only has the right to compensation for harm caused by infringements of competition law been expressly acknowledged and regulated, particularly regarding burden of proof, access to evidence, standing and definition of damage (actual loss and loss of profit), as provided for in the directive; in a bid to ensure consistent application of the new and innovative – for the Italian legal system – rules, the number of courts entrusted with hearing competition law damages claims has been reduced to just three: Milan, Rome and Naples.

Other factors may add to the attractiveness of the Italian courts for claimants:

- the costs of such actions are relatively low, compared with other jurisdictions. Claimants should only pay a modest court fee when lodging their suit (a few hundred or thousand euros, depending on the claim value), and are rarely required to provide a deposit as a condition for bringing the claim, even where the legal basis of the claim does not appear to be that sound. The involvement of experts may also not be necessary up to the stage of the proceedings where evidence is collected and evaluated by the court;
- Italian judges are given wide discretion as to when and how to invite the parties to seek consensual settlement and may even recommend to the parties the concrete terms of a potential settlement. In fact, settlements are currently perceived as a useful tool to reduce the number of pending proceedings, which is one of the priorities of the Italian administration. While such proposals may well be formulated irrespective of technical support from experts and economists, with all the consequent uncertainty, the parties are usually more than willing to adhere to an authoritative invitation to settle, rather than proceed with a costly dispute and run contrary to the preference expressed by the judge; and
- at least in principle, under Italian law, nothing prevents third party funders from either funding or even purchasing cartel damages claims. The possibility of 'de-personalising' the claim may convince a number of otherwise reluctant victims to proceed against their suppliers. However, the Italian market for litigation funding is probably still largely untapped.

On the other hand, the lack of judicial precedents in cartel damages claims and the unpredictability of the approach when it comes to complex technical evaluations, may still constitute a deterrent to bringing large legal actions in Italy.

The 'Italian Torpedo' Strategy

To conclude, long gone are the days when infringers sought to seize Italian courts in an attempt to paralyse private enforcement actions across Europe. The strategy, referred to as 'Italian torpedo,' involved leveraging principles laid down in the Brussels Convention, currently enshrined in EU Regulation No 2015/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to prevent other European courts from dealing with the same matter while an Italian suit was pending. As a way to seize Italian courts first, defendants would apply for 'negative ascertainment' that their customers had suffered damage following the infringement decision of the relevant competition authority. The assumption was that such legal actions would take so long to be decided, that they would, de facto, thwart the right to redress by the alleged victims of the cartel. It must also be said that such strategy was eventually rejected by Italian courts and jurisdiction denied – perhaps unsurprisingly, given the overt mistrust in the judiciary underlying the Italian torpedo strategy.

1.2 Other Developments

On 19 January 2017, Legislative Decree No 3/2017 transposing Directive No 2014/104 came into force. Consistent with the aims of the directive, the legislative decree makes it easier and more effective for a victim of an antitrust infringement to bring an action for damages before the Italian courts, also

thanks to the introduction of far-reaching tools that were previously not available to the Italian procedural system.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

The legal basis to bring an action for damages for breach of competition law in Italy is contained in Law No 287 of 10 October 1990 as well as in Legislative Decree No 3 of 19 January 2017 and in Article 2043 of the Italian Civil Code.

Pursuant to Article 33 of Law 287/90, it is possible to bring actions for damages due to competition law infringements before the competent Italian judges. It is established case law that such actions can be qualified as torts under Italian law; the general rule being enshrined in Article 2043 of the Italian Civil Code. Accordingly, anyone may claim for damages caused by a violation of law, if the person is able to prove the connection between the violation and the damage, as well as the amount of the damages suffered as a consequence. The recent decree implementing EU Directive No 3 of 2017 has regulated in detail the action for damages from competition law infringements, making it easier for victims to obtain redress.

According to the above set of rules, it is possible to file both follow-on and standalone claims, the main difference being the 'advantage' conferred to the former category by the existence of a competition authority's decision establishing the underpinning violation of antitrust rules.

2.2 Specialist Courts

Under Article 18 of Legislative Decree No 3/2017, an action for antitrust damages can only be brought before the specialised business sections of three local courts (the so-called *Tribunale delle Imprese*):

- the Milan courts have jurisdiction over the judicial districts of Brescia, Milan, Bologna, Genoa, Turin, Trieste, Venice, Trento and Bolzano;
- the Rome courts have jurisdiction over the judicial districts of Ancona, Firenze, L'Aquila, Perugia, Rome, Cagliari and Sassari; and
- the Naples courts have jurisdiction over the judicial districts of Campobasso, Naples, Salerno, Bari, Lecce, Taranto, Potenza, Caltanissetta, Catania, Catanzaro, Messina, Palermo and Reggio Calabria.

Rules on territorial jurisdiction are exclusive and mandatory.

As a consequence, mixed claims, ie, claims brought on the grounds of competition law violations as well as, for example, breach of contract, IP infringements, unfair competition, abuses of personal data etc, should in principle be heard by one of the above courts only.

Under the general rules of Italian civil procedure, in a case where a judge finds that the claim should have been lodged with a different court, the proceedings are to be terminated, possibly at an early stage, and the parties referred to the competent court (where the case should be resumed by one of the parties within a prescribed term). Given the mandatory nature of the jurisdictional criteria set out above, the lack of jurisdiction in respect of a competition law claim can be raised by the court by its own motion, and not just upon the objection of the defendant.

2.3 Decisions of National Competition Authorities

Article 7, paragraph 1, of Legislative Decree No 3/2017 provides that a final decision of the Italian Competition Authority (ie, a decision that can no longer be appealed) or a final judgment adopted by an administrative court in the exercise of its judicial review, are partially binding for national judges in antitrust damages actions. In particular, the binding effect is limited to the factual analysis of the antitrust infringement, the nature of the violation and its substantive, personal, temporal and territorial scope. At the same time, such decisions or final judgments are not binding with regard to the existence of damages and the causal link between the infringement and the loss.

Pursuant to Article 7, paragraph 2, of Decree No 3/2017, antitrust infringements ascertained by final decisions of other national authorities or final judgments of the review courts of other EU member states are considered as evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

The Italian Competition Authority may intervene in judicial proceedings on its own initiative when it intends to submit observations to the court regarding the proportionality of the disclosure request sought by the latter (Article 4 of Decree No3/2017).

Furthermore, according to Article 14, paragraph 3 of the same decree, the court may seek the assistance of the authority with respect to the determination of the amount of damages to be awarded to the victims of the antitrust infringement.

2.4 Burden and Standard of Proof

Article 2697 of the Italian Civil Code allocates the burden of proof on the claimant.

Since antitrust violations are regarded as torts, the relevant damages action is governed by Article 2043 of the Italian Civil Code on non-contractual liability. According to Article 2043, the claimant must demonstrate the existence of:

- the unlawful act;
- the damage; and

- the causal link between the unlawful act and the damage.

There are two important exceptions that partially relieve the claimant of the burden of proof:

- a final decision of the Italian Competition Authority is enough to prove that the defendant committed an infringement of competition law; and
- it shall be presumed that cartel infringements cause harm, with the infringer having the right to rebut that presumption.

The defendant may invoke the so-called 'pass-on' defence in order to demonstrate that the claimant has not suffered any damages since it passed the overcharge down the supply chain. In this case, the burden of proof lies on the defendant.

With regards to the relevant standard of proof, Italian civil proceedings typically employ the principle of 'preponderance', which refers to a balance of probabilities when assessing pieces of evidence. In general, the court has a duty to carefully evaluate all the evidence submitted by the parties (see Article 116 of the Italian Code of Civil Procedure).

Article 2 of Legislative Decree No 3/2017 gives a definition of 'evidence' for the purpose of antitrust litigation, stating that it includes all means of proof seized which are admissible before the national court, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored.

2.5 Direct and Indirect Purchasers
Claims for damages are available both for those who purchased goods or services from the infringer (direct purchasers) and for purchasers further down the supply chain (indirect purchasers – see Recital 44 of Directive 2014/104/EU).

Under Article 12 of Legislative Decree No 3/2017, in an action for damages, the indirect purchaser must prove the existence and the extent of pass-on. Given the difficulty of demonstrating this, the court may order the disclosure of relevant documents from the defendant or from third parties.

The pass-on of the overcharge is deemed to be proven, if the claimant demonstrates that:

- the defendant infringed competition law;
- the infringement resulted in an overcharge to the direct purchaser; and
- the indirect purchaser bought goods or services that were the object of the infringement or derived from or containing them.

2.6 Timetable
The duration of a civil proceeding cannot be predicted in advance as it is subject to many different factors. As already mentioned, most antitrust litigation proceedings commenced so far in Italy have not yet concluded with a (first instance) judgment because they have largely been settled.

It has recently been estimated that the duration of first-instance civil proceedings in Italy is between three and five years. While the business sections of the courts are supposed to hear cases on a fast track, the complexity of the subject matter and the likelihood of expert involvement may well result in lengthy proceedings.

If a parallel investigation is pending before a national competition authority, the judge may decide to stay proceedings and wait for the NCA to terminate its investigation (Article 4, paragraph 8 of Legislative Decree No 3/2017).

Another case of discretionary stay of proceedings is provided for in Article 15, paragraph 2 of Legislative Decree No 3/2017, should the parties engage in consensual dispute resolution.

Moreover, according to Article 296 of the Italian Civil Procedure Code, parties may request the court to stay proceedings for any justified reason. The Article also states that the court may grant the stay only once and for a period not longer than three months.

3. Class/Collective Actions

3.1 Availability
Article 1 of Legislative Decree No 3/2017 expressly states that it applies also to class actions regulated by Article 140 bis of the Consumer Code. The said Article ensures the right to full compensation to anyone (ie, any natural or legal person) who suffered harm following an infringement of competition law.

The current Italian legislation on class actions provides for an opt-in mechanism, therefore members of the class must join the proceedings in order to benefit from a positive decision. Please note that a new regime for class actions will apply as from 19 April 2020 (Law No 31/2019).

Nothing prevents both direct and indirect purchasers from commencing a class action provided that their rights are homogeneous.

3.2 Procedure
Under the current regime, a class action can be brought by both consumers and consumer organisations. The new regime, applicable as from 19 April 2020, provides that not only consumers, but any classes of natural and legal persons as well as non-profit organisations and associations will be entitled to commence a class action to obtain redress for

'individual homogeneous rights' violated by companies or public services providers.

A class action can be rejected at the preliminary stage if:

- it is patently unfounded;
- there is a conflict of interests;
- the rights which the lead claimant seeks to uphold are not homogeneous to the entire class; or
- it appears that the lead claimant cannot adequately protect the interests of the class.

If the class action is declared admissible, the court establishes the features of the 'homogeneous individual rights' and specifies the requirements for the inclusion of new members.

Class action proceedings largely follow the ordinary rules of civil procedure, with some significant peculiarities, as follows:

- the lead claimant must serve a writ of summons on the defendant at least 90 days before the date set for the first hearing;
- the writ of summons must be filed before the competent court within ten days of service of the writ;
- under Article 140bis of the Consumer Code, the writ of summons must also be served on the public prosecutor, who may express their opinion on the admissibility of the action; and
- after the first hearing, the court rules on the admissibility of the class action or suspends the proceedings (if there are other proceedings concerning the same issues already pending before an administrative agency or an administrative court).

The class action can be rejected at this preliminary stage if:

- it is patently unfounded;
- there is a conflict of interests;
- the rights which the lead claimant seeks to uphold are not homogeneous to the entire class; or
- it appears that the lead claimant cannot adequately protect the interests of the class.

After the preliminary ruling, the court sets a deadline (which cannot exceed 120 days from the publication of the class action notice) for the opt-in of other members of the class. Italy has not adopted the US 'opt-out' model (which some commentators believe may account for the lack of success of class actions in Italy), therefore, if the class action is deemed admissible, the court orders the defendant to publish a notice at its own expense to allow other members of the class to opt in.

Under the New Statute

From 19 April 2020, when the new statute will be in force, the proceedings will be regulated by the special rules set out in Article 702bis of the Civil Procedure Code, which provides for a more flexible approach in terms of timing and procedure.

The class will have to lodge an application that will be published on the Ministry of Justice's website by the court registry, together with the court's decree setting the date of the hearing.

The court must decide on the admissibility within 30 days from the first hearing.

The costs of publishing the preliminary ruling on admissibility will no longer be borne by the claimants, as the court registry will publish this online.

According to Law 31/2019, other members of the class will be entitled to join in two different phases of the proceedings:

- after publication of the initial application; and
- after publication of the judgment on the merits.

In both cases, the time window set by the court will be between 60 and 150 days.

Class actions are currently heard by civil courts, by a panel of three judges. They must be brought before the main regional court where the defendant has its registered office (Article 140 bis, section 4, Consumer Code). Smaller regions fall under the jurisdiction of the larger courts, as follows:

- court of Turin: Valle d'Aosta;
- court of Venice: Trentino-Alto Adige and Friuli-Venezia Giulia;
- court of Rome: Marche, Umbria, Abruzzo and Molise; and
- court of Naples: Basilicata and Calabria.

After the new law comes into force, the competent authority will be the business sections (*Tribunale delle Imprese*) which have territorial jurisdiction over the place where the defendant has its registered office.

3.3 Settlement

Under Article 185 of the Italian Code of Civil Procedure, upon joint request, the court sets the date for a hearing in which it freely interviews the parties in order to settle the dispute.

The court can propose the amount of damages to be awarded to each claimant or the criteria to be applied for its quantification. In the latter case, the parties are given a deadline to

reach an agreement, failing which, the amount of damages will be adjudicated directly by the court.

4. Challenging a Claim at an Early Stage

4.1 Strikeout/Summary Judgment

Strikeout/summary judgments are not available in Italy. Nevertheless, the defendant may raise preliminary issues (eg, lack of jurisdiction or locus standi, limitation) and, if any of these are granted, the court will issue a strikeout order without evaluation of the merits.

4.2 Jurisdiction/Applicable Law

As mentioned, rules on jurisdiction for antitrust damages claims are contained in Article 18 of Legislative Decree No 3/2017. These rules shall be applied consistently with conflict of law rules, especially Regulation EU No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, when the parties to the proceedings are domiciled in different countries.

According to general criteria, Italian courts have jurisdiction over actions brought against a defendant domiciled in Italy (see Article 4, Regulation No 1215/2012).

In case of multiple defendants domiciled in different EU member states, pursuant to Article 8, paragraph 1 of Regulation No 1215/2012, the defendants may be attracted to the judge of the domicile or registered office of one of them (a so-called ‘anchor defendant’), provided the claims are so closely connected that it is expedient to hear and determine them together.

Therefore, Italian courts may hear claims brought against defendants with domicile or registered office in Italy – irrespective of the place where the infringement was committed – as well as those who, even if domiciled abroad, have violated competition law alongside defendants domiciled or based in Italy.

Under Article 6, paragraph 5 of Regulation No 1215/2012, disputes arising out of the operations of a branch, agency or other establishment are heard by the competent courts for the place where the branch, agency or other establishment is situated. Where consumers are involved in a contract, the court which has jurisdiction is chosen by the consumer and can be either at the place where the defendant has their domicile or registered office, or where the consumer has their domicile.

For the sake of completeness, it should be noted that parties may agree to subject any disputes arising from or in connection with a legal relationship, to the jurisdiction of courts of a specific member state (Article 25 of Regulation No 1215/2012). In addition, there is a tacit extinction of jurisdiction when a defendant enters an appearance without contesting the jurisdiction of the seized court.

The relevant rules on applicable law can be found in Regulation CEE No 864/2007 (Rome II), which contains a specific provision regarding “unfair competition and acts restricting free competition” (Article 6) and states that:

- when it comes to restrictions of competition, the applicable law is that of the country where the market is, or is likely to be, affected – par. 3, let. a);
- when the market of more countries is, or is likely to be, affected (so-called ‘multi-jurisdictional violations’) in an action for damages, the claimant may base the claim on the law of the competent court for the domicile of the defendant, if the market in that member state is one of those affected by the restriction on which the action for damages is based – par. 3, let. b); or
- when the claimant sues more than one defendant in the above court, the claimant must base their claim on the law of that court, provided that the restriction also affected the market of the member state of the seized court – par. 3, let. b).

4.3 Limitation Periods

According to Article 8 of Legislative Decree No 3/2017, the limitation period to bring an action for damages stemming from an antitrust violation is five years. Such limitation period shall not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, that the behaviour constitutes an infringement of competition law, that the infringement caused the claimant harm, and the identity of the infringer.

According to paragraph 2 of Article 8, if the competition authority starts an investigation relating to the antitrust violation on which the action for damages is based, the limitation period is suspended and the suspension ends one year after the infringement decision becomes final or after the investigation is otherwise terminated.

Upon parties’ request, the court seized in an action for damages may grant a suspension of the limitation period for up to two years, if the parties are engaged in consensual dispute resolution.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

Under Article 3 of Legislative Decree No 3/2017, at the reasonable request of a party, the court can order the disclosure of relevant evidence from the counterparty or a third party.

The Legislative Decree, in accordance with the Directive, has introduced the notion of ‘categories of evidence’, which shall

be identified on the basis of common features of their constitutive elements such as their nature, the period in which they were formed, their scope or their content.

The disclosure order shall be limited to what is considered proportionate by the court for the purpose of the decision. In deciding this, the court should assess whether:

- the claim or the defence are supported by the evidence requested;
- the scope and the cost of the disclosure are feasible, especially relating to third parties; and
- the evidence for which the disclosure is sought contains confidential information, especially relating to third parties.

The court may order specific measures to protect confidential information (documents containing confidential information of personal, commercial, industrial and financial nature relating to natural or legal persons and trade secrets) contained in the evidence requested – such as hearings closed to the public, limitation of the people authorised to inspect the documents, summaries of the documents, aggregated data and redacted documents.

In order to ensure due process, the party from whom disclosure is sought can be heard before the court.

According to Article 4 of the Legislative Decree, the court may order the disclosure of the evidence included in the authority's file, if neither the parties nor the third parties are able to provide such evidence or following the reasonable request of one of the parties.

Paragraph 3 of the Article provides for a proportionality test to be applied by the court which shall consider whether:

- the request specifically identifies the nature, subject matter or contents of documents submitted to a competition authority or held in its file;
- the disclosure is likely to support the action for damages; or
- the disclosure would impair the effectiveness of the public enforcement of competition law.

There are certain categories of evidence that can be disclosed only after the closure of the authority's investigation (see Article 4, paragraph 4 of Legislative Decree No 3/2017). The so-called 'grey list' includes: evidence collected during an investigation by the authority; documents prepared by the authority and addressed to the parties of the investigation; and settlement applications that have been withdrawn.

Neither pre-action nor early disclosure is available in the Italian legal system.

5.2 Legal Professional Privilege

Pursuant to Article 3, par. 6 of Legislative Decree No 3/2017, documents covered by legal privilege can be withheld from disclosure.

In accordance with EU case law (C-155/1979, AM&S; T-30/1989, Hilti; T-125/2003, Akzo Nobel), it is maintained that the concept of legal privilege should extend to the following categories of documents:

- communications between the company and its external lawyers (provided they are admitted in an EU country), which have as their object the alleged competition law infringement (including the resulting damages);
- internal company notes reproducing the contents of the communications exchanged with the external lawyers (see preceding point); and
- internal company notes drawn up for the purpose of requesting external legal advice in respect of the alleged competition law infringement.

It is therefore recommended that such categories of communications are clearly marked 'confidential and privileged', as communications with internal lawyers, ie, those that are employed by the company, even if members of the Bar in a member state, are not covered by legal privilege.

5.3 Leniency Materials/Settlement Agreements

Leniency statements and settlement agreements are included in the so-called 'black list', which refers to documents that cannot be disclosed at any time (see Article 4, paragraph 5 of Legislative Decree No 3/2017).

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Although it is not very common in these types of proceedings, in principle, statements given by witnesses of fact could be taken into account by the court on a discretionary basis.

Pursuant to Articles 253 and 257bis of the Italian Code of Civil Procedure, witnesses may render both oral and written statements.

However, written witness statements are not widely used in Italy as Article 257bis of the Italian Code of Civil Procedure only applies to a limited number of cases (eg, where both parties give their consent to such a statement). In such a case, the party requesting the examination must draw up a template on which the witness can give their testimony before signing it.

Oral examination is carried out by the court by questioning the witness on specific facts. Moreover, the judge may ask

further questions where required. However, in Italian civil proceedings, cross-examination is generally not allowed.

Under Article 250 of the Italian Code of Civil Procedure, witnesses are formally summoned to render testimony. However, if the witness who has been summoned does not appear at the hearing, the judge may order that a second notice be served to force the witness to appear at the hearing. Should they still not appear without justified reason, the judge may order the witness to pay a fine of between EUR200 and EUR1,000.

Certain limitations apply regarding the subjects on which witnesses are called to give statements. In particular, according to Article 2721 ofthe Italian Civil Code, the existence of a contract cannot be proved by witness statements, unless the court authorises otherwise.

6.2 Expert Evidence

Given the complexity of antitrust actions for damages, it is quite common for the parties to ask the court to appoint an impartial expert. The expert is usually an economist with specific knowledge of antitrust. Their task is usually to prepare a written report and answer a set of questions provided by the judge.

Pursuant to Article 61 of the Italian Code of Civil Procedure, the court may rely on technical consultants whenever it deems this necessary. Technical consultants can give their evidence either orally or in writing depending on the circumstances (see Article 195 of the Italian Code of Civil Procedure) and they are not subject to cross-examination. The relevant cost of such consultancy is usually shared between the parties.

Article 201 ofthe Italian Code of Civil Procedure provides that, following the appointment of the court's expert, parties may appoint their own experts who may attend hearings and work alongside the court's expert.

The court does not require experts to produce joint statements indicating the areas in which they agree/disagree in advance of the trial and Italian law does not foresee alternative methods of hearing expert evidence, such as the so-called 'hot tub'.

7. Damages

7.1 Assessment of Damages

In establishing the right to full compensation, Article 1 of Legislative Decree No 3/2017 mandates that such compensation shall include actual loss, loss of profit and interest from the time the harm occurred until the compensation is actually paid.

The quantification of harm implies a complex analysis comparing the present position of the damaged party to the position in which it would have been had the infringement not occurred (the so-called 'counterfactual scenario'). Exemplary or punitive damages are not available in Italy (in any event, Article 3 of Directive 2014/104/EU expressly specifies that full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages).

Article 14 of Legislative Decree No 3/2017 states that the existence of damage is presumed when it has been caused by a cartel, unless the infringer proves otherwise.

In the quantification of the amount of the damage, the court shall refer to Articles 1223, 1226 and 1227 of the Italian Civil Code. Article 1226 allows the court to assess the damage in an equitable manner. Pursuant to Article 1223, the damages awarded must make up for the actual and foreseeable loss (so-called 'loss of profit') suffered as a direct and immediate consequence of the infringement.

Experts and economists can be appointed by the court for the purpose of quantifying the damage suffered by the victim. Parties are entitled to appoint their own experts to interact and provide observations on the reports submitted by the court experts. Normally, the appointment of experts would only occur if the court was reasonably convinced that some sort of harm took place, and thus only at an advanced stage of the proceedings.

The court may also seek assistance from the competition authority for the quantification of damages.

7.2 'Passing-on' Defences

In an action for damages, the defendant can invoke as a defence the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. For this purpose, the defendant must prove the existence and extent of pass-on of the overcharge and, in so doing, he may request the disclosure of evidence held by other parties or third parties.

This principle was applied in a past case where the claimant had brought an action for damages against a well-known football club that discriminated among intermediaries in the sale of its tickets, alleging it had abused its dominant position. The court found that the overprice paid by the intermediary had been entirely passed on to the fans who bought the tickets and thus rejected the claim.

7.3 Interest

According to Italian civil law, statutory interest is payable on damages (this is currently set at 0.8% per annum). The rate of statutory interest is set by the minister of treasury on an annual basis (see Article 1284 of the Italian Civil Code).

According to Article 1224 of the Code, when a payment is overdue, legal interest is always due from the day of default.

However, the Italian Supreme Court, in its Decision No 19499/2008, stated that interest on damages shall not be less than the average return on 12-month Italian bonds. Since such yields are presently rather low, the Supreme Court decision has in practice had little effect on the amount of payable interest. It should be noted that in damages claims, the rate of interest is left to the discretion of the judge who, at least in principle, might decide to apply a higher or lower rate depending on the circumstances.

8. Liability and Contribution

8.1 Joint and Several Liability

Undertakings which have infringed on competition law through joint behaviour are jointly and severally liable for the harm caused to the victims.

The Italian regime on joint and several liability is set out in Article 2055 of the Italian Civil Code which states that if a harmful act is committed by more than one person (natural or legal), each of them is jointly and severally liable for the full compensation awarded.

Therefore, infringers that have jointly carried out a violation of competition law are jointly and severally liable for the damages caused. Consequently, a claimant has the right to require full compensation from any of the co-infringers until the damage is fully compensated. Co-infringers that pay more than their share, can recover the excess from the other co-infringers (see also Article 9 of Legislative Decree No 3/2017).

Supreme Court Ruling

It should be pointed out that pursuant to Article 269 of the Italian Civil Procedure Code, as interpreted by the Supreme Court (Ruling No 4309/2010), defendants should be authorised by the judge, if they want to summon other co-infringers in the same damage proceedings. In making the decision, the judge will not only consider the right of redress, but also whether, as a consequence of other co-infringers being summoned, the proceedings would, on balance, risk being unduly impaired or undermined. A negative decision by the judge would obviously not impact on the defendant's right to seek contribution from the other co-infringers in subsequent proceedings, should the defendant be ordered to pay the share of damage caused by the others too. The defendant that manages to have other co-infringers summoned in the same proceedings, should ask the court to apportion the damage between them.

Exceptions

Legislative Decree No 3/2017 provides for two exceptions to this general rule. Firstly, when the infringer is a small or medium-sized enterprise (SME), such enterprise is liable only to its own direct and indirect purchasers if:

- its market share in the relevant market was below 5% during the entire infringement period; and
- the application of the rules of joint and several liability would irreversibly jeopardise its economic viability.

Nevertheless, the exception does not apply if:

- the SME was the leader of the infringement; or
- it coerced other undertakings to participate therein; or
- it committed previous infringements.

A second exception is provided in relation to 'immunity recipients' that will be jointly and severally liable to their 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. The recovery against an immunity recipient cannot exceed the amount of damage they caused to their direct or indirect purchasers or providers.

8.2 Contribution

Pursuant to Article 106 of the Italian Code of Civil Procedure, parties to a proceeding may summon a third party which is considered to be involved in the lawsuit, subject to the authorisation of the judge. Contribution proceedings against other co-infringers can be started by the infringer that was ordered to pay the entire damage to the claimant. It may not always be an easy task to substantiate the claim for contribution, in part because the criteria for apportionment may vary and be subject to the discretionary evaluation of the judge. Among the criteria that may come into play are the following: equal share for each infringer; share proportional to actual sales to the claimant in the relevant period; overall sales; and role in the infringement (eg, ringleaders pay the most).

9. Other Remedies

9.1 Injunctions

Although the Italian legal system contemplates injunctive relief, it is not a common feature in the context of actions for damages stemming from antitrust infringements, the only exception being actions against abuse of dominance (eg, to obtain access to the network).

Injunctions are usually employed by creditors to collect their claims on the basis of documentary evidence.

In other urgent cases, injunctions can be granted, with or without notice to the other parties, in cases of proven urgency. Should the application for interim relief be granted without delay, the court will schedule a hearing within 15 days to revoke, confirm or amend the injunction.

Interim measures can be granted even before the lawsuit is started and their content may vary greatly, depending on the circumstances of the case. In order to obtain an interim measure, the claimant needs to demonstrate:

- the prima facie soundness of the claim (fumus boni iuris); and
- the risk that they will suffer serious damage (periculum in mora).

9.2 Alternative Dispute Resolution

Pursuant to Article 15, paragraph 1 of Legislative Decree No 3/2017, parties can resort to consensual dispute resolution methods such as mediation, arbitration, out-of- court settlements and alternative dispute resolution with the involvement of consumer associations.

Although ADR mechanisms are not compulsory, parties are strongly encouraged to agree on compensation damages for antitrust infringements outside the courts to reduce the uncertainties concerning the conditions under which injured parties can exercise the right to compensation, deriving from the discrepancies between the national rules (see also Recitals 5 and 7 of Directive 2014/104/EU).

In order to give a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before Italian courts, the legislative decree provides that limitation periods should be suspended for the duration of the consensual dispute resolution process (see Article 15 of Legislative Decree No 3/2017). Moreover, for the same purpose, the court may suspend the proceeding brought for damages compensation for up to two years if the parties start a consensual dispute resolution process. If no conciliation is reached, the court shall summon the parties within 30 days of formalisation of the failure to reach an agreement.

As an incentive to provide adequate redress to damaged parties, the legislative decree establishes that, when assessing the fine, the authority may consider as a mitigating factor the compensation paid as a result of a consensual settlement reached prior to its decision.

A claimant who takes part in a consensual settlement with some of the infringers cannot seek the damage agreed to by the settling infringers from other non-settling co-infringers.

Should a non-settling co-infringer become insolvent, the injured party may seek compensation for the insolvent party's share of damage from settling co-infringers, unless expressly excluded under the terms of the consensual settlement.

Furthermore, the court must take into account the share of damage already paid by a co-infringer under a settlement agreement, in determining the amount of contribution that the said co-infringer has to make to correspond to any other co-infringer.

10. Funding and Costs

10.1 Litigation Funding

Italian law does not contain specific provisions relating to third party funding and, as a consequence, third party funding and claim transfers are not prohibited. Claim management companies are becoming more and more active on the Italian market, with non-performing loans, bankruptcy proceedings, and passenger compensation for flight delays or cancellations being just some of the thriving areas.

10.2 Costs

Pursuant to Article 91 of the Italian Code of Civil Procedure, the court awards the costs together with the final ruling on the merit, ordering the succumbing party to pay expenses in favour of the successful party. In principle, when quantifying lawyers' fees, the court refers to the official tariffs published by the Justice Ministry (these are presently contained in Ministerial Decree No 37 of 8 March 2018). The amount of legal costs does not normally make up for the real expenditures borne by the winning party (largely consisting of lawyers' fees), especially if these have been substantial. On top of that, it is not unusual for Italian courts to diverge from this principle and settle expenses among the parties irrespective of the outcome of the proceedings. This is mostly the case when the succumbing party is relatively small compared to the other party, eg, when a consumer sues a large provider of goods or services.

11. Appeals

11.1 Basis of Appeal

Rulings issued by a lower court (*Giudice di Pace*) can be appealed before the Tribunal. If a first-instance ruling is issued by the Tribunal, normally because the claim value exceeds EUR5,000, it can be appealed before the Court of Appeal. In both cases, two different deadlines apply:

- the short-term deadline is 30 days from the date of service of the ruling, if any; and
- the long-term deadline is six months from the date of publication of the ruling.

Second-instance appeals can be based both on the evaluation of the merits and points of law. It is unusual for the appel-

late court to admit new evidence and appeals are heard at a single hearing. The duration of appellate proceedings may vary between 18 months and a few years.

Judgments issued by appellate courts may be further appealed before the Supreme Court (*Corte di Cassazione*) within the following terms:

- the short term is 60 days from the date of service of the ruling, if any; and
- the long term is six months from the date of publication of the ruling.

Appeals to the Italian Supreme Court are admissible on points of law only, and the proceedings may last from one to a few years, largely depending on whether the appeal is considered admissible or not. If considered inadmissible, the court will issue a strikeout order with a short reasoning. The court may also refer the case back to (a different) appellate court, if it considers that further evaluation of the merits or new evidence is required. If not, the court will render the final decision.

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