

PRIVATE ANTITRUST ENFORCEMENT IN ITALY



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CPI ANTITRUST CHRONICLE

JUNE 2019

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CPI Antitrust Chronicle June 2019

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I. INTRODUCTION

In Italy, private antitrust lawsuits can be brought in connection with any possible infringement of national competition law or Articles 101 and 102 TFEU. Victims of anticompetitive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution, and injunctive relief.

Italy has a long-standing (and increasing) tradition of private antitrust enforcement.

Stand-alone actions are more common for unilateral conduct, in particular when the dominant position is not controversial, or if it has already been established in previous decisions by competition authorities. Nonetheless, follow-on actions have higher chances of success considering the high evidentiary value that national courts give to Italian Competition Authority (“ICA”) findings.

On February 3, 2017, Legislative Decree No. 3, dated January 19, 2017, (“Decree”), implementing Directive No. 2014/104/EU on actions for antitrust damages (“Damages Directive”), entered into force. According to the Damages Directive, any natural or legal person who has suffered harm caused by an infringement of competition law can exercise the right to claim for full compensation. The Decree introduced a number of substantive and procedural provisions to facilitate damages claims by victims of antitrust infringements. The Decree is expected to increase private antitrust litigation in Italy, particularly follow-on actions to ICA cartel decisions. The new rules are applicable both to individual and collective actions.

This article compares the Decree and the Damages Directive, highlighting the main consistencies and discrepancies, and pointing out the important changes that the Decree has introduced in the Italian legal framework. It does so by analyzing key features of the private enforcement regime including procedural aspects, disclosure, effects of ICA decisions, and the statute of limitations. Finally, it refers to the most recent and noteworthy cases in Italy on these points.

II. THE NEW REGULATORY FRAMEWORK ON PRIVATE ENFORCEMENT

A. Procedural Aspects

From a procedural standpoint, the Italian legislator used the transposition of the Damages Directive to increase the degree of specialization in antitrust matters before first instance courts. It did so by dividing Italy into three macro-regions: Giving the Milan court jurisdiction over Northern Italian districts, the Rome court over Central Italian districts, and the Naples court over Southern Italian districts.²

B. Disclosure

The Damages Directive introduces a number of harmonizing provisions concerning the disclosure of evidence. It does so in order to tackle one of the main obstacles to successful litigation in private enforcement of competition law across the EU.

Disclosure is now regulated by the Decree in Articles 3 to 5, which fully mirror the corresponding provisions of the Damages Directive.

A specific feature of the Decree relates to the possibility for national courts seized of an action for damages to suspend their proceedings if access to grey listed documents is requested, so as to wait until the ICA proceedings come to an end. In this regard, the Decree goes beyond the Damages Directive and makes the comfort zone of the ICA even wider.

Rules on disclosure in the Decree make it easier for victims of antitrust infringements to support their claims. The Italian system already had a provision allowing similar disclosure (Article 210 of the Civil Procedure Code), but courts had used this provision in very few cases in the context of antitrust damages actions. Under Article 210, the party seeking disclosure had to show that the documentation was necessary and indispensable for the case. Moreover, according to the traditional strict interpretation of Article 210, only disclosure of precisely identified documents could be granted.

The Decree increases the powers of national courts to collect evidence to prove the existence of antitrust infringements. First, one of the most significant changes compared to the previous rules relates to the power of Courts to order the counterparty or third parties to disclose specific items of evidence or categories of evidence available to them. The concept of categories of evidence was not in the previous Italian civil procedure rules. Although Article 3 of the Decree attempts to define it by making reference to the exact wording of Recital 16 of the Damages Directive, the Decree only provides vague guidance, leaving room for a substantial degree of judicial discretion. Whether or not this change will have a practical effect will depend on the willingness of national judges to make use of their powers.

Second, another significant change relates to disclosure of confidential documents. Before the Decree, no provision empowered the judge to deny or limit access to confidential documents. As a result: (i) parties frequently refused to submit relevant documents in order to prevent the disclosure of confidential information; and/or (ii) disclosure orders were frequently challenged. Under the new set of rules, the courts have the power to give practical directions aimed at reconciling access to evidence and the protection of confidential data. For the first time, Article 3 of the Decree provides a non-exhaustive list of judicial orders to protect confidentiality, such as duty of secrecy, redacted versions of documents, non-confidential summaries, and data rooms (most of these measures are already well known in the Italian court practice, though mainly in patent infringement litigation).

Third, important changes also relate to penalties in case of failure or refusal to comply with disclosure orders, or destruction of relevant evidence. Before the Decree, parties' failure to comply with disclosure orders merely allowed the judge to draw very weak evidential inferences (Article 116 of the Civil Procedure Code). Regarding non-parties' failure to comply, the law was completely silent. According to the Decree, both parties and non-parties who refuse to comply with disclosure orders can now be subject to heavy fines, the amount of which (from €15,000 to €150,000) is much higher than the fines in the Civil Procedure Code.³ Notwithstanding the above, there is still the risk that the addressee considers it more profitable to pay the fine and refuse to disclose. Hence, parties are subject to an additional "procedural" penalty: The judge

² According to D. Bonaretti, President of Chamber at the Court of Appeal of Milan, almost 90 percent of antitrust claims in Italy are lodged before the Court of Milan (speech given at the AAI conference held in Florence on May 24, 2019).

³ See, *inter alia*, the fines imposed in case the custodian does not perform its duty (Article 67 of the Civil Procedure Code: from €250 to €500); for refusal to allow an inspection (Article 118 of the Civil Procedure Code: €250 to €1,500); and for lack of attendance of witnesses or refusal of witnesses to attend the trial (Article 255 and 257-bis of the Civil Procedure Code: from €100 to €1,000).

can draw adverse evidential inferences from a party's refusal or failure to comply. When the addressee of the disclosure order is a party to the proceedings, fines and adverse evidential inferences can both be applied at the same time.

C. Effects of ICA Decisions

Regarding the effects of national competition authorities' decisions in judicial proceedings, the Decree is consistent with the Damages Directive, but introduces significant changes to the Italian legal framework.

Based on case-law prior to the Decree,⁴ the ICA's findings – if confirmed by administrative courts or no longer subject to appeal – were already considered as special evidence of the infringing conduct. Courts have always considered those decisions as highly reliable evidence, so called “*prova privilegiata*,” namely something in between legal evidence and evidence left to the evaluation of the judge. The practical effect was, in fact, the inversion of the burden of proof on the defendant (i.e. they created a rebuttable presumption with respect to the existence of the infringement). This approach conferred special evidentiary value on the final decisions, without compromising the discretionary assessment of the judge and without precluding the possibility for counter-party rebuttal.

The Decree goes a few steps further, considering that the evidentiary value of competition authorities' decisions is now dictated by law:

- A final ICA finding of infringement, which is confirmed after judicial review or no longer subject to appeal, is binding on civil courts having jurisdiction over follow-on damages actions in relation to the nature of the infringement and its actual, personal, temporal and territorial scope;
- Moreover, the final finding of infringement by a competition authority or an appeal court in another Member State *may* constitute “evidence to be assessed along with other evidence” against the author of the infringement.⁵

Only final ICA decisions, which are confirmed after judicial review or no longer subject to appeal, are binding on civil courts having jurisdiction in follow-on damages actions. On the contrary, ICA decisions subject to judicial review are not fully and immediately binding. In those cases, civil courts must still assess the evidence and facts of the case. The burden of proof lies with the claimants, who must prove the facts on which their claims are founded. The defendants, on the other hand, must offer evidence in support of their objections or counterclaims.

This solution was the result of a debate relating to the unconstitutional nature of rules on the binding force of competition authorities' decisions (some scholars considered such binding force to conflict with the constitutional principles according to which judges are independent and subject only to the law). While providing for the binding force of final ICA decisions, the Decree stresses the fact that administrative courts are entitled to fully review the facts upon which the challenged decisions are grounded.

In any case, the binding effect of ICA decisions appears to be limited to infringement decisions. In contrast, ICA discharge decisions will still be weighed by the court as atypical evidence. Moreover, such binding effect is not absolute since, even in follow-on actions, the claimant carries the burden of proof with respect to: (i) the occurrence of damages, and (ii) the causal link between the antitrust conduct and the alleged damages (Article 7 of the Decree).

D. Statute of Limitations

The statute of limitations is specifically regulated by Article 8 of the Decree, which is broadly consistent with the corresponding provisions of the Damages Directive.

The Decree clarifies – and, to some extent, changes – the previous national time-bar rules. In particular, the Decree:

- States that the limitation period for bringing an action for damages is five years, confirming that antitrust damages actions are equal to tort actions (which are subject to a five-year limitation period pursuant to Article 2946 of the Civil Code);

⁴ See Supreme Court, February 13, 2009, No. 3640, *ANC/Inaz Paghe*; *Id.*, May 28, 2014, No. 11904.

⁵ Unlike the Damages Directive, the Italian Decree does not use the term “*prima facie evidence*,” presumably because this term has not previously been used in the national legal framework.

- Provides that the limitation period starts to run when: (i) the infringement of competition law has ceased; and (ii) the claimant is – or, using reasonable care, should be – aware (a) of the behavior and the fact that it constitutes an infringement of competition law, (b) of the fact that the infringement of competition law caused harm to the claimant, and (c) of the identity of the infringer; and
- In order to facilitate follow-on actions, changes the legal framework by providing that the limitation period is suspended if the competition authority opens an investigation or proceedings concerning the infringement of competition law to which the action for damages relates, until one year after the adoption of the final infringement decision or the closing of the proceedings.

E. Joint and Several Liability

Joint and several liability is regulated by Article 9 of the Decree, which fully implements the corresponding provisions of the Damages Directive.

In Italy, the principle of joint and several liability was established even before the adoption of the Decree. However, in accordance with the Damages Directive, the main changes introduced by the Decree relate to small or medium-sized enterprises (SMEs) and immunity recipients under leniency programs:

- Joint and several liability of SMEs is limited to their own direct and indirect purchasers, provided that the other conditions set out in Article 9 are met and without prejudice to the right of full compensation.
- Immunity recipients under leniency programs are jointly and severally liable only to their direct and indirect purchasers or providers, whilst they are liable to other damaged parties only when they cannot obtain full compensation from the other infringers.

F. Passing-on

The Damages Decree introduces detailed rules concerning passing-on of the overcharge. The passing-on is regulated by Articles 10 to 13 of the Decree, which fully implement the corresponding provisions of the Damages Directive.

Even though a few judgments dealt with the passing-on defense before the implementation of the Damages Directive,⁶ the Decree expressly recognizes the passing-on defense and offence for the first time.

G. Quantification of Harm

The national legal framework for the quantification of harm already appears mainly compliant with the provisions of the Damages Directive. The Decree merely recalls the relevant applicable national rules.

In line with the Damages Directive, the Decree also provides the courts with the possibility to be assisted by the ICA – as technical expert – with respect to the determination of the quantum of damages. The ICA estimation is not binding upon the court. This provision is rather controversial since there may be doubts about ICA neutrality and independence in this regard, especially when its assistance is requested in follow-on actions.

Moreover, in line with the Damages Directive, the Decree for the first time expressly includes a rebuttable presumption that cartel infringements cause damage (Article 14(2)).⁷

⁶ See Court of Milan, June 27, 2016, No. 7970, *Swiss/SEA*.

⁷ Even before the Decree was adopted, according to settled case-law, a direct link could be presumed to exist between a cartel and the damages suffered by consumers, because downstream contracts between cartelists and consumers are usually the means by which a cartel is implemented. See Supreme Court, October 31, 2016, No. 22031, *M.M. & Figli S.n.c., A. e S.M./Reale Mutua Assicurazioni*.

III. GUIDANCE FROM CASE-LAW

A. Soft Application of the Burden-of-Proof Principle in Stand-Alone Actions

Even before the Decree was adopted, the Italian Supreme Court had taken a proactive approach in antitrust private enforcement, by fostering a broad interpretation of the existing provisions relating to the gathering of evidence and the burden of proof. Regarding stand-alone cases, the Supreme Court held that, in line with the Damages Directive and even before it was transposed into national law, civil courts must take into due account the information asymmetry among the parties in access to evidence. It also held that civil courts must guarantee the effectiveness of the right to antitrust damages through a less strict interpretation of procedural rules on disclosure and court-appointed experts.⁸

Following the adoption of the Decree, rules on disclosure of evidence should ensure an even more effective application of competition law in private actions.

B. The Importance of Technical Expert Reports

In the context of a follow-on action, the Court of Milan awarded damages in tort for the plaintiff's loss of profit arising from the discriminatory termination tariffs the defendant charged the plaintiff, which were less favorable than those the defendant charged to itself. The defendant challenged the first instance ruling, *inter alia*, on the grounds that: (i) there was no evidence of causal link between the conduct and the damage; and (ii) in the assessment of the causal link, the Court had made uncritical reference to the report of the technical experts.

In dismissing the appeal, the Court of Appeal of Milan confirmed that ICA infringement decisions constitute privileged evidence of anticompetitive conduct. It also confirmed that technical expert reports play a crucial role in cases involving complex economic assessments, in particular with regard to the assessment of causal link and calculation of damages.⁹

C. Binding Effects of Antitrust Decisions or Full Jurisdiction?

In a judgment before the new Decree regime was introduced, the Court of Appeal of Milan cast doubt on whether ICA decisions should have binding force in civil proceedings. The judgment suggested that national courts can have several genuine reasons to depart from the ICA infringement decision assessment (such as the need to consider new events and facts).

In January 2012, the ICA found that Pfizer had abused its dominant position in the market for a glaucoma treatment based on the active ingredient Latanoprost (marketed by Pfizer as Xalatan) through a complex legal strategy.¹⁰

The ICA found that this abusive strategy, aimed at delaying generic companies' entry into the market, was implemented by Pfizer through several attempts to extend its active ingredient patent coverage until 2011, including by lodging a divisional patent application with the European Patent Office ("EPO"). At the same time, Pfizer Italia had started legal and administrative actions against competing generics producers before national courts.

The first-instance administrative Court, TAR Lazio, annulled the ICA decision, but the Council of State then upheld it on appeal. In particular, the Council of State dismissed Pfizer's arguments on the full compliance of its divisional patent application with intellectual property law, and its underlying rationale of protecting extensive R&D investments.

Following the Council of State's judgment, the Italian Ministries of Health and of Economics and Finance brought a follow-on action against Pfizer claiming damages of approximately €14 million for the Italian National Health System due to the abusive conduct found by the ICA.

In July 2017, the Court of Rome dismissed the claim.¹¹

⁸ Supreme Court, June 4, 2015, No. 11564, *Cargest*.

⁹ Court of Appeal of Milan, January 2, 2017, *Brennercom*.

¹⁰ ICA decision, January 11, 2012, *Ratiopharm/Pfizer* (Case No. A431).

¹¹ Court of Rome, July 24, 2017, No. 15020, *Ministry of Health and Ministry of Finance /Pfizer*.

First, the Court found that a company's exercise of its Intellectual Property rights is presumed to be lawful insofar as its legitimate protection purposes are not distorted. It concluded that IP protection is actually pro-competitive as long as its aim is to make R&D activities profitable. The Court of Rome also found that Pfizer's application for a divisional patent, together with its other administrative actions, were not part of an exclusionary strategy because they had a legitimate legal and/or economic rationale. Secondly, regarding the alleged abuse of dominance through a complex vexatious litigation strategy, it recalled established EU case-law, which requires two cumulative conditions to be met to consider a legal action as abusive. In particular: "(i) the action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition."¹² These conditions must be interpreted narrowly.

In reaching its conclusion, the Court of Rome did not apply Article 7 of the Decree, which only came into effect after the judicial proceedings. Therefore, it did not consider the ICA's infringement decision as binding in relation to the nature of the infringement as well as its material and territorial scope. Additionally, it confirmed the necessity for the claimant to prove in all circumstances two elements: (i) the damage and (ii) the causal link between the alleged damage and the infringement of competition law.

The Court of Rome found that the plaintiffs had submitted inadequate evidence to corroborate their allegations. In particular, they had failed to prove both the damage and causal link between the infringement and damage. Moreover, the existence of the antitrust infringement itself was questionable because, after the ICA's decision, the EPO Technical Board of Appeal, overturning the previous decision of the EPO Opposition Division, confirmed the validity of Pfizer's divisional patent application.

In this context, as seen in more recent cases, national courts have stressed the importance of the assessments contained in ICA infringement decisions.

This is particularly the case in relation to a number of rulings concerning abuse of dominant position by the manager of the Malpensa and Linate Milan airport, Società Esercizi Aeroportuali ("SEA"). In 2008, the ICA found that SEA had charged unfair and excessive prices in connection with the provision of airport facilities to cargo ground-handling service operators.¹³ Between February and July 2018, the Court of Milan issued three judgments regarding cargo ground-handling service operators' follow-on damages claims.¹⁴

In particular, in the *ITR Handling* case, the Court of Milan upheld the plaintiff's claims by relying heavily on the findings contained in the 2008 ICA infringement decision. Interestingly, in the *Brussels Airlines/American Airlines/Aegean* case, while the plaintiffs did not take part in the proceedings before the ICA, they were considered to fall within the scope of the ICA decision because they directly carried out part of the ground-handling services related to their flights. Accordingly, they could benefit from the evidentiary value of the ICA's findings.

D. Convergence of Statute of Limitations Principles Towards the Damages Directive and the Decree

The statute of limitations is often critical in determining whether an action for damages should be dismissed or successful.

In the *Iveco* case, concerning a claim following the EU trucks cartel,¹⁵ the Court of Milan had to establish whether or not the action was time-barred, based on the legal framework that was applicable before the Damages Directive and the Decree.¹⁶

¹² *Agria Polska and Others v. Commission*, Case T-480/15, ECLI:EU:T:2017:339.

¹³ In particular, the ICA found that the fees that the SEA charged for sub-letting airport space and infrastructure to the cargo handlers were significantly higher than those determined for these purposes by the Italian Civil Aviation Authority (ENAC).

¹⁴ Court of Milan, February 16, 2018, No. 1671, *ITR Handling*; March 15, 2018, No. 3011, *Brussels Airlines/American Airlines/Aegean*; and July 27, 2018, No. 8374, *Schenker Italiana*.

¹⁵ In July 2016, the European Commission reached a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault, finding that truck manufacturers colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules.

¹⁶ Court of Milan, (preliminary ruling) October 4, 2018, No. 9759, *Cave Marmi Vallestrona/Iveco*. The Court of Milan took the view that statute of limitation rules have a substantive nature and, consequently, are not retroactive. Interestingly, the Court also ruled on the binding effects of Commission settlement decisions, maintaining that they have the same binding force as infringement decisions.

The defendant submitted that the time period had started to run from the opening of the investigation by the UK Competition and Markets Authority in September 2010 or, in the alternative, the opening of the investigation by the European Commission in January 2011.

The Court of Milan dismissed the defendant's argument and pointed out that the documents filed by the defendant reporting the opening of these investigations against the truck manufacturers could not provide reliable and complete awareness of the damage. In particular, the Court stated that:

The press releases filed by the defendant contain opinions and analysis which are irrelevant from a legal standpoint and do not provide detailed information about facts and infringements. From such general information, it is not possible to assume any awareness of all the components of the unlawful conduct – at that date yet to be ascertained – including the specific antitrust infringement and the damage deriving from it. None of the press articles and documents produced by the defendant provide, at the dates, detailed, reliable and accurate information of the defendant's antitrust infringements and the subsequent damage to the plaintiff.

The Court of Milan appears to share the same rationale of the recent ECJ judgment in *Cogeco*.¹⁷ In its reference for a preliminary ruling, the Portuguese court sought clarification on the Damages Directive's time-barring rules. It also sought clarification on the extent to which, in cases involving rights arising from the TFEU, pre-existing national statute of limitations rules have to be interpreted (or even set aside), in line with the solution reached in the Damages Directive.

In her opinion, Advocate General Kokott held that the Damages Directive did not apply – *ratione temporis* – to the applicant's claim.¹⁸ Nonetheless, AG Kokott clarified that national courts must comply with other relevant EU law principles. Particularly the principle of effectiveness, which states that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. Although AG Kokott maintained that a three-year statute of limitations period generally complies with EU law, she concluded that Portugal's statute of limitations was not compatible with EU law because it: (i) began to run before the damaged party had full knowledge of the harm; and (ii) was not suspended during investigations by the competition authority. In the preliminary ruling on March 2019, the ECJ substantially agreed with AG Kokott's opinion.

The Court of Milan judgment in the *Iveco* case does not appear to conflict with the abovementioned principles, because the five-year time-barring period starts to run when the infringement of competition law has ceased, and the claimant is – or, using reasonable care, should be aware: (i) of the behavior and the fact that it constitutes an infringement of competition law; (ii) of the fact that the infringement of competition law caused harm to the claimant; and (iii) of the identity of the infringer. Accordingly, in the specific case, the press releases filed by the defendant, who bears the burden of proof, did not provide the plaintiff with any reliable and full awareness of the unlawful conduct.

¹⁷ *Cogeco/Sport TV Portugal*, C-637/17, ECLI:EU:C:2019:263.

¹⁸ AG Kokott, Opinion, January 17, 2019, *Cogeco/Sport TV Portugal*, C-637/17, ECLI:EU:C:2019:32.



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