



Private Antitrust Litigation 2012

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Private Antitrust Litigation 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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ISSN 1742-2280

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Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

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Legislation and jurisdiction

- 1 How would you summarise the development of private antitrust litigation?

Private antitrust litigation in Italy has been on the rise in recent years. There may be several reasons for this trend, such as:

- the increasing general awareness of the remedies offered by judicial action, which was further stimulated by the publication in April 2008 of the Commission's White Paper on damages actions for breach of the EC antitrust rules and the circulation in 2009 of a draft proposal for a Council directive on this matter;
- the civil courts' exclusive power to grant interim relief measures upon request by private parties; and
- a change in the case law of the Court of Cassation, which eventually recognised that consumers are entitled to bring private actions before civil courts on the basis of national antitrust law.

Private antitrust litigation, in particular follow-on damage litigation originating from cartel infringement decisions, might increase further in the future as a result of the growing popularity of the 2007 leniency programme of the Italian Competition Authority (the Authority) – which the Authority has applied in three infringement decisions to date (cases I700, decision of 24 March 2010, I701, decision of 15 December 2010, and I722, decision of 15 June 2011) – and the enactment of new legislation on consumers' class actions (article 140-bis of the Italian Consumer Code; see questions 19–27). On the other hand, the development of follow-on damage litigation is expected to be negatively affected by the fact that the commitment procedure introduced in 2006 – by virtue of which, where the parties to an investigation offer suitable commitments to meet the concerns expressed by the Authority in its preliminary assessment, the procedure may be closed, without a finding of infringement, by a final decision making those commitments binding on the companies concerned – seems to have in effect become the Authority's favourite enforcement tool with reference to abuse of dominance cases.

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Private antitrust litigation is governed essentially by general civil law and procedure. In addition, article 33(2) of Law No. 287 of 1990 regarding the protection of competition and the market (the Competition Law) sets forth a jurisdictional and venue provision, discussed in question 3.

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

Article 33(2) of the Competition Law provides that petitions for declaratory relief (for a declaration that an agreement hindering competition is null and void), actions for damages and requests for

interim relief relating to infringements of the Competition Law must be brought before the court of appeals having territorial jurisdiction. Such court has jurisdiction at first and last instance, so its decisions are subject to review by the Court of Cassation on questions of law only. As established by the Court of Cassation, the scope of this special jurisdiction of the court of appeals must be interpreted strictly: it cannot be extended to any claims related to the violation of the Competition Law other than those expressly listed in said article 33(2), such as unjust enrichment claims or claims for the determination by the court of the price in a contract for services or works, where the court finds that the agreed-upon price represents the result of anti-competitive conduct and is thus null and void (No. 25880/2010).

In addition, pursuant to the general civil procedure rules, lower civil courts (*giudici di pace and tribunali*) have jurisdiction with respect to:

- private actions under EU antitrust law;
- actions based on alleged violations of unfair competition law (some of which may be characterised as antitrust infringements);
- petitions for declaratory relief and actions for damages due to the creation or maintenance of dominant positions in the telecommunications and broadcasting sectors; and
- actions brought pursuant to article 9 of Law No. 192 of 1998 (abuse of economic dependence).

Moreover, in the context of civil actions based on non-antitrust claims, lower civil courts may have to incidentally consider matters involving the application of the Competition Law (for example, challenges to the enforceability of a contract based upon the ground of nullity for violation of the ban on restrictive agreements).

Although the Court of Cassation previously reached the opposite conclusion, since 2005 it has been uncontroversial that consumers may bring actions for damages based on the Competition Law. In particular, the court stated (No. 2207/2005 and No. 2305/2007) that by its very nature, the Competition Law is intended to protect anyone, including consumers, whose interests may be affected by antitrust infringements. Private consumer actions based on the Competition Law must be brought before the court of appeals, whereas, pursuant to article 140-bis of the Consumer Code, consumers' class actions must be brought before the tribunali of the main Italian judicial districts, based on the place of the defendant company's registered office (see question 26).

Pursuant to articles 120 and 134 of the 2005 Code of Industrial Property Rights, private actions based on the Competition Law and relating to the exercise of industrial property rights must be brought before the specialised sections for industrial property rights instituted within the competent civil courts. In the absence of much case law on the point, it remains to be clarified whether the Code has actually superseded article 33(2) of the Competition Law, attributing jurisdiction over such actions to the specialised sections of the lower civil courts in lieu of those of the courts of appeals. In any event, accord-

ing to the first precedents in case law, a private antitrust action is considered to relate to the exercise of industrial property rights only when the plaintiff's request is actually founded, at least in part, on an industrial property right; a mere factual connection between an antitrust infringement and an industrial property right is not sufficient to establish jurisdiction of the specialised sections (Appello Milano, 26 April 2005; Tribunale Salerno, 29 June 2009).

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

Interim measures may be granted according to article 700 et seq of the Civil Procedure Code. An interim measure may be requested if the plaintiff reasonably fears that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings.

As far as the substantive provisions are concerned, declaratory actions may be based on article 2(3) of the Competition Law or article 101 TFEU, pursuant to which forbidden agreements are null and void for all purposes, or on article 3 of the Competition Law or article 102 TFEU, which prohibit abuse of market power. In theory, negative declaratory actions should also be admissible (for example, by a dominant company seeking a declaration that certain conduct does not amount to abusive behaviour under article 3 of the Competition Law or article 102 TFEU, with a view to pre-empt possible third-party claims for damages based on such conduct). However, in the only known case so far of antitrust negative declaratory actions brought before Italian courts of law, the court rejected the plaintiffs' request to declare:

- the non-existence of a cartel infringement established by the European Commission, pending the actions for annulment of the Commission's decision that its addressees brought before the EU Court of First Instance; and
- in any event, that the cartel in question did not cause a price increase of the relevant products or any other damage to the defendants.

Indeed, although the Commission's decision had not established that the conduct had a market impact, the court took the view that the plaintiffs were in fact requesting it to rule counter to a decision adopted by the Commission, which would have been prohibited by article 16(1) of EC Regulation 1/2003. Furthermore, the court refused to grant the plaintiffs declaratory relief on the ground that they failed to indicate, in respect of each defendant or group of defendants, specific facts and other circumstances allowing the court to assess whether damage claims could possibly be made against them (Tribunale Milano, 8 May 2009).

National antitrust law applies only to infringements not covered by EU antitrust law (article 1 of the Competition Law). Therefore, in principle, the courts of appeals should decline jurisdiction over infringements affecting trade within member states and thus falling within the scope of EU antitrust law. Accordingly, in its latest rulings on the point, the Milan Court of Appeals has declined jurisdiction over infringements that, based on the facts as presented by the plaintiffs, affected trade between member states (Appello Milano, 15 to 24 May 2007; Appello Milano, 24 February 2010; Appello Milano, 1 October 2010). Remarkably, in a previous interim order the same court stated that, regardless of the applicability of EU antitrust law, the courts of appeals may retain jurisdiction over the matter if the plaintiff also alleges a violation of the Competition Law (see obiter in Appello Milano, 10 to 18 January 2006). The latter solution, however, could encourage the application of national and EU antitrust rules by different courts to the same infringement and thus was held inconsistent with article 3 of EC Regulation No. 1/2003, pursuant to which national courts applying national antitrust rules to infringements that may affect trade within member states must also apply EU antitrust rules.

Based on general civil liability principles, a plaintiff claiming antitrust damages must prove that the defendant intentionally or negligently violated the Competition Law or EU antitrust rules, the plaintiff suffered damages, and a direct causal link exists between the defendant's conduct and the alleged damages. Depending on the underlying facts, antitrust infringements may also give rise to damages actions based on contract liability (for example, being party to a cartel may induce a company to act in bad faith towards its customers or distributors).

Consumers may also rely on consumer protection provisions, such as article 1(2)(e) of Law No. 281 of 1998 on consumers' and final users' rights, pursuant to which these categories of persons enjoy a fundamental right 'to honesty, transparency and fairness in contractual relationships'. An infringement of this right is actionable, for example, by claiming damages against the company selling the goods or providing the service in question to the extent that the sale price was raised as a result of an agreement between the company and its competitors (Giudice di pace Lecce, 30 January 2003).

4 In what types of antitrust matters are private actions available?

Private antitrust actions may be filed in connection with any possible violation of the Competition Law or articles 101 and 102 TFEU, as shown by the following examples.

Damages

Damages have been awarded in cases involving abuses of market power or cartels. For instance, in *Telsystem* and *x-DSL/x-SDH*, damages in tort were awarded to potential new entrants whose market access had been prevented by the incumbent telecom operator's refusals to supply them with services they needed in order to enter the market (Appello Milano, 18 July 1995 and 24 December 1996 and Appello Roma, 11 December 2002 and 11 September 2006).

In *Piccoli v Isoplus*, breach of contract damages were awarded to an agent whose business proposals had been systematically turned down by Isoplus as a result of a market-sharing agreement it had entered into with certain competitors (Appello Bari, 22 November 2001).

In *Valgrana*, the plaintiff, a producer of Grana Padano cheese, was awarded damages for the harm it suffered as a result of illegitimate output-limitation decisions adopted by the Consortium for the protection of Grana Padano, the industry association of which it was a member (Appello Torino, 7 February 2002).

In *Bluvacanze*, damages in tort were awarded to a travel agency that had been collectively boycotted by several tour operators in retaliation for the aggressive discounts the agency offered to its customers by renouncing part of its commissions (Appello Milano, 11 July 2003).

In *Inaz Paghe*, damages in tort were awarded to a software provider that had been collectively boycotted by national and local employment consultant associations in retaliation for encroaching on activities allegedly reserved for authorised employment consultants (Appello Milano, 11 December 2004).

In *Nigriello v SAI*, damages in tort were awarded to a consumer who paid higher premiums to insure its moped against third-party liability as a result of the information exchange cartel to which its insurance company was a party (Appello Napoli, 3 May 2005; however, Court of Cassation No. 2305/2007 quashed the decision on the ground that the court had too lightly dismissed the company's defence of 'lack of causation', as well as misapplied the statute of limitations).

In the *Gruppo Sicurezza* case, an airport security service provider sued the managing body of the Fiumicino airport for damages, alleging to have been the victim of exclusionary abuse (unlawful interference with the plaintiff's customers, which led them to terminate the contracts they had entered into with the plaintiff). Gruppo Sicurezza

was awarded damages to compensate its loss of profit as well as the harm to its reputation (Appello Roma, 4 September 2006).

In *Avir v ENI*, the court found that the incumbent gas operator had abused its dominant position by imposing unfair prices: the claimant was therefore awarded restitution of the overcharge paid, in addition to damages (Appello Milano, 16 September 2006).

In *International Broker*, the court awarded damages to a broker for the loss of profit suffered as a result of the price alignment determined by the participation of the main oil refining companies in a local market in a joint venture for the production and distribution of bitumen (Appello Roma, 31 March 2008).

Individuals and corporations may also sue an authority before administrative courts for damages resulting from the authority's wrongful and unlawful action or inaction.

Interim relief

Only in a handful of cases have dominant companies been ordered to stipulate supply agreements by way of interim measures (see, for example, Appello Milano, 29 April 1995, and Appello Roma, 12 February 1995). On the other hand, the defendant may be ordered to cease and desist from continuing its unlawful behaviour (for example, from further carrying out alleged cartel activities) until a final judgment is issued (Appello Milano, 13 July 1998 and 29 September 1999). Lower civil courts (as opposed to courts of appeals) have jurisdiction with respect to requests for interim relief, where the interim relief sought by the applicant is not ancillary to petitions for declaratory relief or actions for damages (Appello Torino, 18 June 2001).

Nullity

Only agreements that directly eliminate, restrict or distort competition are null and void under article 2(3) of the Competition Law, not agreements entered into downstream by one or more of the parties to the upstream cartel (*Cassazione*, No. 9384/2003; *TAR Lazio*, No. 1790/2003). However, based on dicta in Court of Cassation No. 2207/2005 and No. 2305/2007, some commentators argue that downstream agreements are part of the anti-competitive agreement and, as a result, may also be found null and void. In *Avir v ENI*, the Milan Court of Appeals found that gas supply agreements through which the incumbent gas operator had abused its dominant position by imposing excessive purchase prices were null and void, in part because they were contrary to the prohibition of such abusive conduct laid down in article 3(a) of the Competition Law (Appello Milano, 16 September 2006).

Private antitrust actions are very unlikely to originate from violations of merger control rules. Pursuant to the Competition Law, the Authority has the exclusive power to vet and prohibit mergers through a mechanism of prior notification by the merging parties similar to the EU merger control system. Therefore, private litigation could take place in principle only in the event that the merging parties do not comply with a prior Authority decision by implementing a prohibited merger or by violating the terms of a conditional authorisation with remedies. However, in the only precedent available, the Milan Court of Appeals stated that the Authority has the exclusive power to verify compliance with its own merger control decisions (Appello Milano, 24 May to 3 June 2004). If such stance were to be followed by other courts, private litigation would be virtually precluded within the ambit of merger control.

- 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 Competition Law applies to any antitrust infringements taking place or having effect in the Italian territory. In addition, private actions based on EU competition rules (alone or in combination with the provisions of the Competition Law) may be brought before Italian courts.

Pursuant to the general rules on jurisdiction, a private action may be brought before the court of the place of residence or domicile of the defendant, if this is a natural person, or the place where the defendant company has its registered office or a branch and an agent authorised to act for the defendant in court proceedings. In addition, the action may be brought before the court of the place where the alleged obligation arose or must be performed (ie, the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the harm occurred, which is usually the residence or registered office of the plaintiff). If the claim is to be filed against several defendants who are domiciled in different EU member states, pursuant to EU Regulation 44/2001, the action may be brought in each of these jurisdictions. Moreover, as regards damages actions based on torts, pursuant to EU Regulation 44/2001, if the harmful event occurred in more than one EU member state, the plaintiff may bring its action in any of the EU member states concerned.

Special rules apply to consumers' class actions (see question 26), which must be brought before the tribunals of the main Italian judicial districts, depending on the place of the defendant company's registered office.

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

Under the general procedural rules, both natural and legal persons (including those from other jurisdictions) may be sued for antitrust violations.

Private action procedure

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

There are no specific rules concerning third-party funding of litigation in Italy. Certain forms of third-party funding agreements could arguably be permissible under general contract law principles.

Pursuant to new rules passed in 2006, outcome-based fee arrangements are now permitted. However, since, pursuant to the ethical rules of the Italian Bar, attorneys are obliged to charge fees that are proportionate to the amount of work performed, 'no-win, no-fee' arrangements would seem to be of questionable enforceability.

- 8 Are jury trials available?

No.

- 9 What pre-trial discovery procedures are available?

Pre-trial discovery is not available in civil litigation, including for private antitrust actions.

- 10 What evidence is admissible?

All evidence normally admitted in civil liability proceedings, including witness testimonies, documents and expert opinions, is admissible in private antitrust actions (see below). Courts may also order one of the parties or a third party to submit relevant documents (which must be reasonably identified by the party applying for a disclosure order) or request documents from the Authority's file. In the above-mentioned *International Broker* litigation, following a request from the Rome Court of Appeals, the Authority disclosed to the court the minutes of a hearing of the defendants' representatives as well as the documents seized in a dawn raid at the defendants' premises.

11 What evidence is protected by legal privilege?

Italian law protects the confidentiality of communications between a lawyer who is a member of the Bar of a EU member state and his clients. To the extent that such communications are exchanged in the exercise of the client's right of defence, they are covered by professional legal privilege (eg, they cannot be used by the Authority for the purposes of an investigation). However, pursuant to Italian law, if a lawyer has the status of employee, then he cannot be a member of the Bar. Accordingly, in-house lawyers, who are employees of the company for which they work, cannot be members of the Bar; thus their communications and advice are not covered by the rules of privilege.

As regards documents containing trade secrets, the Authority does not allow access to such documents, unless they constitute the evidence of the infringement or contain essential information for the defence of the party which requested access to them. In these cases access is in any event limited to the relevant essential information.

In civil proceedings, if a party intends to rely on a document containing trade secrets of its own, such a document must be included in the case-file, which is fully accessible to each of the parties to the proceedings. The court may not order an inspection or the submission of documents in the possession of one of the parties, or of a third party, if this could cause serious harm to them (the possible unfavourable outcome of the proceedings not being a relevant factor in the framework of the court's assessment). Each party to the proceedings has full access to all of the documents produced by the other parties or by third parties. Confidential information contained in documents produced before the court is, therefore, fully accessible to the parties and may also be subsequently used in other proceedings. Third parties, on the other hand, do not have access to the file, and may only request a copy of the judgment.

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

Antitrust infringements cannot give rise to criminal liability under Italian law.

However, conduct relevant to the purpose of determining whether the Competition Law has been violated can constitute a crime (for example, where a bid-rigging cartel results in criminal interference with public tender procedures). Private antitrust actions are not barred by a criminal conviction in respect of the same matter. Nonetheless, if the civil proceedings are instituted after delivery of the first instance criminal judgment, they must be suspended until the judgment of a criminal conviction becomes *res judicata*.

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?

As a matter of principle, the evidentiary value of any evidence or findings in criminal proceedings should be assessed on a case-by-case basis by the civil court in the context of a parallel private antitrust action. Moreover, principles of *res judicata* require that the definitive findings in criminal proceedings in which all of the parties involved in a parallel private antitrust suit participated (or could have participated) be given *res judicata* consideration in the private action.

Leniency applicants are not protected from follow-on litigation. However, on 6 May 2010 the Authority amended its leniency programme, introducing a provision barring any third parties, including those which have been admitted to intervene in the investigation procedure, from access to written or oral leniency statements and the documents annexed to such statements.

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

Under general rules of civil procedure, the court must stay the proceedings in cases where its decision depends on the decision of another court.

Moreover, under article 16(1) of EC Regulation 1/2003, national courts cannot take decisions running counter to a decision adopted by the European Commission (see question 3). It follows that where a private enforcement action follows a Commission decision that is subject to judicial review, the defendant may ask the judge to stay the proceedings pending the action for annulment of that decision.

On the other hand, civil courts are not bound by the Authority's decisions (see questions 15 and 26). Accordingly, they have full discretion in deciding whether to suspend proceedings pending a possible judicial review of the Authority's decision from which the private action may have originated.

Please note, however, that in the case of a class action (see questions 19–26), the court may suspend the proceedings at the admissibility stage if the facts on which the action is based also form the object of an investigation of an independent enforcement agency such as the Authority, or of judicial review proceedings pending before an administrative court.

15 What is the applicable standard of proof for claimants and defendants?

As far as the standard of proof is concerned, the court may weigh any evidence provided by the parties, except where the value of a given means of proof is specifically mandated by law (for example, a party's confession is by law irrefutable proof of the confessed facts, provided it concerns disposable rights of the confessing party). The court may base its findings of fact on circumstantial evidence provided it is strong, precise and conclusive.

The burden of proof lies with the claimant, who must prove the facts on which his or her claims are founded. The defendant, on the other hand, must offer evidence in support of his or her objections or counterclaims.

With respect to causation, the Court of Cassation recently held that, based on the laws of probability, it may be presumed that a direct link exists between a cartel and the damages suffered by consumers, because downstream contracts between cartel participants and consumers are normally the means by which the cartel is put into effect (No. 2305/2007). As a result, the claimant is only required to prove the existence of a cartel (possibly relying on prior findings by the Authority, if any), provide a copy of the agreement it entered into with one or more of the cartel participants and provide a reasonable estimate of the overcharge paid as a result of the cartel. The court expressly noted, however, that the presumption in favour of the claimant is a rebuttable one. Conversely, as regards the possibility for the defendant to rely on the passing-on defence, since the latter is not recognised as such by Italian courts of law (see question 36), the defendant should prove that the plaintiff has in fact succeeded in passing on the overcharge attributable to the illegal conduct to indirect purchasers and, thus, has not suffered any damage.

At its discretion, the court may appoint an expert to assist in matters requiring specific technical expertise (for example, the definition of the relevant market or the liquidation of damages).

Any findings made by the Authority in the context of administrative proceedings pursuant to the Competition Law are not binding on the judge, although they may create rebuttable presumptions. Indeed, according to the Court of Cassation (No. 3640/2009), the Authority's and the administrative courts' findings have value as a preferred mode of proof of the infringing conduct. Nevertheless, they do not, in strictly technical terms, have a binding legal effect upon a civil court having jurisdiction over any damage action based on such findings,

meaning that the defendant(s) is/are given an opportunity to provide evidence to the contrary.

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

Petitions for interim relief in antitrust matters are normally adjudicated upon within four to five weeks from the filing of the application.

The average duration of ordinary actions before the lower and the appellate courts is two to three years at each level of jurisdiction. Such a time frame may be lengthened considerably in the event of an appeal to the Court of Cassation.

However, pursuant to articles 702-bis et seq of the Civil Procedure Code (as introduced by Law No. 69 of 2009), where a single-judge lower court has jurisdiction and the action in question may be decided on the basis of a summary investigation, the plaintiff may request an accelerated proceeding. This type of proceeding is characterised by a significant simplification of formalities, as well as a lower number of hearings and briefs to be filed. Nevertheless, if the judge takes the view that more than a summary investigation is required, based on the parties' pleadings, the accelerated proceedings may be converted into ordinary ones. Since these new rules only apply to actions brought as of 4 July 2009, it is difficult to predict the average duration of accelerated proceedings and whether the related summary investigation will prove adequate to the peculiar needs of private antitrust litigants.

It is not yet possible to predict the typical timetable for consumers' class actions, as the new legislation entered into force only in January 2010 and to date only one consumers' class action has met the admissibility requirements (see question 22).

17 What are the relevant limitation periods?

Declaratory actions are not subject to a statute of limitations. The limitation periods for damages actions based on tort or breach of contract are, respectively, five and 10 years. The Court of Cassation clarified recently that the limitation period for antitrust damages actions starts running when the claimant is – or, using reasonable care, should be – aware of both the damage and its unlawful nature; that is, that the damage was caused by an antitrust infringement (No. 2305/2007).

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

The lower courts' rulings may be appealed both on the facts and on the law to the upper courts (ie, the decisions of the *giudici di pace* may be appealed to the lower civil courts, whose judgments may in turn be appealed to the Court of Cassation on matters of law only; likewise, where a lower civil court delivers a decision at first instance, it may be appealed to the court of appeals). The judgments of the courts of appeals (including where they have jurisdiction at first and last instance) may be appealed to the Court of Cassation on questions of law only.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

As mentioned, as of 1 January 2010 consumers may bring class actions, pursuant to article 140-bis of the Consumer Code, for damages allegedly suffered as a result of certain breaches of contract or torts that occurred after 15 August 2009.

Under the new legislation, class actions may be brought by any consumer or user, either on his or her own or through associations mandated by him or her or committees of which he or she is a mem-

ber, seeking damages or declaratory relief for a violation of rights that are 'identical' to those of other consumers or users and that arise from certain actionable breaches of contract or torts, including, *inter alia*, 'anti-competitive activities'.

However, since a consumer or user is defined as 'any individual who is acting for purposes falling outside his trade, business or profession' (article 3(a) of the Consumer Code), the new rules on class actions do not apply to claims on behalf of individuals acting within the scope of their trade, business or profession, including their employment contract, or parties who are not individuals. As a result, the new instrument is expected to have a modest impact on private antitrust litigation.

There are two stages in the class action procedure. First, following an opening hearing, the court decides on the admissibility of the action (see question 21). At this stage, the court may suspend the proceedings if the facts on which the class action is based also form the object of an investigation of an independent enforcement authority, or of review proceedings pending before an administrative court. If the court deems the class action to be admissible, it issues an order setting out:

- the rules for the notification of the proceedings to the other members of the class;
- the characterisation of the rights that are at stake in the proceeding;
- the deadline for the exercise of other consumers' or users' right to opt in; and
- the rules governing the ensuing investigatory phase.

If the court issues a final ruling in favour of the plaintiffs, it may either award a fair estimate of damages to each of the individual consumers or users who have elected to opt into the class, or establish a criterion to quantify damages.

20 Are collective proceedings mandated by legislation?

Consumers' class actions are not mandated by legislation. Individual consumers and users have the right to bring private antitrust litigation on an individual basis, including where class action proceedings have already been commenced based on the same illegal conduct and against the same defendants.

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

Pursuant to article 140-bis(6) of the Consumer Code, for a class action to be admissible the following requirements must be satisfied:

- the action is not manifestly unfounded;
- there is no conflict of interest between class members;
- the rights claimed by the class members appear to be identical; and
- the first claimant seems able adequately to protect the interests of the class.

22 Have courts certified collective proceedings in antitrust matters?

In only one reported case has a consumer class action, unrelated to an antitrust infringement, been declared admissible to date (Tribunale Milano, 20 December 2010, confirmed by Appello Milano, 3 May 2011).

23 Are 'indirect purchaser claims' permissible in collective and single party proceedings?

Based on general civil liability principles, indirect claims would seem to be admissible in non-class proceedings (Appello Roma, 31 March 2008 and *obiter* in Appello Torino, 6 July 2000). Arguably, the same rule will also apply in class actions brought by consumers.

24 Can plaintiffs opt out or opt in?

As noted, Italian consumers' class actions are based on an opt-in system.

25 Do collective settlements require judicial authorisation?

Under general civil procedure principles, settlements do not require judicial authorisation. However, pursuant to article 140-bis(15) of the Consumer Code, any settlements reached between certain parties to the proceedings do not affect the rights of consumers or users who have opted into the class action but have not expressly agreed to the settlement.

26 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?

Article 140-bis(4) of the Consumer Code sets out a special criterion for allocating territorial jurisdiction among Italian tribunals: a class action may be brought only before the court sitting in the principal town of the Italian region where the defendant company has its registered office, except in nine of the 20 regions, meaning that the territorial jurisdiction of certain other tribunals has been extended compared to the ordinary rules (eg, a class action vis-à-vis a company having its registered office in the Region of Marche or Umbria shall be brought before the Court of Rome). Pursuant to article 140-bis(14) of the Consumer Code, a defendant should not face more than one class action with reference to the same facts. Accordingly, if, prior to the expiry of the deadline for the exercise by other consumers or users of their rights to opt into a class action, further class actions are brought with reference to the same facts, these actions shall be joined to the first class action. Any other class actions initiated after the expiry of the said deadline shall be declared inadmissible.

Similarly, as regards non-class proceedings, simultaneous private actions concerning the same matter are not permitted. In fact, in the event of a conflict of jurisdiction between two or more courts of appeals (or two or more lower courts) having territorial jurisdiction, the first court where the application was filed has jurisdiction.

Conflicts of jurisdiction will rarely arise between courts of appeals and lower courts, because normally they have jurisdiction over different matters (see question 3). However, both a court of appeals and a lower civil court may have to decide upon the nullity of an allegedly anti-competitive agreement in proceedings between the same parties (as mentioned above, lower civil courts may have to incidentally consider such claims with respect to challenges raised in the context of contract enforcement actions). Although there is no case law on the point, it may be argued that in such cases the lower court should stay the proceedings and wait for a judgment by the court of appeals.

Conflicts of jurisdiction may also arise between a civil court and an administrative court that exercises judicial review over a decision delivered by the Authority. In such an instance, although suspension of either proceeding is not mandatory, the most reasonable course of action appears to be for the civil judge to stay the proceeding and wait for the outcome of the other case, although it should be noted that the civil judge is technically not bound by the terms of the administrative judgment.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable (see question 16).

Remedies**28** What forms of compensation are available and on what basis are they allowed?

Both damages and restitution may be available, depending on the circumstances (for example, restitution may be claimed in the event that an agreement is found to be null and void for violation of anti-trust rules: Appello Milano, 16 September 2006).

Damages allowed in antitrust actions are limited to the plaintiff's actual loss ('out of pocket' loss plus loss of income). Multiple damages are not available. Plaintiffs can only claim damages actually incurred. Where a precise amount cannot be proven, the court may award a fair estimate of damages. The judge may also request the assistance of an expert.

Liquidation of damages based on loss of income is especially difficult to carry out where the injured company could not even enter the market due to the incumbent operator's abusive conduct. In the *Telsystem* case (see question 4), the court commissioned an expert's report on the calculation of the lost income of a potential new entrant into the leased lines market which failed to have market access because of the dominant company's refusal to supply leased-line interconnectivity. The damage liquidation was based, inter alia, on the principle that in a free market economy every monopolist rent, such as that of a first mover on the market, tends to be neutralised by competition within a certain time frame, and in order to award damages it is necessary to determine such time frame in the relevant market.

In *Valgrana* (see question 4) the plaintiff was awarded damages on the basis of a fair estimate of the harm suffered. Its loss of profits was calculated by considering the extra volumes of Grana Padano cheese that the plaintiff would have otherwise produced during the term of the infringement and multiplying such volumes by the plaintiff's average profit per ton. The sum was then reduced to take into account the estimated fall in prices that would very likely have resulted from the increase of the total market supply.

In *x-DSL/x-SDH* (see question 4) several data transmission operators and internet providers (together with the Italian trade association of internet providers) claimed they had lost income due to the dominant company's refusal to supply them with x-DSL/x-SDH services. The court multiplied the plaintiffs' market shares in the data transmission or internet services market by the dominant company's turnover obtained from the provision of x-DSL/x-SDH services and awarded damages of 10 per cent of the resulting amount.

In *Bluvacanze* (see question 4) the court calculated the loss of income suffered by a travel agency that had been boycotted by several tour operators due to its aggressive discount policy, by confronting the turnover achieved by the claimant before and after the collective boycott. In particular, the court awarded damages as a percentage of the turnover that the travel agency had achieved during the previous year, multiplied by the annual increase rate of the relevant market for travel packages in the year in which the infringement had taken place. Such percentage was equal to the normal profit margin that the travel agency would have earned, less the discount that it used to grant to its customers. The court also awarded additional damages to the travel agency, calculated on an equitable basis, as compensation for the harm the collective boycott had caused to its reputation.

In *Inaz Paghe* (see question 4) the court awarded damages based on loss of profits arising from contracts terminated by the clients of a software provider as a result of a collective boycott organised by national and local employment consultant associations. In order to identify these contracts the court compared the number of contracts terminated in the two-year period before and after the boycott to the number of contracts terminated during the two-year boycott. It then multiplied the average profit for each client (identified in the opinion rendered by the court-appointed expert) by the number of contracts terminated due to the boycott, assuming a potential residual con-

Update and trends

Private antitrust litigation in Italy has been on the rise in recent years. This trend may be due to several reasons:

- the increasing general awareness of the remedies offered by judicial action, which was further stimulated by the publication in April 2008 of the Commission's White Paper on damages actions for breach of the EC antitrust rules and the circulation in 2009 of a draft proposal for a Council directive on this matter;
- the civil courts' exclusive power to grant interim relief measures upon request by private parties; and
- a change in the case law of the Court of Cassation, which eventually recognised that consumers are entitled to bring private actions before civil courts on the basis of national antitrust law.

Private antitrust litigation, in particular follow-on damage litigation originating from cartel infringement decisions, might further increase

in the future as a result of the growing popularity of the 2007 leniency programme of the Italian Competition Authority – which has been applied in three infringement decisions to date – and as a consequence of the entry into force of new legislation on consumers' class actions. On the other hand, the development of follow-on damage litigation is expected to be negatively affected by the fact that the commitment procedure introduced in 2006 – by virtue of which, where the parties to an investigation offer suitable commitments to meet the concerns expressed by the Authority in its preliminary assessment, the procedure may be closed, without a finding of infringement, by a final decision making those commitments binding on the companies concerned – seems to have become in effect the Authority's favourite enforcement tool with reference to abuse of dominance cases.

tractual duration of two to three years. The court did not award any damages for potential new customers that the plaintiff had allegedly not been able to win due to the boycott, as it considered that the plaintiff's allegations were not adequately proven.

In the context of consumer actions for damages arising from the price-fixing conspiracy among insurers in the third-party auto liability market (see question 4), a number of petty claims courts and courts of appeals (eg, Appello Napoli, 3 May 2005, set aside by Court of Cassation No. 2305/2007) awarded damages based on a fair estimate of the overprice paid by the plaintiffs, amounting to 20 per cent of the total premiums (such percentage was held to correspond to the premiums' average annual price increase during the existence of the cartel, according to the Authority).

In *Gruppo Sicurezza* (see question 4) the loss of profits suffered by the plaintiff was calculated by making a fair estimate of the profits that the defendant would have obtained from the customers taken away from the defendant, on the assumption that the plaintiff would have provided them with its services for a three-year term. In addition, the court awarded damages on an equitable basis for the costs that the claimant bore to enlarge its production capacity in order to supply those prospective customers.

In *Avir v ENI* (see question 4) the court granted the plaintiff restitution of the overprice paid to the defendant, finding that the incumbent gas operator abused its dominant position by applying price increases that did not bear a reasonable relation to the cost of gas. Upholding the court-appointed expert's arguments, the court compared the increase of ENI's gas prices to the trend of gas quotations at the London Commodity Exchange during the disputed period. The difference between the two growth rates was found to constitute an abusive overcharge and the same amount was awarded to the claimant as restitution (including pre-judgment interest). The court also decided that additional damages were to be quantified by a separate judgment.

In *International Broker* (see question 4) the court awarded the plaintiff both actual loss and loss of profit. The former was calculated as the total costs borne by the plaintiff in gathering the evidence of the infringement and participating as complainant in the Authority's investigation. The court established that the loss of profit was equal to 40 per cent of the plaintiff's turnover in the 12 months prior to the implementation of the anti-competitive agreement by the defendants.

29 What other forms of remedy are available?

As noted, a plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate in order to preserve the plaintiff's rights until a final judgment is issued. Civil courts have no power to permanently enjoin antitrust infringements in their final judgments.

30 Are punitive or exemplary damages available?

No. In the Italian legal system plaintiffs can only claim damages actually incurred.

31 Is there provision for interest on damages awards?

In the case of tort liability, the legal interest on damages awarded to the plaintiff accrues as of the date on which the infringement was committed. In the case of contract liability, legal interest will accrue only from the date the damages claim was filed with the court. The current legal interest rate in Italy is 1.5 per cent per annum.

32 Are the fines imposed by competition authorities taken into account when settling damages?

No.

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

The unsuccessful party is ordered to pay all costs, including attorneys' fees. However, where each party succeeds on some and fails on other matters, or where the circumstances are exceptional, the court may order that the costs be shared or that each party bear its own costs.

Fees are settled by the court and depend on the seriousness and number of the issues dealt with, and on the basis of the tariff for members of the Bar. This tariff is determined on the basis of the monetary value of the dispute and the level of court hearing the case, and is approved by the Ministry of Justice. The court's settlement must remain within the tariff's maximum and minimum limits. However, in certain exceptional circumstances the court may depart from these limits, on the condition that it gives reasons for doing so.

34 Is liability imposed on a joint and several basis?

Where an action for damages is brought against all the undertakings involved in an antitrust infringement that caused the harm suffered by the plaintiff, each co-conspirator is held jointly and severally liable for the full amount of the plaintiff's damages (Appello Roma, 4 September 2006; id 31 March 2008). In this respect, it is irrelevant that the plaintiff's suit may have been based on different types of claims against the individual defendants (for example, because one or more of the co-conspirators are liable in tort, and one or more of the others for breach of contract).

Under general civil liability principles, in case of joint and several liability, where a defendant pays more than its share of the damages, it can in turn seek a contribution from other defendants or can sue

other defendants for indemnification of its costs. The defendants' relative responsibilities must be determined in proportion to the seriousness of each defendant's fault and the materiality of its conduct's effects. Where such allocation is not possible, all defendants are held liable for an equal amount of damages.

35 Is there a possibility for contribution and indemnity among defendants?

There is no case law on the point. Under general contract law principles, contribution and indemnity provisions according to which a party to an agreement undertakes totally or partially to indemnify the other party from any liability for damages that the latter may incur with regard to third parties, as a result of a finding that the agreement is unlawful, are enforceable. However, if the co-defendants are unable to show a legitimate interest as to why they agreed to such an obligation, the indemnity provision may be held null and void for lack of contractual cause or as contrary to public order.

It follows that any contribution and indemnity provisions in agreements falling within the scope of article 2 of the Competition Law are likely to be unenforceable as contrary to public order, to the extent that the co-defendants were aware of the agreement's anti-competitive object or effects; that is, if the parties could reasonably be expected to be aware that the agreement was *prima facie* illegal.

Moreover, since any agreement that violates the Competition Law may be declared null and void in its entirety, the risk exists that the very contribution and indemnity provisions contained therein may be declared unenforceable, and the underlying claim found not to be actionable.

36 Is the 'passing-on' defence allowed?

The passing-on defence is not recognised as such. However, pursuant to general civil liability principles, a claimant may only seek compensation for any damages it actually suffered, provided that it did not concur in causing them. In the only antitrust precedent on the point, the Turin Court of Appeals found that a travel agency could not be granted damages because it had wilfully participated in an anti-competitive agreement with the intent to pass the overcharge on to final customers (Appello Torino, 6 July 2000).

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

Defendants may use any defences that are normally used against civil liability claims.

38 Is alternative dispute resolution available?

The parties may reach out-of-court settlements or submit to arbitration. Because of the confidential nature of these transactions no statistics or reports are available.

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